IN THE INCOME TAX APPELLATE TRIBUNAL,
CHENNAI D BENCH, CHENNAI

[Coram: Pramod Kumar AM and G Pavan KumarJM]

I.T.A. No. 1085/CHNY/2015
Assessment year: 2010-11

Mosbacher India LLC, ……………………..........**Appellant**
[PAN: AAACM4731H]

Vs

Additional Director of Income Tax
International Taxation- I, Chennai …………………......**Respondent**

Date of concluding the hearing : November 3, 2016
Date of pronouncing the order : November 29, 2016

Appearances by:

R Vijayraghavan, alongwith S C Agarwal,
Shriram Saigal and Vasanthraj Kumar *for the appellant*
Durai Pandian *for the respondent*

O R D E R

Per Pramod Kumar AM

[1] This appeal, filed by the assessee, challenges correctness of the order dated 24th February 2016 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2010-11.

[2] To adjudicate on this appeal, only a few relevant facts need to be taken note of. The assessee before us a company incorporated in the State of Delaware, United States of America, and is engaged in the business of exploration, extraction and processing of oil and natural gas. It was in the course of this business that the assessee entered into production sharing contract contracts with Government of India, Hindustan Oil Exploration Ltd (HOEC) and Petrodyne Inc, covering PY 1 contract area, on 6th October 1995 (PSC1) and with Government of India, HOEC ad Energy Equity India Petroleum Pty Ltd (EEIPPL), covering CY-OSN-97/1 contracts area, on January 8, 2001 (PSC2). The assessee was, with effect from the same dates and under joint operating agreement, designated as operator of PY 1 and CY-OSN-97/1.

[3] Vide agreement dates 20th October 2003, the assessee transferred all his participating interests in PY 1, and part of his interests in CY-OSN-97/1, to Hindustan Oil Exploration Limited. Under this agreement, the assessee was to receive US $ 13.5 million for transfer of participating interest in PY 1. Out of this amount of US $ 13.5 million, the assessee received US $ 10.5 million as upfront consideration, in the period relevant to the assessment year 2006-07. The balance amount of US $ 3 million, which was payable on first sale of commercial gas from oil block PY-1, was paid in the period relevant to the assessment year before us. As regards the consideration for transfer of partial interests in PY2, the assessee received US $ 1,97,512, out of which US$ 1,67,353 pertained to the Overriding Royalty Interest (ORRI) payment and US $ 30,159 pertained to interest on ORRI due. These receipts were also in the period relating to the assessment year before us.

[4] In the income tax return filed by the assessee for the assessment year 2006-07, the assessee took into account receipt of US $ 10.5 million (Rs 45,64,45,986) and offered the capital gains of Rs 9,01,86,186 to tax. The amount of capital gain was worked out by reducing the total prospecting expenditure incurred in this regard, which had remained unallowed, from the capital sum received, and as no part of the expenditure incurred by the assessee was allowed as deduction, no income was offered to tax under section 42(2)(b). The computation, as set out in the respective assessment order, was as follows:

		Rs.
Capital sum received		45,64,45,986
Total expenditure remaining unallowed		36,62,59,800
Total expenditure incurred in the business		36,62,59,800
Profits and Gains per 42(2)(b) is lower of		
(i) Capital sum less expenditure unallowed	9,01,86,186	
(ii)Total expenditure less exp unallowed	Nil	
Profits as per section 42(2)		Nil

[5] The balance amounts of sale consideration for PY 1, i.e. US $ 30,00,000, and sale consideration for partial interests in PY 2, i.e. US $ 1,97,152, were, however, not offered to tax in the assessment year 2006-07. It is taxability of these amounts which is subject matter of dispute before us. The stand of the assessee is that these amounts constitute consideration for sale of a capital asset, and should, therefore, be taxable as capital gains.

[6] While filing the income tax return for the present assessment year, i.e. assessment year 2010-11, the assessee disclosed these receipts of US $ 30,00,000 plus US $ 1,97,152 (i.e. Rs 14,52,08,040) as income under the head business and profession but offered the same to tax @ 21.1115%. The tax liability was thus computed at Rs 3,02,67,946. During the course of the scrutiny assessment proceedings, the Assessing Officer observed that %On perusal of the return of income and the details filed, it is found that, in the relevant previous year, the assessee has received Rs 13,63,20,000 from the sale of commercial gas from PY-1 contract area, and Rs 88,88,040 as Overriding Royalty Interest+ and that %the entire income was offered to tax under the head profits and gains from business and profession+. The Assessing Officer also noted that the amount of Rs 13,63,20,000 on sale of first commercial gas from PY 1 and that, from a perusal of details filed by the assessee, %It is very clear that the assessee has admitted the income from sale of commercial gas in PY1 contract under the profits and gains from business or profession+. The Assessing Officer also noted that %under computation in Part B-TTI of the return of income, the tax payable on total income of Rs 14,33,48,075 at the normal rate was given as Rs 3,02,67,946 which is incorrect *(as)* the correct tax on normal rate of 40% was computed at Rs 5,73,39,232 while processing the return of income+. When the assessee was confronted with, what the Assessing Officer apparently treated as an error in computation of tax liability, it was explained by the assessee that while the tax was correctly computed by the assessee @ 21.1115%, the inadvertent error committed by the assessee was in showing the income as business income, whereas the income in question was actually a capital gain which can only be brought to tax @ 21.1115%. A reference was made to Section 42(2)(b) which justifies the stand of the assessee. The Assessing Officer was thus urged to take into account the above fact and treat the amount as capital gains.

