IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 6455-6460 OF 2017

(ARISING OUT OF SLP(C) NO(S). 17277-17282 OF 2015)

RAJ DADARKAR & ASSOCIATES .....APPELLANT(S)

VERSUS

ACIT – CC-46 .....RESPONDENT(S)

Before dealing with the respective contentions, we may state, in a summary form, scheme of the Act about the computation of the total income. Section 4 of the Act is the charging Section as per which the total income of an assessee, subject to statutory exemptions, is chargeable to tax. Section 14 of the Act enumerates five heads of income for the purpose of charge of income tax and computation of total income. These are: Salaries, Income from house property, Profits and gains of business or profession, Capital gains and Income from other sources. A particular income, therefore, has to be classified in one of the aforesaid heads. It is on that basis rules for computing income and permissible deductions which are contained in different provisions of the Act for each of the aforesaid heads, are to be applied. For example, provisions for computing the income from house property are contained in Sections 22 to 27 of the Act and profits and gains of business or profession are to be computed as

per the provisions contained in Sections 28 to 44DB of the Act. It is also to be borne in mind that income tax is only One Tax which is levied on the sum total of the income classified and chargeable under the various heads. It is not a collection of distinct taxes levied separately on each head of the income.

There may be instances where a particular income may appear to fall in more than one head. These kind of cases of overlapping have frequently arisen under the two heads with which we are concerned in the instant case as well, namely, income from the house property on the one hand and profits and gains from business on the other hand. On the facts of a particular case, income has to be either treated as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. Wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of Section 22 of the Act are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto. Section 22 of the Act makes 'annual value' of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in Section 23 of the Act. 'Owner of the house property' is defined in Section 27 of the Act which includes certain situations where a person not actually the owner shall be treated as deemed owner of a building or part

thereof. In the present case, the appellant is held to be “deemed owner” of the property in question by virtue of Section 27(iiib) of the Act. On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee.

What is the test which has to be applied to determine whether the income would be chargeable under the head “income from the house property” or it would be chargeable under the head “Profits and gains from business or profession”, is the question. It may be mentioned, in the first instance, that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income frombusiness. Such a question would depend upon the circumstances of each case.

. In view thereof, the object clause, as contained in the partnership deed, would not be the conclusive factor. Matter has to be examined on the facts of each case as held in ***Sultan Bros. (P) Ltd.*** case. Even otherwise, the object clause which is contained in the partnership firm is to take the premises on rent and to sub-let. In the present case, reading of the object clause would bring out two discernible facts, which are as follows:

(a) The appellant which is a partnership firm is to take the

premises on rent and to sub-let those premises. Thus, the business activity is of taking the premises on rent and sub-letting them.

In the instant case, by legal fiction contained in Section 27(iiib) of the Act, the appellant is treated as "deemed owner".

(b) The aforesaid clause also mentions that partnership firm may take any other business as may be mutually agreed upon by the partners.

In the instant case, therefore, it is to be seen as to whether the activity in question was in the nature of business by which it could be said that income received by the appellant was to be treated as income from the business. Before us, apart from relying upon the aforesaid clause in the partnership deed to show its objective, the learned counsel for the appellant has not produced or referred to any material. The ITAT being the last forum insofar as factual determination is concerned, these findings have attained finality. In any case, as mentioned above, the learned counsel for the appellant did not argue on this aspect and did not make any efforts to show as to how the aforesaid findings were perverse. It was for the appellant to produce sufficient material on record to show that its entire income or substantial income was from letting out of the property which was the principal business activity of the appellant. No such effort was made.

Reliance placed by the appellant on the judgments of this Court in

Chennai Properties & Investments Ltd. and ***Rayala Corporation (P) Ltd.*** would be of no avail. In ***Chennai Properties & Investments Ltd.*** where one of us (Sikri, J.) was a part of the Bench found that the entire income of the appellant was through letting out of the two properties it owned and there was no other income of the assessee except the income from letting out of the said properties, which was the business of the assessee. On those facts, this Court came to the conclusion that judgment of this Court in ***Karanpura Development Co. Ltd.*** v. ***CIT***, (1962) 44 ITR 362 was applicable and the judgment of this Court in ***East India Housing and Land Development Trust Ltd.*** v. ***CIT***, (1961) 42 ITR 49 was held to be distinguishable. In the present case, we find that situation is just the reverse. The judgment in ***East India Housing and Land Development Trust Ltd.*** which would be applicable which is discussed in para 8 of ***Chennai Properties & Investments Ltd.*** case and the reproduction thereof would bring home the point we are canvassing:

T&AP High court

THE HONBLE SRI JUSTICE SANJAY KUMAR AND THE HONBLE SRI JUSTICE U.DURGA PRASAD

I.T.T.A No.667 of 2016

The Principal Commissioner of Income Tax, Guntur.AppellantAnd

M/s. Sri Bharathi Warehousing Corporation, 8-24-31, Mangalagiri Road, Guntur. . Respondent

DATE OF JUDGMENT PRONOUNCED: 30.01.2017

30-01-2017

The Principal Commissioner of Income Tax, Guntur.Appellant

3) The appellant, in the grounds of appeal has, in terms of Section 260-A(2)(c) of the I.T.Act mentioned the following substantial questions of law for consideration:

1. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in not upholding the decision of the A.O treating the rent receipt as income from house property when the source of income as exploitation of

building on a leased land belonging to the partner of the firm?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in changing its decision for earlier years on similar issue relying on a decision of the Honble Supreme Court in the case of Chennai Properties & Investments Limited (Civil Appeal No.4494/2004 dated 09-04-2015) whose facts are not identical and similar?

c) In M/s.Chennai Properties & Investments Ltd., Chennais case (supra), the brief facts were that the appellant-assessee was a Company and its main objective as stated in its Memorandum of Association was to acquire the properties in City of Madras and to let out those properties. The assessee showed its rental income as income from business in its return. However, the Assessing Officer computed it under the head rental income. The appeal preferred by the assessee before the Commissioner of Income Tax (Appeals) was allowed. Aggrieved, the department filed appeal before the I.T.A.T and the same was dismissed. Then the Department approached the High Court and its appeal was allowed by the High Court holding that the Income Tax derived by letting out the properties would not be the income from business but the income from house property. The assessee then carried the matter to the Apex Court. Considering its earlier judgments, the Apex Court observed

the deciding factor was not the ownership of the lands or lease but the nature of the activity of the assessee and the nature of the operations in relation to them and ultimately held, that the letting of the properties was in fact the business of the assessee and therefore, the assessee rightly disclosed the income under the head income from business and accordingly, allowed the appeal.

d) **Applying the above ratio to the instant case, it can be emphatically said that the main objective of the assessee firm as manifest from the partnership deed was to carry on business in construction of different types of buildings such as godowns, residential or commercial buildings, flats, shops etc., and lease them out as a part of its business activity but not as exploitation of the property as an owner. In simple, construction of different types of buildings and leasing them out was the main business activity of the firm and doing other activity was only an optional one. In that view, the assessee firm was right in showing its both incomes under the head income from business. Therefore, we find no merit in the argument of learned Standing Counsel that the rental income should be shown under a different head. We also do not find any merit in the other argument that since the Tribunal has held in the previous instances that the income received by the same assessee was the income from house property and not a business income, in the instant case also it should have held similarly, for the reason that in the earlier instances, the Tribunal had no occasion to peruse the judgment in**

M/s.Chennai Properties & Investments Ltd., Chennais case (supra) which was rendered by the Apex Court on 09.04.2015.