[7] The Assessing Officer did not accept the submissions of the assessee. He was of the view that since the time limit for filing an income tax return under section 139(5) has already elapsed, the assessee cannot file any revised return at this stage. The Assessing Officer further held that %after filing the original return of income, the assessee cannot change the head of income through filing a letter during the course of assessment proceedings+ and that %there is no bonafide inadvertent mistake on the part of the assessee+. He also placed his reliance on the judicial precedents in the cases of **Goetze India Ltd Vs CIT (284 ITR 323)**, **Sunanda Ram Deka Vs CIT (210 ITR 988), CIT Vs Andhra Cotton Mills Ltd (219 ITR 404)** and **Golden Installation & Engineering Ltd (305 ITR 427).** As for taxability of transaction, the Assessing Officer observed as follows:

II. Further, the assessee's contention that the amount received by the assessee during the relevant previous year is taxable as capital gains u/s 42(2)(b) is not correct for the following reasons:

a) The assessee has not submitted any evidence to prove that the agreement was laid on the Table of each House of the Parliament, which is one of the basic conditions for claiming the special provision.

b) As per the special provision for deductions in the case of business for prospecting, etc for mineral oil under section 42(2)(b), where the proceeds of the transfer so far as they consists of capital sums exceeds the amount of the expenditure incurred remaining un-allowed, so much of the <u>excess shall be chargeable to income-tax as profits and gains of the assessee.</u>

c) The assessee has submitted that a farm out transaction in Block PY1 was done during the FY. 2005-06 for Rs,45,64,45,986/- and expenditure of Rs.36,61,60,300/- was incurred up to the period. As per the details furnished the expenditure remaining un-allowed for the A.Y.2010-11 is Rs.18,59,965/-. With the above figures, the profit is computed as per the computation method prescribed in circular No.772 dt.23.12.1998 asunder:

a)	*Expenditure incurred*	*36,90,23,586*
b)	*Expenditure remaining unallowed*	*18,59,965*
c)	*Proceeds of transfer*	*13,63,20,000*
d)	*Amount allowable as deduction in A.Y.2010-1 1 (b-c)*	*NIL*
e)	*Amount allowable as deduction in subsequent years*	*NIL*
f)	*Excess of proceeds of transfer over expenditure remaining unallowed*	*13,44,60,035*
g)	*Difference between the expenditure incurred and the expenditure remaining unallowed (a-b)*	*36,71,63,621*
h)	*Amount chargeable to income-tax as profits and gains in the A.Y. 2010-11 [lower of (f) & (g)]*	*13,44,60,035*

With the above profit, if the receipt of Over Riding Royalty Interest of Rs.88,88,040/- is added, the profit would be Rs.14,33,48,0755 which is the same as income admitted by the assessee in the return of income. Therefore, even if the profit is computed under section 42(2)(b) and as prescribed in the circular No.772 issued on 23.12.1998, the returned income of the assessee will be taxable a income under head profits and gains from the business or profession and the taxable income would be same as the returned income of Rs.14,33,48,075/-."

[8] Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) justified the conclusions arrived at by the Assessing Officer and held that the amounts in question were

liable to be taxed as business income under section 44(2)(b). He also held that in terms of the provisions of Section 44(2)(b) and the explanations given by CBDT, vide circular no. 772 dated 23rd December 1998, these amounts cannot be taxed as capital gains. As held so, he reproduced and relied upon the illustrations given in the said circular. Without prejudice to the stand so taken, learned CIT(A) also held that the entire sale consideration should have been taxed in the assessment year 2006-07 as the related asset was transferred in the period relevant to the assessment year 2006-07. In support of this stand, he relied upon Hon'ble Madras High Court's judgment in the case of **T V Sunderam Iyengar & Sons Ltd Vs CIT [(1959) 37 ITR 26)].** He was, therefore, of the opinion that "the consideration received in assessment year 2010-11 cannot be taxed as capital gains in the assessment year 2010-11". He thus declined to interfere in the matter. The assessee is not satisfied and is in further appeal before us on the following grounds of appeal:

> *Based on the facts and circumstances of the case, M/s Mosbacher India LLC ("Appellant") respectfully submits as under:*
>
> ***<u>General</u>***
>
> *1. The order of the Ld Assessing Officer ("AO") and the order of the Ld. Commissioner of Income Tax (Appeals) ["CIT(A)"] are contrary to canons of equity and natural justice, contrary to law and facts involved, not based on facts and circumstances of the case, contrary to mandatory provisions of the Income-tax Act, 1961 ("Act"), lacks jurisdiction and is liable to be struck down.*
>
> ***<u>Taxability of consideration for transfer of participating interest in oil block and Overriding Royalty Interest ("ORRI")</u>***
>
> *2. The Ld CIT(A) erred in treating the receipt of balance consideration on account of sale of participating interest in the oil block PY-1 as 'business income' as against 'capital gains' as provided under the provisions of section 42(2)(b) of the Act.*
>
> *3. The Ld CIT(A) has failed to appreciate that the amounts received during the assessment year ("AY") 2010-11 is a part of the consideration towards transfer of participating interest in oil block PY-1 which took place during the AY 2006-07, and that the consideration received during AY 2006-07 has been accepted by the Ld. AO as capital gains.*
>
> *4. The Ld CIT(A) failed to appreciate that the participating interest in oil block constitutes a capital asset, the transfer of which shall result in capital gains to the Appellant.*
>
> *5. The Ld CIT(A) has erred in upholding the order of the Ld AO, which was merely based on the bona fide mistake committed by the Appellant in filling the income under a wrong column while e-filing the return of income. The Ld CIT{A) has failed to appreciate that the Ld AO should not take advantage of a bona fide mistake of the Appellant.*

6. The Ld CIT(A) has erred in not rectifying the bona fide mistake in the original return of income, wherein the Appellant had wrongly described the head of income as business income as against capital gains, which was subsequently sought to be rectified vide letter dated March 15, 2013 and also through the revised return of income filed on March 19, 2013.