7) At the outset, we do not find any substantial questions of law involved in this appeal. Accordingly, this appeal is dismissed at the admission stage.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.
INCOME TAX REFERENCE No. 4/2002
WITH
INCOME TAX REFERENCE No. 5/2002
WITH
INCOME TAX REFERENCE No. 6/2002
WITH
INCOME TAX REFERENCE No. 7/1995
WITH
INCOME TAX REFERENCE No. 18/1998
M/s Central Provinces Manganese Ore
Company Limited, Nagpur. **APPLICANT**
.....VERSUS.....
The Commissioner of IncomeTax,
(Vidarbha), Nagpur. **RESPONDENT**
In the aforesaid
factual background, the following questions were referred to this Court in these reference applications for a decision:I.

Whether on the facts and in the circumstances of the case, the income of the assessee was assessable under the head 'business' rather than 'other sources'?

II. Whether on the facts and in the circumstances of the case, there was any justification in law for the adhoc disallowance of 20% of the establishment expenses?

III. Whether on the facts and in the circumstances of the case, the set off of losses of earlier years could be allowed as a deduction during this year?

The observation of the Tribunal that since during the relevant assessment years, the loan was not advanced, the income of the assessee should be considered as income from other sources and not income from business is not well founded. It is held by the Hon'ble Supreme Court in the case of *Nalinikant Ambalal Mody* (Supra) that the amount received by the assessee therein, who was a practicing lawyer in the High Court, after he was elevated as a Hon'ble Judge to the High Court would represent the outstanding fees and the same was liable to be taxed under the head 'business income' and not 'income from other sources'. It is held by the Hon'ble Supreme Court that the moneys received by the Hon'ble Judge in that case after his elevation represented the outstanding dues of professional work and as they were the fruits of the professional activity of the assessee they could be charged to tax only under the head 'business income'. By applying the test laid down by the Hon'ble Supreme Court in the case of *Nalinikant Ambalal Mody* (Supra), it could be safely said that the moneys received by the assessee from the eight parties during the relevant assessment years would also be the fruits of the activity of

banking and money lending that was admittedly carried on by the assessee during the year 1973 to 1975. The learned counsel for the assessee has rightly relied on the judgments of the Hon'ble Supreme Court in the case of *Piara Singh* (Supra) and *Dr. T.A. Quereshi* (Supra) to substantiate his submission that even assuming that the assessee did not possess a license in banking and money lending, nonetheless the expenses incurred by the assessee for the business establishment in the business of banking and money lending were liable to be deducted. In the case of *Piara Singh* (Supra), currency notes were confiscated from the assessee, who was carrying on the business of smuggling and it was held that the confiscation of the currency notes is a loss occasioned in pursuing the business and the said loss that springs directly from the carrying on of the business was allowable as business loss. If the loss in the business of smuggling is allowable as business loss, it is difficult to digest that the expenses incurred by the assesseeCompany
for the business
establishment for banking and money lending without a license, should not be deducted. In the case of *Dr.T.A. Quereshi* (Supra), the assessee was dealing in contraband goods and was engaged in the transport and sale of heroin and it was held that the heroin seized from the assessee's stock in trade could be allowable as business loss. The incidental questions that are referred to this Court for a decision are answered by the judgments of the Hon'ble Supreme Court in the case of *Piara Singh* and *Dr.T.A. Quereshi* in favour of the assessee. It is also necessary to refer to the judgment in the case of *Commissioner of Income Tax Versus Paramount Premises (Private) Limited*, reported in **1991 (190) ITR 259**, relied on by the counsel for the assessee to hold that the interest earned

on deposits for short period with banks or given as loans would be receipts arising out of the business activity and, hence, the same would be assessable as business income. While deciding the appeals, the Income Tax Appellate Tribunal did not consider the facts involved in this case in detail and also the law that could have applied to the same before upholding the finding of the Commissioner of Income Tax (Appeals) that the entire expenses incurred by the assessee for maintaining its establishment at Nagpur for the purpose of its business activity could not have been deducted.

Hence, we hereby hold that in the facts and circumstances of the case, the income of the assessee was assessable under the head 'business' and not income from 'other sources'. Having answered the aforesaid question in favour of the assessee, we hold that in the circumstances of the case, there was no justification in law for the disallowance of 20% of the establishment expenses. We further hold that the set off of losses of earlier years could be allowed as deduction during the relevant assessment year. We also hold that in the circumstances of the case, no income from interest on the loan to Shri Ramprasad could be assessed during the relevant assessment year on accrual basis when the loan was written off in the year 1984.

Nalinikant Ambalal Mody Versus S.A.L. Narayana Row,
reported in **1966 (61) ITR 0428**

The Commissioner of Income
Tax Versus Piara Singh and the judgment in the case of *Dr.T.A. Quereshi Versus The Commissioner of Income Tax*, reported in **1980 (124) ITR 40** and **2006(157) Taxman 514**

Allahabad high court

Reserved on 08.02.2017

Delivered on 08.03.2017

Case :- INCOME TAX APPEAL No. - 115 of 2010

Appellant :- The Commissioner Of Income Tax-Ii Lko

Respondent :- M/S M.I.Builders Pvt. Ltd. Lko.

Counsel for Appellant :- D.D.Chopra,Manish Mishra

Counsel for Respondent :- Mudit Agarwal,Sri Mudit Agrawal.

Appeal was admitted on the following substantial questions of law:-

"(I) Whether it is necessary that revaluation of closing stock routed through profit and loss account and accordingly Assessing Authority had rightly added the amount of rupees one crore in the income of assessee which has been reversed by Appellate Authorities?