7. The Ld CIT(A) has erred in treating the ORRI relating to the transfer of participating interest in oil block PY-1 as 'business income' as against 'capital gains'.

8. The Ld CIT(A) has erred in not considering the remand report dated January 28, 2015 submitted by the Ld Commissioner of Income Tax, International Taxation, through which it was clearly brought to the notice of the Ld CIT(A) that the Ld AO has, for AY 2006-07 and AY 2007-08 after due application of mind, taxed similar receipts on transfer of participating interests under the head 'capital gains' and not as 'business income'.

9. The Ld CIT(A) has failed to follow the principles of consistency, given that similar receipts on transfer of participating interests in oil blocks in AY 2006-07 and AY 2007-08 were accepted to be taxed as capital gains in the relevant assessment orders passed under section 143(3) of the Act.

10. The Ld CIT(A) has erred in stating that the income earned by the Appellant during the AY 2010-11 cannot be taxed as capital gains in AY 2010-11, but should have been offered to tax as capital gains in AY 2006-07.

11. The Ld CIT(A) and the Ld AO have failed to appreciate that the income earned by the Appellant cannot be taxed as business income under the provisions of section 42(2)(b) of the Act read with Circular No 772 dated December 23, 1998 issued by the Central Board of Direct Taxes.

12. The learned CIT(A) has, while computing the business income under section 42(2) of the Act, failed to appreciate that the entire expenditure incurred by the Appellant so far is remaining unallowed, and consequently there shall not arise any excess of proceeds from transfer over and above the expenditure remaining unallowed.

Passing of final assessment order as against draft assessment order under section 144C of the Act

13. The Ld CIT(A) erred in upholding the action of the Ld AO in not issuing a draft assessment order under section 144C of the Act, even after proposing a variation to the head of income which is prejudicial to the interest of the Appellant and therefore the assessment order passed under section 143(3) is bad in law and void ab initio and deserves to be set aside.

14. The Ld CIT(A) and the Ld AO erred in not appreciating that the re-classification of income as 'business income' taxable at 42.23 percent as opposed to 'capital gains' taxable at 21.115 percent amounts to a variation in the income returned, which is prejudicial to the interest of the Appellant.

Levy of interest under section 234B and section 234C of the Act

15. The Ld CIT(A) and the Ld AO have erred in charging interest under the provisions of section 234B and section 234C of the Act.

[9] We will take up all these grounds of appeal as all these grounds are on the same issue and interconnected. In substance, in our considered view, the questions actually required to be adjudicated by us are as follows:

- **Whether the CIT(A) ought to have held that Assessing Officer should have first issued a draft assessment order in this case, and whether the Assessing Officer's failure to do so, on the facts and in the circumstances of this case, has rendered the impugned assessment order null and void?**

- **Whether the CIT(A) ought to have held that the assessee's alleged mistake in disclosing the income of Rs 14,52,08,040 on account of transfer of participation rights as business income, by itself, could be put against the assessee in his assessment of income?**

- **Whether the CIT(A) was justified in holding that the income of Rs 14,52,08,040, on the facts and in the circumstances of the case, be brought to tax as business income of the assessee, as against capital gains claimed by the assessee, in the assessment year before us, and, as a corollary thereto, whether or not, as is issue raised in ground of appeal no 10, the learned CIT(A) "has erred in stating that the income earned by the Appellant during the AY 2010-11 cannot be taxed as capital gains in AY 2010-11, but should have been offered to tax as capital gains in AY 2006-07"**

[10] We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

[11] We will first take up the assessee's grievance against non issuance of a draft assessment order under section 144C. Section 144C, to the extent relevant for our discussion, provides as follows:

> ***Reference to dispute resolution panel.***
>
> *144C. (1)* ***The Assessing Officer shall****, notwithstanding anything to the contrary contained in this Act,* ***in the first instance, forward a draft of the proposed order of assessment*** *(hereafter in this section referred to as the draft order) to* ***the eligible assessee if he proposes to make****, on or after the 1st day of October, 2009,* ***any variation in the income or loss returned which is prejudicial to the interest of such assessee****.*
>
> *[Emphasis, by underlining, supplied by us]*
>
> *(15) For the purposes of this section,*
> *…………*
> *(b) "eligible assessee" means,—*

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and
(ii) any foreign company.

[12] In order to successfully invoke the provisions of Section 144C, thus, two basic conditions are required to be fulfilled:

- **the assessee is an eligible assessee *[i.e. (i) any person in whose case the variation referred to the income or loss in the returned income or loss, which is prejudicial to the interest of the assessee, is made on account of an order under section 92A(3) i.e.an ALP adjustment], or (ii) any foreign company]; and***

- **the Assessing Officer proposes to make "any variation in the income or loss returned by the assessee which is prejudicial to the interest of such assessee".**

[13] There is no dispute that the assessee is an eligible assessee inasmuch as the assessee is a foreign company. The first condition for giving a choice to the assessee to follow the DRP route, which, in turn, requires issuance of draft assessment order, is thus clearly fulfilled.

[14] As for the second condition, i.e. the Assessing Officer proposing to make %any variation in the income or loss returned by the assessee which is prejudicial to the interest of such assessee+, since the Assessing Officer has merely accepted the returned income, as filed by the assessee, the second condition is not fulfilled. In the present case, while making the impugned assessment under section 143(3), the Assessing Officer has not made any variation in the income or the loss returned by the assessee. The Assessing Officer has simply accepted the income returned by the assessee, and the variations, if at all, are in the computation of tax payable in respect of income returned by the assessee. The variation, as the statutory provision unambiguously states, has to be vis-à-vis returned income or loss. That is certainly not the case before us. The assesseeqs contention is that the income returned by the assessee was an inadvertent mistake and the Assessing Officer ought to have corrected the mistake as all the relevant facts were on record and what the Assessing Officer can bring to tax is income of the assessee in accordance with the law. We will deal with that aspect of the matter separately as and when the occasion comes to deal with the matter on merits. So far as the application of Section 144C is concerned, in our considered view, it is a condition precedent that the Assessing Officer proposes a %variation in the income or loss returned by the assessee which is prejudicial to the interest of the assessee+, and since this condition is admittedly not satisfied on the facts of this case, no fault can be found in the path taken by the Assessing Officer.