(II) Whether any disturbance of closing stock have to be carried out profit and loss account and while reversing the order passed by Assessing Authority, the Appellate Authority and Tribunal

committed substantial illegality by not recording finding of each and every issue dealt with by the Assessing Authority?

15. From the rival submissions one thing is clear that there is no income received or accrued to the assessee in any form. Any immovable property which was already subject to disclosure in accounts, its notional value termed as market value was enhanced by Assessee and corresponding entries have been made. In what manner, it will reflect in lower rate of tax in capital gain vis-a-viz sale of stock in trade, we find it difficult to understand, and learned counsel appearing for Revenue also could not explain or demonstrate the same.

16. *Tax management which is not contrary to any statutory provision does not constitute tax evasion*. Every person is entitled to arrange his affairs to reduce brunt of taxation to the minimum. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed, is not prohibited. Effectiveness of device depends not upon considerations of morality, but on the operation of Act, 1961.

21. In National Hydro Electrical Power Corporation Limited versus C.I.T. (2010), 3 SCC 396, Court observed that broadly there are two types of reserves:- (i) those that are routed through profit and loss

account and (ii) those which are not carried out via profit and loss account. For example a capital reserve such as share premium account.

22. Therefore the basic assumption that every Reserve has to route through profit and loss account, either way is incorrect. Moreover, it is not the case of A.A. that any income has been received or accrued or deemed to have received or accrued. Only transfer of entry was made by Assessee. Unless an income is received or accrued or deemed to accrue, it is not chargeable to tax under Act 1961. There is no finding that this conversion of current asset to fix asset is fraudulent. With respect to market value of the plot also, since A.A. himself makes an addition of Rs. 1,00,00,000/- therefore value taken by assessee was also acceptable to him. If that be so, Assessee, while transferring entry from current asset to fix asset, reflected market value in the schedule of Fixed assets and similar amount was credited to fix Reserve account. It could not be shown as to how this exercise would have resulted in evasion of tax. There is no receipt or accrual of income nor deemed receipt or deemed accrual of income. In our view, A.A. has assumed a hill when there was not even a mole. That is how A.A. created entire chain of dispute for a small matter of transfer of entry.

23. We are informed by learned counsel for the appellant that there are some accounting standards prescribed by recognized body of Accounting like Institute of Chartered Accountants of India that no amount can be carried to any Reserve account or no Reserve can be created without moving through profit and loss account and profit appropriation account but none such prescribed principles could be shown to us.

24. Process of revaluation of stock by itself can not bring in any real profit as held in C.I.T. versus K.A.R.K. Firm 1934(2) I.T.R. 183 (SC) and C.I.T. versus Hind Construction Limited 1972 (83) I.T.R. 211 (SC). Moreover, what is taxable under the income tax law is only real income as held in C.I.T. versus M/s Shoorji Vallabhdas and Co.,1962 (46) I.T.R. 144 (SC) and C.I.T. versus Birla Gwalior (P) Ltd., 1973 (89) I.T.R. 266 (SC). Courts have held that there is no principle by which the stock-in-trade can be valued at market price so as to bring to tax the notional profits which might in future be realized as a result of the sale of the stock in trade.

25. C.I.T. and Tribunal have examined the matter and accepted explanation of Assessee that it wanted to construct an office building on the said plot, hence transferred it from Current Assets Account to Fixed

Assets Account by passing general entries. Further, as market value of plot is not much more in books while transferring plot to Fixed Assets, it was enhanced to Rs. 1,00,00,000/- and a cross entry was passed in the consequence.

26. This contrary entry has been passed by debiting Quinton Road plot account and crediting Revaluation Reserve Account. There was some error which was rectified and it was shown to be part of Fixed Schedule and not part of entries. The view taken by C.I.T.(A) that revaluation of Fixed Assets does not lead to any taxable income of an Assessee could not be shown incorrect. The said value has also been accepted by Tribunal. This is findings of facts.

27. The aforesaid approach in our view is neither illegal nor contrary to law nor shown to us to have violated any statutory provision.

28. We therefore answer both substantial questions of law against Revenue and in favour of Assessee.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3360 OF 2006

M/S.MOTHER HOSPITAL PVT. LTD. ... Appellant

VERSUS

COMMISSIONER OF INCOME-TAX, TRICHUR ... Respondent

We are in agreement with the view taken by the High Court. Building which was constructed by the firm belonged to the firm. Admittedly it is an immovable property. The title in the said immovable property cannot pass when its value is more than Rs.100/- unless it is executed on a proper stamp paper and is also duly registered with the sub-Registrar. Nothing of the sort took place. In the absence thereof, it could not be said that the assessee had become the owner of the property.

As is clear from the plain language of the aforesaid explanation, it is only when the assessee holds a lease right or other right of occupancy and any capital expenditure is incurred by the assesee on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension of or improvement to the building and the expenditure on construction is incurred by the assessee, that assessee would be entitled to depreciation to the extent of any such expenditure incurred.

In the instant case, records show that the construction was made by the firm. It is a different thing that the

assessee had reimbursed the amount. The construction was not carried out by the assessee himself. Therefore, the explanation also would not come to the aid of the assessee. We, thus, do not find any merit in this appeal which is, accordingly, dismissed.

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA

ITA No.649/Kol/2016
' Assessment Year:2009-2010

Hari Shankar Modi

Date of Pronouncement 04/01/2017

Brief facts of the case qua the assessee are that the assessee filed return of income on 24.09.2009 declaring total income of Rs.11,39,230/-. The assessee`s case was selected for scrutiny U/s 143(3) of the Act and Assessing Officer completed the assessment by making addition of medical insurance receipt of Rs.2,41,767/-. The assessee had received a sum of Rs.2,41,767/-as reimbursement of expenses incurred in relation to a surgery of gall bladder by New India Insurance Company under medical insurance policy. Assessing officer observed that the amount of insurance receipt of Rs.2,41, 767/- on account of medical, is an income U/s 2(24) of the Income Tax Act and since no express exemption is granted under any provisions of the Act therefore, it is chargeable to tax.

4.3 Having Heard the rival submissions, perused the material available on

record, we are of the view that there is merit in the submissions of the assessee, as the propositions canvassed by the ld.AR for the assessee are supported by the facts narrated by him above. As the ld AR pointed out that reimbursement does not mean that the assessee is deriving any income from any sale of goods and services. What the assesse spent, is getting back by way of reimbursement, is not an income. The term "income" has been defined by Law dictionary as follows:
The Black`s Law Dictionary defines the income as "The money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts and the like."