[15] Coming to the judicial precedents relied upon by the learned counsel, the common thread in all these judicial precedents, i.e. in the cases of **Vijay Television (P.) Ltd. v. Dispute Resolution Panal [(2014) 46 taxmann.com 100 (Mad)], Jazzy Creations Pvt Ltd Vs ITO [(2016) 133 DTR 1 (Mum)]** and **Capsugel Healthcare Ltd Vs ACIT [(2015) 152 ITD 142 (Del)]**, is that all these precedents pertain to the situations in which applicability of Section 144C was not in slightest doubt and yet the Assessing Officer did not issue the draft assessment order- as is required to under the scheme of Section 144C. That is not the case here. It was a conscious, and in fact correct, decision of the Assessing Officer, as he has discussed in fair detail in the impugned order, that since there is no variation in the income returned by the assessee, the provisions of Section 144C cannot be invoked. Given these crucial variations in the facts of the case, the judicial precedents cited at the bar donot come to the rescue of the assessee.

[16] We, therefore, reject the plea of the assessee that since the Assessing Officer has issued the impugned assessment order directly, without first issuing a draft assessment order, the impugned assessment order should be quashed and treated as *non est.*

[17] The second issue that we need to deal with is whether the CIT(A) ought to have held that the assessee not making the correct claim by way of the revised income tax return is not fatal to the claim itself. In effect thus whether the fact that the assessee, though by mistake, disclosed the income as business income =, as against the capital gains, can be put against the assessee at the appellate stage.

[18] This question poses little difficulty. There cannot be any taxation on the basis of a concession, an acquiescence or an estoppel. As Article 265 of the Constitution of India states so unambiguously, %no tax shall be levied or collected without the authority of law+. Unless law authorises levy of tax, the Assessing Officer cannot levy the tax simply because the assessee himself has offered so. It is only elementary that the income liable to be taxed has to be worked out in accordance with the law as in force. In this process, it is not open to the Revenue authorities to take advantage of mistakes committed by the assessee. Tax cannot be levied on an assessee at a higher amount or at a higher rate merely because the assessee, under a mistaken belief or due to an error, offered the income for taxation at that amount or that rate. It can only be levied when it is authorised by the law, as is the mandate of Art. 265 of the Constitution of India.

[19] As for the Goetze India *(supra)* decision relied upon by the Assessing Officer, we may only refer to the decision of Hon'ble jurisdictional High Court, in the case of **Ramco Cements Ltd Vs DCIT [(2015) 373 ITR 146 (Mad)]**, wherein Their Lordships have held that where there is a *bonafide* lapse on the part of the assessee in making a claim, he can very well do so before the CIT(A). In effect thus, a mistake by the assessee at the assessment stage, with respect to a claim, does not prejudice the claim of the assessee on merits. Therefore, even if the assessee does not make a claim in the course of assessment proceedings even by filing a letter, leave alone making the claim by way of filing a revised return, he can do so at the first appellate stage. Not making the claim through the revised return does not, therefore, prejudice the legitimate interests of the assessee, on merits of the claim. The law so laid down by Hon'ble jurisdictional High Court binds us. The hyper technical objection of the revenue authorities must, therefore, be rejected.

[20] In our considered view, therefore, the stand taken by the assessee in the e return ought to have been examined on merits, particularly when assessee, in the course of scrutiny assessment proceeds, specifically stated that there was an error in e filing of the income tax return inasmuch as what was e filed as business income was infact a capital gain, and that this error is corroborated by the fact that the rate computed on the income offered to tax was as applicable on capital gains, rather than rate as applicable on business income. In these circumstances, nothing really turns on how the assessee had treated this income, so far as classification of income is concerned, in the e return filed by the assessee. The claim of the assessee has to be essentially examined on merits at least at the appellate stage.

[21] The next question that we need to address ourselves to is whether the receipts of US $ 30,00,000 plus US $ 1,97,152 (taken as equivalent to Rs 14,52,08,040) in the hands of the assessee is an income taxable under the head profits and gains of business or profession, or is taxable as income under the head capital gains. As a corollary to this question, we also need to decide whether the income, as capital gains, is to be taxed in the present assessment year, i.e. 2010-11, or it could only have been taxed in the assessment year 2006-07, i.e. the year in which the capital gains have actually arisen.

[22] As we deal with this aspect of the matter, it is necessary to take a quick look at Section 42 of the Act and consider whether it applies to the situation before us. It is so for the reason that taxability of the impugned receipts as profits and gains form business and profession has been upheld because these receipts are held to taxable under section 42

which falls in Chapter VI titled %Computation of Business Income+. The relevant extracts from Section 42 are as follows:

> ***Special provision for deductions in the case of business for prospecting, etc., for mineral oil.***
>
> *42. [(1)] For the purpose of computing the profits or gains of any business consisting of the prospecting for or extraction or production of mineral oils in relation to which the Central Government has entered into an agreement with any person for the association or participation of the Central Government or any person authorised by it in such business whch agreement has been laid on the Table of each House of Parliament, there shall be made in lieu of, or in addition to, the allowances admissible under this Act, such allowances as are specified in the agreement in relation—*
>
>> *(a) to expenditure by way of infructuous or abortive exploration expenses in respect of any area surrendered prior to the beginning of commercial production by the assessee ;*
>>
>> *(b) after the beginning of commercial production, to expenditure incurred by the assessee, whether before or after such commercial production, in respect of drilling or exploration activities or services or in respect of physical assets used in that connection, except assets on which allowance for depreciation is admissible under section 32 :*
>>
>> *Provided that in relation to any agreement entered into after the 31st day of March, 1981, this clause shall have effect subject to the modification that the words and figures "except assets on which allowance for depreciation is admissible under section 32" had been omitted; and]*
>>
>> *(c) to the depletion of mineral oil in the mining area in respect of the assessment year relevant to the previous year in which commercial production is begun and for such succeeding year or years as may be specified in the agreement; and such allowances shall be computed and made in the manner specified in the agreement, the other provisions of this Act being deemed for this purpose to have been modified to the extent necessary to give effect to the terms of the agreement.*
>
> *(2) Where the business of the assessee consisting of the prospecting for or extraction or production of petroleum and natural gas is transferred wholly or partly or any interest in such business is transferred in accordance with the agreement referred to in sub-section (1), subject to the provisions of the said agreement and where the proceeds of the transfer (so far as they consist of capital sums)—*
>
>> *(a) are less than the expenditure incurred remaining unallowed, a deduction equal to such expenditure remaining unallowed, as reduced by the proceeds of transfer, shall be allowed in respect of the previous year in which such business or interest, as the case may be, is transferred;*

(b) exceed the amount of the expenditure incurred remaining unallowed, so much of the excess as does not exceed the difference between the expenditure incurred in connection with the business or to obtain interest therein and the amount of such expenditure remaining unallowed, shall be chargeable to income-tax as profits and gains of the business in the previous year in which the business or interest therein, whether wholly or partly, had been transferred:

Provided that in a case where the provisions of this clause do not apply, the deduction to be allowed for expenditure incurred remaining unallowed shall be arrived at by subtracting the proceeds of transfer (so far as they consist of capital sums) from the expenditure remaining unallowed.

Explanation.—Where the business or interest in such business is transferred in a previous year in which such business carried on by the assessee is no longer in existence, the provisions of this clause shall apply as if the business is in existence in that previous year;

(c) are not less than the amount of the expenditure incurred remaining unallowed, no deduction for such expenditure shall be allowed in respect of the previous year in which the business or interest in such business is transferred or in respect of any subsequent year or years:

…………………………..
…………………………..

Explanation —For the purposes of this section, "mineral oil" includes petroleum and natural gas

[23] So far as Section 42(1) is concerned, it provides for deduction, in lieu of or in addition to deductions otherwise admissible under the Act, in respect of prospecting expenses in certain circumstances. Clearly, therefore, nothing in Section 42(1) can be put against the assessee so far taxability of income is concerned. Similarly, coming to Section 42(2), clause (a) and (c) of this sub section also deal with availability of deduction in case where sale consideration of the transfer of business interest is less than the expenditure remaining unallowed so far, and non availability of deduction in a case the sale consideration is not less than the expenditure remaining unallowed. When the sale consideration is less than or equal to the amount remaining unallowed as deduction, there cannot obviously be any occasion of gains, because, in such a situation, the sale consideration has to be less than the total prospecting expenses incurred for the reason that, by definition, expenses remaining unallowed have to be only a part of the total expenses incurred. When the sale consideration is less than a part of total expenses incurred, it has to be less than total expenses incurred as well. These clauses, therefore, can also not be put against the assessee so far as taxable of an income in the hands of the assessee is concerned.

[24] That leaves us with Section 42(2)(b) which, as a plain reading of the statutory provision would show, deals with a situation in which sales consideration of the %business of prospecting for, or extraction or production of, petroleum gas+ is more than the prospecting expenses incurred by the assessee which have not been allowed as a deduction till the point of time when the interest in that business is transferred. Clearly, therefore, it is only when the assessee gets sale consideration which is more than the expenses incurred, but remaining unallowed, by the assessee that the provision of Section 44(2)(b) are invoked. While section 44(2)(b) gets invoked when the sale consideration is more than prospecting expenses remaining unallowed, in substance it comes into play only when the sale consideration is more than expenses remaining unallowed plus the expenses allowed i.e. total prospecting expenses. It is so for the reason that what can be brought to tax in such a situation is the difference between sale consideration and total expenses incurred, as long as it does not exceed the difference between the expenditure incurred and expenditure not allowed. In other words, only that portion of excess of sale consideration over the costs incurred by the assessee which has been allowed as deduction but the assessee has, due to sale transaction, ended up recovering the same as part of sale consideration. Section 44(2)(b) is rather complexly worded at the first sight but what it provides is simple. In the event of sale of interests in prospecting business, when assessee has any capital gains, such a portion of capital gains, which represents the expenditure in respect of which the assessee has already been allowed as deduction, will be taxable as business income. It is in the nature of reversal of, what the statue apparently treats as, undue relief granted to the assessee. If Section 44(2)(b) was not to be on the statute, on one hand the assessee has a capital gain which gets taxed at a concessional rate, on the other hand, in respect of a part of such capital gains, the assessee is allowed a deduction in computation of business income which is taxable at normal rates. It is apparently to remove this incongruity that Section 44(2)(b) finds place in the scheme of the Act. In effect thus, it is a part of capital gain, representing the deduction already allowed, which can be brought to tax under section 44(2)(b). It is also important to bear in mind the fact that even under section 44(2)(b), the taxability can only be in the year in which the asset is transferred, i.e. in which capital gains arise, as it is specifically stated that the said income %**shall be chargeable to income-tax as profits and gains of the business in the previous year in which the business or interest therein, whether wholly or partly, had been transferred+.**