Punjab & Haryana High Court in the case of Sat Pal and Co. V/s Excise and Taxation Commissioner 185 ITR 375 [1990] defined the 'income' as follows:

"The Income-Tax Act defines the expression 'income' in clause 24 of section 2, but that definition can not be read back into entry 82 of List 1 of the Seventh Schedule to the Constitution. Even the said definition is an inclusive one and has been expanding from time to time. Several items have been brought within the definition from time to time by various amending Acts. The said definition cannot, therefore, be read as exhaustive of the meaning of the expression income occurring in entry 82 of list 1 in the Seventh Schedule. This, of course, does not mean that an

amount which can, by no stretch of imagination, be called income can be treated as income and taxed as such by parliament. It must have some characteristics of income as broadly understood. So long as the amount taxed as income can rationally be called income as generally understood, it is competent for the Parliament to call it income and levy tax thereon. (Section 44AC and 206C)"

After going through the definition of the income, as explained above, one can say easily that the "reimbursement" is not an income. The term "reimbursement" does not fall in the characteristics of income. No doubt the definition of 'income' is inclusive. This, of course, does not mean that an amount which can, by no stretch of imagination, be called income can be treated as income and taxed as such by parliament. It must have some characteristics of income as broadly understood.

Based on the above analysis of the term 'income', we are of the view that addition made by Assessing Officer and confirmed by ld.CIT(A) needs to be deleted. Accordingly, we delete the addition.

P&H high court in Tribune Trust case

If a trade or business or

commercial activity does not result in profit, it would not be necessary to deal with the same in the Income Tax Act. The relief from taxation partly or fully predicates taxability and taxability predicates income and income predicates profit. This is the normal sense of these terms. There is nothing in the Act which persuades us that the words are used in Section 2(15) with a different intention

T&AP high court
HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms JUSTICE J.UMA DEVI
Writ Petition Nos.36483, 37209, 37213, 37270, 37469, 37478, 37479, 37524 and 37555 of 2016

5. Thereafter, the Assessing Officers sent a rejoinder indicating the reasons for reopening. Except the figures indicated therein, the reasons stated in all the notices were identical and hence the reasons stated in respect of one case alone is extracted as follows as a model:
"It is observed that your gross receipt was Rs.2,28,48,838/- for the AY 2013-14 and you have admitted total income amounting to Rs.4,16,840/- which is 2.10% of your total receipt, and the income admitted is also very less compared to others who are in the same line of business."

11. Under Section 147(1), the Assessing Officer is entitled to reopen assessment, if he has reason to believe that any income chargeable to tax has escaped assessment for the assessment year. Two conditions ought to be satisfied for the invocation of the power under Section 147. They are: (1) the

existence of a reason to believe and (2) the escapement of any income chargeable to tax from assessment. The reason to believe on the part of the Assessing Officer, should arise out of concrete facts which could at least form the foundation for reopening. Without any concrete facts, reopening cannot be ordered merely on the presumption that the returned income is very shockingly lower than the total gross receipts. Therefore, we are of the considered view that the Assessing Officers completely erred in reopening assessments on the basis of either a suspicion that there is suppression of income or on the basis that persons in the same line of business are returning a higher income. Without even mentioning the comparables, no initiation of proceedings under Section 147 can be made.

12. In the order rejecting the objections, the Assessing Officer has relied upon Clause (b) under Explanation 2 to Section 147. Clause (b) under Explanation 2 to Section 147 deals with cases where a return of income has been furnished

by the assessee but no assessment has been made and the Assessing Officer notices that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return. Admittedly, the cases of none of these petitioners fall under the category of claiming excessive loss or deduction or allowance or relief in the return. The cases of the assessees are attempted by the Assessing Officers to be brought within the category of "understatement of income", so as to invoke Clause (b) under Explanation 2.

13. But to come to the conclusion that there was understatement of income, it is not sufficient for the Assessing Officers to just arrive at the percentage of gross receipts that were declared as income, without even referring to other assessees whose admitted income was at a better percentage of the gross receipts than the petitioners. Therefore, the invocation of the jurisdiction under Section 147 on the basis of suspicions and presumptions cannot be sustained. Therefore, the writ petitions are allowed. The miscellaneous petitions, if any, pending in these writ petitions shall stand closed. No costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: .12.2016

Pronounced on : 15.02.2017

Coram:

The Hon'ble Mr.Justice HULUVADI G. RAMESH

AND

The Hon'ble Dr. Justice ANITA SUMANTH

T .C.A. Nos.700, 701, 702 and 719 & 830 and 8 31 of 2004

Tax Case (Appeal) No.700 of 2004:

Commissioner of Income Tax

Cent. Cir.III, Chennai

Appellant

Vs

Smt. L. Parameswari,

Whether in the facts and circumstances of the case, the

Tribunal had enough material to hold and was right in holding

that the commission paid to Swastic Corporation Ltd., is a

deductible expenditure?

The orders of the Commissioner of Income Tax (Appeals) were

confirmed by the Income Tax Appellate Tribunal vide a common order dated

15.9.2003. The tribunal discussed the matter in detail from paragraph 17.3 onwards. The concurrent findings of fact by the first as well as the second appellate authorities is that the modus operandi adopted by the assessees was not contrary to commercial principles and has, in fact been put in place to render the commercial operations more economical and profitable. The tribunal also approves the findings of the Commissioner of Income Tax (Appeals) to the effect that the disallowance arises only from a suspicion in the mind of the assessing officer primarily from the fact that all entities are related and the payment was made on the last day of the accounting year.

10. The assessing officer also appears to have been swayed by the fact that the assessees approached the settlement commission after the search with a large disclosure. The agreement produced by the assessee was disregarded by the assessing officer on the ground that it had not been located or noted in the course of search proceedings in the business and residential premises of A.K.Lingamurthy on 11.10.1996 and was thus an afterthought. **While these facts can, at best, lead to a suspicion, it cannot lead to a disallowance that requires the support of positive material**. A conclusion of colourability has to be based on hard facts and not on assumptions and presumptions. The fact that the document was not noticed at the time of search cannot be conclusive in leading to an adverse inference against the assessee as the possibility that it escaped the attention of the investigating authorities cannot be ruled out. **Then again, the mere fact that the settlement commission had been approached cannot mean that every act**

of the assessee has to be dubious or colourable, except if supported by collaborative material. In the present case, a plausible explanation has been offered that has found favour with the appellate authorities.