[25] Let us now revert to the facts of the case before us. It is a case in which the total prospecting expenses incurred by the assessee were Rs 36,62,59,800 and no part of these expenses were ever allowed as deduction in computation of business income. When no part

of these expenses was ever allowed as deduction, there cannot be any occasion to bring anything to tax under section 44(2)(b). As for the amount of Rs 18,59,965, which is taken into account for computation of income under section 44(2)(b) as expenses unallowed, the Assessing Officer fairly accepts that this is the expenses remaining unallowed for the present assessment year 2010-11 and it has nothing to do with the asset transferred in respect of which the amounts in question are received. When the related asset is transferred in the assessment year 2006-07, the expenditure incurred and remaining unallowed subsequently cannot even get into that computation. In any case, even going by the admission of the Assessing Officer, and rightly so, the related asset was not transferred in the previous year pertaining to the assessment year before us i.e. 2010-11. Therefore, going by the plain words of the statue, no income can be brought to tax in this assessment year. In view of these discussions, as also bearing in mind entirety of the case, we are of the considered view that no part of the receipts in question could be brought to tax, in the hands of the assessee, under section 44(2)(b) of the Act. To this extent, we vacate the orders of the authorities below.

[26] The next question that we must deal with now is whether the amounts in question can be taxed as capital gains. Learned counsel of the assessee does not dispute that. As a matter of fact, it has been the stand of the assessee that it the amount in question are capital receipts in nature which should be taxed as capital gains. Learned CIT(A) has, however, given a categorical finding that this capital gain, even if that be so, can be taxed only in the assessment year 2006-07. That is, of course, without prejudice to the basic stand of the CIT(A) that the impugned amounts are taxable as business income in the assessment year before us, but then this plea, for the detailed reasons set out above, stands rejected.

[27] There is no, and cannot be any, dispute about the fundamental factual position that the amounts in question represent consideration received by the assessee for transfer of his entire participating interests in PY 1, and part of his interests in CY-OSN-97/1, to Hindustan Oil Exploration Ltd, and that since definition of capital asset, under section 2(14), includes %**property of any kind held by an assessee, whether or not connected with business or profession**+, these participation interests are required to be treated as capital assets. Under section 45, %**any profits or gains arising from the transfer of a capital asset, effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54 E, 54EA, 54EB, 54F, 54G and 54 H, be chargeable to income tax under the head capital gains and shall be deemed to be the income of the previous year in which the transfer took place**+. The gains on transfer of these participation rights is, therefore, required to be

treated as capital gain and is liable to be taxed in the year in which the transfer of related asset takes place. Under these circumstances, in our considered view, there cannot be any dispute about the legal position that the gains on transfer of participation interests are required to be treated as capital gains. As for the reliance placed by the learned CIT(A) on the provisions of Section 44(2)(b), as explained by the CBDT circular no. 772, all it deals with as to which portion of expenses which is allowed as deduction earlier is to be brought back to tax on sale of %business of prospecting for, or extraction or production of, petroleum gas+. The provisions of Section 44(2)(b) do not override the provisions of Section 45, and, therefore, Section 44(2)(b) cannot have any bearing on deciding as to whether a receipt is in the nature of capital receipt leading to capital gains. When under the scheme of the Act, gains on sale of business is liable to be taxed as capital gains, as is the position on the facts of this case, Section 44(2)(b) cannot disturb that position. Learned Departmental Representative then contends that these amounts cannot be in the nature of capital receipt since no capital asset was transferred during the relevant financial period. We are unable to see any merits in this plea. The amount being in the nature of capital receipt, which can only be taxed as capital gain, is not dependent for the asset having been transferred in this particular previous year. The point of time the asset is transferred only decides the assessment year in which the capital gain is to be brought to be tax and it does not alter the character of the receipt. We, therefore, agree with the learned counsel that the receipts in question, no matter what be the point of time of receipt thereof and no matter what be the manner in which parts of these amounts are quantified, are in the nature of capital receipts which can only be taxed as capital gains. As regards the overriding royalty interest (ORRI) of US $ 1,97,512 received by the assessee, there is no dispute at all that this amount is also part of the consideration r sale of interest in business, and, therefore, this amount can only be taxed as capital gains only. The nomenclature of this amount may be somewhat misleading as it refers to the mode of computation of receipt rather than the nature of receipt, but then it is received as a part of sale consideration, it is a capital receipt for our purposes. The manner in which this part of the consideration is worked out, or nomenclature of the consideration, does not alter the nature of receipt. The remaining amount, i.e. US $ 3,000,000, is part of the overall consideration of US $ 13,500,0000 which had remained unpaid as this part of the payment was deferred for payment till %first sale of commercial gas from oil block PY-1+. The character of these amounts is consideration for sale of interests in oil blocks, which is a capital asset, and the gains on such sale can only be taxed as capital gains.

[28] As we hold that the amounts received by the assessee, on sale of his participation interests in the "business of prospecting for, or extraction or production of, petroleum gas", can only be brought to tax as capital gains in the hands of the assessee, we must also point out that the capital gains in question can only be taxed in the hands of the assessee in the assessment year in which the asset in question is transferred. The fact that a part of the consideration was to be, and has been, received later does not alter the year of taxability. Section 45 categorically provides that "**any profits or gains arising from the transfer of a capital asset, effected in the previous year shall………….. be chargeable to income tax under the head capital gains and shall be deemed to be the income of the previous year in which the transfer took place** *(Emphasis by underlining supplied by us)***".** We are, therefore, of the view that the receipts in question should be brought to tax in the hands of the assessee in the assessment year 2006-07, and it is for this reason these receipts cannot be taxed in the assessment year before us, i.e. assessment year 2010-11. Even though the assessee had taken a stand, in the ground of appeal, that this amount is taxable in 2010-11 only, there was not even whisper of an argument in support of the stand so taken. As a matter of fact, we did specifically put to it to learned counsel as to what is his argument in support of the contention this amount is taxable inn 2010-11, he did not have, and rightly so, anything to say. All that he learned counsel stated is that if it is not taxed in the assessment year 2010-11, it may not be taxable at all. The legal position regarding taxability of the capital gain in the assessment year 2006-07, whether it can be done so today or not, is thus beyond any doubt or controversy

[29] When we pointed out the above legal position to learned counsel of the assessee, he submitted that so far as assessment for the assessment year 2006-07 is concerned, it has attained finality and even the reopening proceedings for the assessment year 2006-07 stand dropped. Our attention was thus invited to the letter dated 21st January 2005, written by DCIT, International Taxation I(1) Chennai, informing the CIT(IT) that the reassessment proceedings for the assessment years 2006-07 and 2007-08 were initiated and then dropped as these reassessments would have resulted in refunds to the assessee, and the reassessments cannot be done for the benefit of the assessee. Once it is a conscious choice of the Assessing Officer not to reopen the assessment proceedings, the assessment for that year has reached finality which cannot be disturbed. There is thus no way in which, according to the learned counsel, the assessment for the assessment year 2006-07 can be disturbed, and it is for this reason that the capital gain, to the extent relatable to the amounts received during the previous year relevant to the assessment year before us, have been

offered to tax in this assessment year. He submits that if these amounts cannot be brought to tax capital gains in the year before us, these amounts cannot be taxed at all.

[30] We have noted that the reassessment proceedings were initiated by the Assessing Officer not to bring to tax the remining portion of capital gains, which has remained to be taxed in the assessment year 2006-07, but this initiation of reassessment proceedings was initiated with an objective to treat the capital receipts on sale of participating interests as business income- in response to the audit objection. Such a treatment would have resulted in refund to the assessee, as entire prospecting expenditure was to be then allowed as deduction in the year in which business is treated to have commenced. This aspect of the matter is clear from the following extracts from the letter dated 21st January 2015 *(supra)* written by the Assessing Officer:

> *Your kind attention is invited to the subject. It is submitted that the assessments in the case for the AY 2006-07 and 2007-08 was completed treating the receipts as Capital Gains, as the Business Income u/s 42 of the IT Act resulted in NIL Income. By characterizing the Income of the assessee as capital gains in the assessment u/s, 143(3), a sum of Rs.9,01,86,186 for AY 2006-07 and Rs.4,93,45,013 for AY 2007-08 have been brought to tax as capital gains.*
>
> *Later the assessments for the AYs 2006-07 and 2007-08 was reopened in view of the Audit objection requiring the Income to be treated as Business Income. The proceedings initiated u/s 147 were dropped considering the fact that if the income has been treated as Business income it would result in a refund of Rs.2,96,95,552 for AY 2006-07 and 1,86,15,213 for AY 2007-08.*
>
> *With respect to the AY 2010-11, the Income was treated as Business Income as the assessee itself has admitted the receipts as Business Income in the Return of Income*.

[31] It is not, therefore, the Assessing Officerؘs unwillingness to tax the capital gains in the assessment year 2006-07 which has resulted in dropping of the reassessment proceedings. The grounds on which the reassessment proceedings were initiated were altogether different and these grounds had no bearing on the taxability of entire capital gains which were actually liable to be taxed in the assessment year 2006-07.

[32] Having said that we are also alive to the fact that the reassessment proceedings under section 147 for the assessment year 2006-07 cannot be initiated at this stage as more than six years have elapsed after the end of the relevant assessment year. That course of action, for the reasons we will now set out, may not required either, nor the taxability of this

part of capital gain in the hands of the assessee in the correct assessment year, in our considered view, is dependent upon the reassessment proceedings under section 147.

[33] We may at this stage take note of the provisions of Section 153 which deals with time limit for completion of assessment, reassessment and recomputation. Under section 153(6), as it stands now in its present form, the time limits set out for completion of assessments, reassessments and recomputations shall not apply in the cases %(i) where the assessment, reassessment or recomputation is made on the assessee or any **person in consequence to, or to give effect to, any findings or direction contained in an order under section** 250, **section 254**õ õ õ on or before twelve months from the end of the month in such order is received or passed by the Principal Commissioner or the Commissioner, as the case may be+. Explanation 2 to Section 153 further provides that %**where, by an order referred to in clause (i) of sub section (6), any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year, for the purpose of section 150 and this section, be deemed to be one made in consequence to or giving effect to any finding or direction contained in the said order**+. As to the nature of findings or directions which can be given in an appellate order, Honþle Supreme Court, in the case of **Rajinder Nath Vs CIT [(1979) 120 ITR 14 (SC)]**, has, *inter alia*, observed as follows:

> 7. **The expressions "finding" and "direction" are limited in meaning. A finding given in an appeal, revision or reference arising out of an assessment must be a finding necessary for the disposal of the particular case, that is to say, in respect of the particular assessee and in relation to the particular assessment year. To be a necessary finding, it must be directly involved in the disposal of the case**. It is possible in certain cases that in order to render a finding in respect of A, a finding in respect of B may be called for. **For instance, where the facts show that the income can belong either to A or B and no one else, a finding that it belongs to B or does not belong to B would be determinative of the issue whether it can be taxed as A's income. A finding respecting B is intimately involved as a step in the process of reaching the ultimate finding respecting A**. If, however, the finding as to A's liability can be directly arrived at without necessitating a finding in respect of B. then a finding made in respect of B is an incidental finding only. It is not a finding necessary for the disposal of the case pertaining to A. **The same principles seem to apply when the question is whether the income under enquiry is taxable in the assessment year under consideration or any other assessment year.**

[Emphasis, by underlining, supplied by us]