11. **There is no prohibition that related parties cannot engage in business transactions**. Such an interpretation would render the provisions of Section 40A (2) of the Act redundant. Section 40A(2) empowers the assessing officer to effect a disallowance of payments that are, 'in his opinion' excessive or unreasonable giving regard to fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by him or accruing to him. **Such 'opinion' has to be based on tangible material and not assumptions and suspicions.**

12. The provisions of section 40A(2) are not automatic and can be called into play only if the assessing officer establishes that the expenditure incurred is, in fact, in excess of fair market value. This had not been done in the present case. The quantum of commission paid is thus at arms length. The decision to streamline business activities and establish a division of labour or hierarchy of operations is within the domain of the entities and cannot be trespassed upon by the assessing officer **except where the officer establishes that such design or method is a *ruse* to circumvent legitimate payment of tax .**

13. The Supreme Court in the case of Vodafone International

Vodafone International Holdings BV. Vs. Union of India and another (341

ITR 1) points out the difference between 'looking through' a transaction and 'looking at' a transaction settling the position that a conclusion of colourable /sham can be arrived at by viewing the transaction in a commercially realistic and wholistic perspective, not adopting a truncated and dissecting approach. In the present case, there is a consistent finding of fact that the transaction was bonafide and acceptable. Nothing is placed before us to indicate that the findings are perverse. We are thus not inclined to interfere with the concurrent findings of the authorities. Substantial question of Law No.1 is answered against the revenue and in favour of the assessee.

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgement delivered on:15th February, 2017

+ ITA 795/2016 & CM No.41578/2016

SIGMA CORPORATION INDIA LTD.

ITA 795/2016

3. The question of law which arises for consideration is as follows:-

"Did the ITAT fall into error in restoring the disallowance of 50% of `48 lakhs paid to the appellant/assessee employee for the relevant assessment year validly under Section 40A(2)(b) of the Income Tax Act, 1961?

Having regard to the above position, this Court is of the opinion that

the ITAT in the present case overlooked the materials that were to be taken into account, i.e. reasonableness of the expenditure having regard to the prudent business practice from a fair and reasonable point of view. The AO's order nowhere seeks to benchmark the expertise of Mr. Preetpal Singh with any other consultant and proceeds on an assumption that he could not have performed multiple tasks for more than one concern. In this Court's opinion, such a stereotyped notion can hardly be justified in today's business world where consultants perform different tasks, not only for one concern but for several business entities. A common example would be that of an accountant or a legal professional, who necessarily has to multi task and are recipients or retainers of payments from many concerns having regard to their special expertise. Likewise in other fields i.e. journalism, the medical profession etc. more than one entity may engage or retain a single professional on the basis of his experience, learning and expertise, unless there is a deeper scrutiny that involves comparable analysis of like situations (a highly difficult task), additions made under Section 40A(2) would be suspect.

11. In the circumstances, this Court is of the opinion that the ITAT's conclusions were not justified. The impugned order is accordingly set aside. The CIT (A)'s order is restored. The question of law is answered in favour of the appellant/assessee and against the Revenue. The appeal is allowed in the above terms.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3893 OF 2006

M/s. MCDOWELL & COMPANY LTD. ... Appellant

VERSUS

COMMISSIONER OF INCOME-TAX,

KARNATAKA CENTRAL, BANGALORE ... Respondent

March 09, 2017.

It is argued by Mr. Jaideep Gupta, learned senior counsel appearing for the assessee-appellant, that the High Court has not appreciated the provisions of the Act, viz., Section 72A or Section 41(1) in their proper perspective and has also committed error in not properly understanding the ratio of the judgment of this Court in '*Saraswati Industrial Syndicate* v. *CIT*' [(1990) Supp. SCC 675] thereby committing serious error in answering the said question. It was argued that the benefit of section 72A of the Act was given as the assessee fulfilled all the conditions stipulated therein and the Central Government while giving declaration was satisfied that the eligibility conditions for taking advantage of carry forward and set off of accumulated loses of the HPL were fulfilled. He, thus, submitted that insofar as the benefit of carry forward of accumulated loses of HPL and seeking set

off thereof is concerned, it was the statutory right of the appellant-assessee which became available to it by virtue of the declaration given by the Central Government under the aforesaid provisions.

On the other hand, submitted the learned counsel, that insofar as Section 41(1) is concerned, language thereof makes it abundantly clear that the income has to be treated at the hands of "first mentioned person" which is HPL in the instant case. This HPL was a distinct entity in law and was also a different assessee. Therefore, any such income earned by the HPL could not have been treated as income of the assessee herein.

He also drew attention of this Court to the discussion contained in paragraph 6 of the said judgment in support of his submission that since HPL was a different assessee, this income could not be held to be the income of the amalgamated company, i.e., the assessee herein, for the purposes of Section 41(1) of the Act which aspect is explained by this Court in the following manner:

The aforesaid arguments appear to be attractive in the first blush, but a little deeper scrutiny thereof in the light of the situation prevailing in the instant case would reflect that these arguments need to be rejected. In fact, same arguments were advanced before the High Court as well

which did not find merit therein. The High Court took note of the fact that the assessee had taken over the sick company-HPL through the scheme of amalgamation sanctioned in 1982 w.e.f. 01.04.1977 and that the HPL ceased to have any identity as it did not remain a 'person' either in fact or in

law after amalgamation. However, rights are determined in terms of the scheme of amalgamation and since the benefit of interest had accrued after the company had ceased to exist, it was, in fact, availed of by the assessee company. What is more important is that the assessee company was allowed to set off the amalgamated losses of the company amalgamated with it, i.e., HPL. This was the benefit which accrued to the assessee under the provisions of section 72A of the Act. When the assessee is allowed the benefit of the accumulated loses, while computing those loses, the income which accrued to it had to be adjusted and only thereafter net losses could have been allowed to be set off by the assessee company. Calculations to this effect are given by the Assessing Officer in his assessment order and there is no dispute about the same. Judgment of this Court in *Saraswathi Industrial Syndicate Ltd.* (supra) deals with the provisions of Section 41(1) of the Act *per se*. Section 72A of the Act was not the subject matter of the said decision. Therefore, the principle laid down in the said case may not be applicable in the instant case inasmuch as the position would be totally different in those cases where the income has accrued to an

amalgamated company under Section 41(1) of the Act and, obviously, that cannot be treated as income at the hands of the company which has taken over the amalgamated company. However, in the instant case, the assessee was given the benefit of accumulated loses of the amalgamated company. The effect thereof is that thought these loses were suffered by the amalgamated company they were deemed to be treated as loses of the assessee company by virtue of Section 72A of the Act. In a case like this, it cannot be said that the assessee would be entitled to take advantage of the accumulated loses but while calculating these accumulated loses at the hands of amalgamated company, i.e., HPL, the income accrued under section 41(1) of the Act at the hands of HPL would not be accounted for. That had to be necessarily adjusted in order to see what are the actual accumulated loses, the benefit whereof is to be extended to the assessee. We, thus, agree with the High Court in its analysis of Section 41(1) along with Section 72A of the Act,… We, thus, find that this appeal is without any merit and is, accordingly, dismissed.