[34] Coming back to the facts of the case before us once again, we find that we have reached a categorical finding to the effect that the capital gain in question could only be taxed in the assessment year 2006-07 and it is for this reason that the said capital gain cannot be taxed in any other assessment year. This finding, in the light of the legal position set out above, *prima facie* constitutes legally sustainable basis for bringing the amount of Rs 14,52,08,040 as additional amount of capital gains in the assessment year 2006-07. We, therefore, see no reasons to give our approval to learned counsel’s generosity of offering this income to tax, as capital gain, in the present assessment year. Our giving in, if we may say so, to this bait could infact jeopardise legitimate interests of the revenue inasmuch as once this income is held to be taxable in assessment year 2010-11, this treatment of income could straightaway close the doors of taxability of this income in the assessment year 2006-07 and resultant additional levies of interest, and, if applicable, penalties as well. In our considered view, this amount is required to be taxed in the assessment year 2006-07 and the Assessing Officer, in the light of the discussions above, is legally competent to do so even at this stage. It is only elementary that when a statutory authority has the power to do something under the statute, he has a corresponding duty to exercise these powers when circumstances so justify or warrant. The call, nevertheless, is to be taken by the Assessing Officer and it is for him to decide the correct legal position taking into account all the necessary inputs, including our observations above.

[35] As we part with this matter, we consider it appropriate to make some observations about the fact that, during the course of hearing, it was pointed out by the assessee that this appeal is a covered matter in as much as like in the cases of **Vijay Television** *(supra),* **Jazzy Creations** *(supra)* and **Capsugel Healthcare** *(supra),* the Assessing Officer did not first issue a draft assessment order, and that, for this short reason alone, the impugned assessment order should be quashed. On the face of it, it did appeal to us too. What was missed out, however, was the crucial difference in the facts of these cases vis-à-vis the facts of the case before us. All those cases, as we have pointed out earlier, were the cases in which the applicability of Section 144C itself was not in slightest of doubt, whereas, in the case before us, the Assessing Officer has set out the reasons, which eventually met our approval, as to why the provisions of Section 144 C did not apply to this case. In the case before us, the provisions of Section 144C itself have been held to be inapplicable even though the assessee is an eligible assessee, i.e. foreign company, because the no variation in his income vis-à-vis returned income was proposed by the Assessing Officer. There is no point in playing down these vital differences and claiming that the issue in appeal is a

covered issue. While citing judicial precedents, one must realize that each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire scenario. There may be many similarities in these cases but yet then there are some differences as well, and these differences are sometimes so crucial that the conclusions significantly, and legitimately, vary. While dealing with judicial precedents, one should avoid temptation, of simply matching the colour of one case against the colour of another and then deciding the issue on the basis, as Justice Cardozo criticised in his oft quoted classic book ±The Nature of Judicial Processq (https://archive.org/details/natureofthejudic008454mbp), that %the sample nearest in the shade supplies the applicable rule+. That could indeed be disastrous. As observed by Honþle Supreme Court in **Mumbai Kamgar Sabha vs. Abdulbahi Faizullbhai AIR 1976 SC 1455**, in their inimitable and felicitous words, "**It is trite, going by anglophonic principles that a ruling of a superior Court is binding law. It is not of scriptural sanctity but of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decisions, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments**". It is, therefore, indeed duty of every judicial forum to apply the ruling of the superior Courts, as indeed follow decisions of the coordinate benches, in such a manner so as to enforce the true legal principles emerging from the same, by putting the words and expression used in the ruling in the right perspective and taking note of the variations, if any, in the facts of those cases vis-à-vis the facts of case in hand.

[36] To sum up, we conclude that

(a) The Assessing Officer was justified in directly issuing the assessment order under section 143(3), without first issuing a draft assessment order, even though the assessee was an 'eligible assessee' under section 144C, as the Assessing Officer did not propose to make any variations in the income returned by the assessee.

(b) The mere fact that the assessee had offered the income of Rs 14,52,08,040 to tax as business income, by itself, cannot justify the said income being taxed as business income.

(c) The receipt of Rs 14,52,08,400 which was brought to tax in the hands of the assessee as business income under section 44(2)(b) could not be taxed in the hands of the assessee as a business income, since section 44(2)(b) only seeks to reverse, under certain circumstances, the deduction for prospecting expenses already granted to the assessee in computation of business income but no part of the prospecting expenses incurred by the assessee, in respect

of the participation interests sold, was ever allowed as deduction in computation of business income.

(d) The receipt of Rs 14,52,08,400, which was in the nature of part consideration for sale of participation interests in PY-1 and CT-OSN-97/1 oil and natural gas exploration site, was liable to be taxed in the hands of the assessee as capital gain. However, such capital gain could be taxed in the hands of the assessee only in the assessment year 2006-07 as transfer of related capital asset, i.e. participation interests in PY-1 and CT-OSN-97/1 oil and natural gas exploration site, took place in the previous year relevant to the assessment year 2006-07. It was for this reason that the said capital gain could not be taxed in the assessment year before us, i.e. 2010-11.

(e) In view of the fact that the Assessing Officer has the power, as indeed the corresponding duty, under section 153(6) read with Explanation 2 thereto, to bring the said amount of Rs 14,52,08,400 to tax in the hands of the assessee for the assessment year 2006-07, we see no reasons to hold that in the event of the said income not being taxed in the present assessment year, i.e. 2010-11, the revenue will be put to undue loss, and that, for this reason, the assessee's offer for taxability of this capital gain in the assessment year 2010-11 should be accepted.

[37] In the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on the 29th day of November, 2016.

Sd/-	*Sd/-*
G Pavan Kumar	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Dated: the 29th day of November, 2016.

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Sr Private Secretary
Income Tax Appellate Tribunal
Chennai benches, Chennai