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.4399 OF 2007

The Commissioner of Income Tax,

Ahmedabad ….Appellant(s)

VERSUS

Equinox Solution Pvt. Ltd. …Respondent(s)

0) Having heard the learned Counsel for the parties and on perusal of the record of the case, no fault can be found in the reasoning and the conclusion arrived at by the CIT (appeal) in his order which, in our view, was rightly upheld by the Tribunal and then by the High Court calling no interference by this Court in this appeal.

11) In our considered opinion, the case of the respondent (assessee) does not fall within the four corners of Section 50 (2) of the Act. Section 50 (2) applies to a case where any block of assets are transferred by the assessee but where the entire running business with assets and liabilities is sold by the assessee in one go, such sale, in our view, cannot be considered as "short-term capital assets". In other words, the provisions of Section 50 (2) of the Act would apply to a case where the assessee transfers one or more block of assets, which he was using in running of his business. Such is not the

case here because in this case, the assessee sold the entire business as a running concern.

12) As rightly noticed by the CIT (appeal) that the entire running business with all assets and liabilities having been sold in one go by the respondent-assessee, it was a slump sale of a "long-term capital asset". It was, therefore, required to be taxed accordingly.

13) Our view finds support with the law laid down by this Court in Commissioner of Income Tax, Gujarat vs. Artex Manufacturing Co. [1997(6) SCC 437 CIT].

14) In Premier Automobiles Ltd. vs. Income Tax Officer & Anr., 264 ITR 193 (Bombay) also, the Division Bench of the Bombay High Court examined this question in detail on somewhat similar facts and has taken the same view. The Learned Judge S.H Kapadia - (as His Lordship then was as Judge of the Bombay High Court and later became CJI) speaking for the Bench aptly explained the legal position to which we concur as it correctly summarized the legal position applicable to such facts.

15) Learned Counsel for the appellant (Revenue) was not able to cite any decision taking a contrary view nor was he able to point out any error in the decisions cited at the Bar by the assesse's counsel referred supra.

16) In the light of foregoing discussion, we find no merit in the appeal which fails and is accordingly dismissed.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No.2162 OF 2007

M/s Berger Paints India Ltd. ….Appellant(s)

VERSUS

C.I.T., Delhi-V …Respondent(s

28/03/2017

The short question that falls for consideration in these appeals is whether "premium" collected by the appellant-Company on its subscribed share capital is "*capital employed in the business of the Company*" within the meaning of Section 35D of the Act so as to enable the Company to claim deduction of the said amount as prescribed under Section 35D of the Act?

16) The Division Bench of the High Court in the impugned order examined the question lucidly. The learned Judge T.S. Thakur, J. (as His Lordship then was and later became CJI) speaking for the Bench held as under:

"6. **A careful reading of the above would show that in the case of an Indian company like the appellant, the aggregate amount of expenditure cannot exceed 2.5% of the capital employed in the business of the Company. The crucial question, therefore, is as to what is meant by capital employed in the business of the Company for it is the amount that represents such capital that would determined the upper limit to which the amount of allowable deduction can go. The expression has been given a clear and exhaustive definition in the explanation to sub-section 3. It reads as:**

"(b)

……

……"

"7. The above clearly shows that capital employed in the business of the company is the aggregate of three distinct components, namely, share capital, debentures and long

term borrowings as on the dates relevant under sub-clauses(i) and (ii) of Clause(b) of the explanation extracted above. The term 'long term borrowing' has been defined in clause (c) to the explanation. It is nobody's else that the premium collected by the Company on the issue of shares was a long term borrowing either in fact or by a fiction of law. It is also nobody's case that the premium collected by the Company was anywhere near or akin to a debenture. What was all the same argued by the counsel for the appellant was that premium was a part of the share capital and had therefore to be reckoned as 'capital employed in the business of the company'. There is, in our view, no merit in that contention. The Tribunal has pointed out that the share capital of the Company as borne out by its audited accounts is limited to Rs.7,88,19679/-. The company's accounts do not show the reserve and surplus of Rs.19,66,36,734/- as a part of its issued, subscribed and paid up capital. It is true that the surplus amount of Rs.19,66,36,734/- is taken as part of share holders fund but the same was not a part of the issued, subscribed

and paid up capital of the Company. Explanation to Section 35D(3) of the Act does not include the reserve and surplus of the Company as a part of the capital employed in the business of the Company. If the intention was that any amount other than the share capital, debentures and long term borrowings of the Company ought to be treated as part of the capital employed in the business of the company, the Parliament would have suitably provided for the same. So long as that has not been done and so long as the capital employed in the business of the Company is restricted to the issued share capital, debentures and long term borrowings, there is no room for holding that the premium, if any, collected by the Company on the issue of its share capital would also constitute a part of the capital employed in the business of the Company for purposes of deduction under Section 35D. The Tribunal was, in that view of the matter, perfectly justified in allowing the appeal filed by the Revenue and restoring the order passed by the Assessing Officer."

17) We are in complete agreement with the view

taken by the High Court quoted supra as, in ourconsidered opinion, the well-reasoned judgment/order
of the High Court correctly explains the true meaning
of the expression employed in sub-section3(b) of
Section 35D read with Explanation (b) quoted above,
calling no interference in the appeals.
18) In our considered opinion also, the "*premium amount*" collected by the Company on its subscribed
issued share capital is not and cannot be said to be
the part of "*capital employed in the business of the Company*" for the purpose of Section 35D(3)(b) of the
Act and hence the appellant-Company was rightly held
not entitled to claim any deduction in relation to the
amount received towards premium from its various
shareholders on the issued shares of the Company.
19) This we say for more than one reason. First, if the
intention of the Legislature were to treat the amount of
"*premium*" collected by the Company from its
shareholders while issuing the shares to be the part of "*capital employed in the business of the company*", then
it would have been specifically said so in the
Explanation(b) of sub-section(3) of Section 35D of the
Act. It was, however, not said.
20) Second, on the other hand, non-mentioning of the
words does indicate the legislative intent that the
Legislature did not intend to extend the benefit of
Section 35D to such sum. Third, these two reasons are

in conformity with the view taken by this Court in the case of **Commissioner of Income Tax, West Bengal** vs. **Allahabad Bank Ltd.,** (1969) 2 SCC 143.

23) As rightly pointed out by the learned Attorney General appearing for the Revenue, the Companies Act provides in its Schedule V- Part II (Section 159) a Form of Annual Return, which is required to be furnished by the Company having share capital every year. Column III of this Form, which deals with capital structure of the company, provides the break up of *"issued shares capital break up*". This column does not include in it the "*premium amount collected by the company from its shareholders on its issued share capital*". This is indicative of the fact that such amount is not considered a part of the capital unless it is specifically provided in the relevant section

24) Similarly, as rightly pointed out, Section 78 of the Companies Act which deals with the "*issue of shares at premium and discount*" requires a Company to

transfer the amount so collected as premium from the shareholders and keep the same in a separate account called "*securities premium account*". It does not anywhere says that such amount be treated as part of capital of the company employed in the business for one or other purpose, as the case may be, even under

the Companies Act.

25) In the light of foregoing discussion, we find no merit in these appeals. The appeals thus fail and are accordingly dismissed.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 5512 OF 2017
M/S. PALAM GAS SERVICE .....APPELLANT(S)
VERSUS
COMMISSIONER OF INCOME TAX .....RESPONDENT(S)

The neat question which arises for consideration in this appeal relates to the interpretation of Section 40(a)(ia) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Section 197C of the Act has also some bearing on the issue involved.

2) Section 40 of the Act enumerates certain situations wherein expenditure incurred by the assessee, in the course of his business,

4) It can be seen that Section 40(a)(ia) uses the expression *'payable'* and on that basis the question which is raised for consideration is:

"Whether the provisions of Section 40(a)(ia) shall be attracted when the amount is not *'payable'* to a contractor or sub-contractor but has been actually paid?" will not be allowed to be deducted in computing the income chargeable under the head *'Profits and Gains from Business or Profession'*.

The question is, as noted above, when the word used in Section 40(a)(ia) is *'payable'*, whether this Section would cover only those contingencies where the amount is due and still payable or it would also cover the situations where the amount is already paid but no advance tax was deducted thereupon. This issue has come up for hearing before various High Courts and there are divergent views of the High Courts there upon. In fact, most of

the High Courts have taken the view that the aforesaid provision would cover even those cases where the amount stands paid. This is the view of the Madras, Calcutta and Gujarat High Courts. Contrary view is taken by the Allahabad High Court. In a recent judgment, the Punjab & Haryana High Court took note of the judgments of the aforesaid High Courts and concurred with the view taken by the Madras, Calcutta and Gujarat High Courts and showed its reluctance to follow the view taken by the Allahabad High Court.

A conjoint reading of these two Sections would suggest that not only a person, who is paying to the contractor, is supposed to deduct tax at source on the said payment whether credited in the account or actual payment made, but also deposit that amount to the credit of the Central Government within the stipulated time. The time within which the payment is to be deposited with the Central Government is mentioned in Rule 30(2) of the Rules.

The aforesaid interpretation of Sections 194C conjointly with Section 200 and Rule 30(2) is unblemished and without any iota of doubt. We, thus, give our imprimatur to the view taken. As would be noticed and discussed in little detail hereinafter, the Allahabad High Court, while interpreting Section 40(a)(ia), did not deal with this aspect at all, even when it has a clear bearing while considering the amplitude of the said provision.

In the aforesaid backdrop, let us now deal with the issue, namely, the word *'payable'* in Section 40(a)(ia) would mean only when the amount is payable and not when it is actually paid. Grammatically, it may be accepted that the two words, i.e.
'payable' and *'paid'*, denote different meanings.

We approve the aforesaid view as well. As a fortiorari, it follows that Section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid. In this behalf, one has to keep in mind the purpose with which Section 40 was enacted and that has already been noted above. We have also to keep in mind the provisions of Sections 194C and 200. Once it is found that the aforesaid Sections mandate a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, any person who does not

adhere to this statutory obligation has to suffer the consequences which are stipulated in the Act itself. Certain consequences of failure to deduct tax at source from the payments made, where tax was to be deducted at source or failure to pay the same to the credit of the Central Government, are stipulated in Section 201 of

the Act. This Section provides that in that contingency, such a person would be deemed to be an assessee in default in respect of such tax. While stipulating this consequence, Section 201 categorically states that the aforesaid Sections would be without prejudice to any other consequences which that defaulter may incur. Other consequences are provided under Section 40(a)(ia) of the Act, namely, payments made by such a person to a contractor shall not be treated as deductible expenditure. When read in this context, it is clear that Section 40(a)(ia) deals with the nature of default and the consequences thereof. Default is relatable to Chapter XVIIB (in the instant case Sections 194C and 200, which provisions are in the aforesaid Chapter). When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word *'payable'* occurring in Section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid. If the provision is interpreted in the manner suggested by the appellant herein, then even when it is found that a person, like the appellant, has violated the provisions of Chapter XVIIB (or specifically Sections 194C and 200 in the instant case), he would still go scot free, without suffering the consequences of such monetary default in

spite of specific provisions laying down these consequences. The Punjab & Haryana High Court has exhaustively interpreted Section 40(a(ia) keeping in mind different aspects. We would again quote the following paragraphs from the said judgment, with our complete approval thereto:

16) As mentioned above, the Punjab & Haryana High Court found support from the judgments of the Madras and Calcutta High Courts taking identical view and by extensively quoting from the said judgments.
17) Insofar as judgment of the Allahabad High Court is concerned,

reading thereof would reflect that the High Court, after noticing the fact that since the amounts had already been paid, it straightaway concluded, without any discussion, that Section 40(a)(ia) would apply only when the amount is *'payable'* and dismissed the appeal of the Department stating that the question of law framed did not arise for consideration. No doubt, the Special Leave Petition thereagainst was dismissed by this Court in *limine*. However, that would not amount to confirming the view of the Allahabad High Court (**See *V.M. Salgaocar & Bros. (P) Ltd.*** v. ***Commissioner of Income Tax***, (2000) 243 ITR 383 and ***Supreme Court Employees Welfare Association*** v. ***Union of India***, (1989) 4 SCC 187.

18) In view of the aforesaid discussion, we hold that the view taken by the High Courts of Punjab & Haryana, Madras and Calcutta is the correct view and the judgment of the Allahabad High Court in ***CIT*** v. ***Vector Shipping Services (P) Ltd.,*** (2013) 357 ITR 642 did not decide the question of law correctly. Thus, insofar as the judgment of the Allahabad High Court is concerned, we overrule the same. Consequences of the aforesaid discussion will be to answer the question against the appellant/assessee thereby approving the view taken by the High court.

THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH
ITA No. 24 of 2011 (O&M)
Decided on : 30.01.2017

M/s Gopal Cotton Industries Pvt. Ltd.
. . . Appellant
Versus
The Commissioner of Income Tax, Rohtak
. . . Respond

This is an application under Section 260A(7) of the Act, read with Order 41 Rule 27 of the Code of Civil Procedure, 1908, for production of documents (Annexures A-11 and A-12) by way of additional evidence in the present appeal.

Notice of this application to the learned counsel for the nonapplicant/

respondent.
Mr. Yogesh Putney, Advocate, accepts notice on behalf of the non-applicant/respondent.
After hearing learned counsel for the parties, we find that the documents viz. Annexure A-11 & A-12, sought to be appended by way of additional evidence are relating to the material depicting that the income tax had been paid by the payee. The amount was included in the income ofpayee on which tax had been paid. We find that in such circumstances, the additional evidence sought to be produced is relevant. Accordingly, the application is allowed and the additional evidence (Annexures A-11 & A-12) is taken on record.
CM stands disposed of.

In view of the fact that vide CM No.16015-CII of 2012, the application for additional evidence filed by the appellant has been accepted, we do not propose to record the detailed facts in the case, as the matter is required to be remitted to the assessing officer to examine the veracity, authenticity and relevancy of these documents after affording opportunity of hearing to the appellant-assessee. Consequently, the orders of the CIT(A) as well as the Tribunal are set aside and the matter is remanded to the assessing officer for adjudicating the issue regarding Section 40(a)(ia) of the Act, in the light of the additional evidence produced by the assessee after affording an opportunity to the assessee and by passing a speaking order in accordance with law. The present appeal stands disposed of accordingly

Allahabad high Court
Court No. 3
Case :INCOME TAX APPEAL No. 141 of 2005
Appellant : The Commissioner Of Income TaxI,

Lucknow

M/S Sahu Investment Mutual Benefit Co.Ltd.

3. Appeal was admitted on the following substantial questions of law:
1. Whether on the facts and circumstances of case Tribunal is justified in deleting the disallowance out of interest / commission paid by Assessee to depositors, to the extent it has less charged from Promoters and their relatives and their sister concerns?
2. Whether on the facts and circumstances of case, Tribunal is justified in ignoring ratio of decision laid down by Jurisdictional High Court in H.R. Sugar Factory P. Ltd. 187 ITR 363?

19. Learned counsel for Revenue argued before us that loans were advanced mainly to Directors, promoters, family members of promoters at a much lower rate, causing persistent loss hence, there was no wise business dealing/ transaction, hence A.O. rightly lifted veil and found a less charged amount of interest and added lesser interest by calculating same at 24.50%. He placed reliance on judgments in **Commissioner of Income Tax, Gujarat II vs. B.M. Kharwar, 1969(72) ITR 603 (SC); Mcdowell and Co. Ltd. vs. Commercial Tax Officer, 1985(154) ITR 148 (SC); Juggi Lal Kamlapat vs. Commissioner of Income Tax, U.P., 1969(73) ITR 702 (SC); Union of India vs. Playworld Electronics (P) Ltd. 1990(184) ITR 308 (SC); The Union of India vs. Gosalia Shipping (Pvt.) Ltd., 1978(113) ITR 307 (SC); Sunil Siddharthbhai vs. CIT (1985) 156 ITR 509 (SC);** and**, The Commissioner of Income Tax, Madras vs. Sri Meenakshi Mills Ltd., Ors., 1967(63) ITR 609 (SC)**.
20. The arguments advanced and authorities cited on the part of Revenue, with great respect, are totally misconceived and inapplicable for the reason that bereft of facts, regarding nature of business of Company and other relevant aspects, a decision rendered in respect of a different nature of Company involving different activities and business, having different factors, cannot be applied universally in all cases. A minor deviation in a fact may have a wider impact on the ultimate inference and conclusion. In the present case A.O., at least, has found no fallacy or incorrectness in the statement or fictitious nature of transaction.

24. In regard to functioning of Assessee, yardstick has to be applied from businessman point of view and not according to A.O. In **Commissioner of Income Tax, Bombay vs. Walchand and Co. Private Ltd., 1967(65) ITR 381 (SC)** and **Voltamp Transformers (P.)**

Ltd. vs. Commissioner of Income Tax, 1981(129) ITR 105 (Guj)
Court observed, whether there is any actual loss or profit, is not to be

examined by A.O. from its own point of view but activities of businessman have to be examined from the point of view of businessman. It is only Assessee who knows commercial and business relations and situation thereof. Department is not supposed to interfere in such business dealings of Assessee. This is what was held by Calcutta High Court also in **Sri Kewal Chand Bagri Vs. Commissioner of Income Tax, 1990(183) ITR 207.**
25. This Court in **Commissioner of Income Tax (Central) vs. Sahara India Mutual Benefit Co. Ltd., 2014(1) ADJ 545** followed observations made in **Highways Construction Co. (P.) Ltd. v. CIT, 1993 (199) ITR 702 (Gauhati)** that additions made by A.O. on notional interest which was not in existent, is not legal. If Assessee had not bargained for interest, or had not collected interest, we fail to see how Income Tax authorities can fix a notional interest as due, or collected by Assessee. No such provision exist in Act, 1961 empowering Revenue to include in the income, interest which was not due or collected.
26. There cannot be any doubt, if there is a case of evasion of tax, Court can take appropriate view so as not to allow any person to evade tax but simultaneously, for fanciful notions of so called prudent business transactions, assumed by an Income Tax authority, something which is notional or nonest,
cannot be converted into income for the
purpose of attracting tax liability. Precedents cited on behalf of Revenue are not in respect of Assessee which was a Mutual Benefit Company but had a different status and are not applicable in this case.

30. We have found, genuineness of business borrowing and further the fact that borrowing was for the purpose of business, has not been found to be illusionary, fictitious or colourable transaction. The factum that entire amount of interest has not been disallowed, shows that genuineness has been accepted even by A.O. That being so, no notion of so called prudent business transaction could have been imported by A.O. and it had to allow deduction 31. Whether amount of interest was actually realized or realizable
both are treated as paid in view of Section 43(ii) of Act, 1961 which says that paid means actually paid or incurred according to method of accounting upon the basis of which profits or gains are computed under the head "profits and gains of business of profession". 32. In the circumstances and in view of discussions made above, we

are satisfied that once genuineness of transactions of deposits or advances are not doubted and not shown fictitious, colourable etc., mere fact that Assessee paid higher rates on amount received/ deposits or realized lesser rates on advances/ loans, would not entitle interference with the claim of deduction, on any notional basis as that is impermissible in law.

38. Learned counsel for Revenue then heavily pressed on the point that here is a fit case where doctrine of "lifting of veil" must be applied and for that purpose, referred to the authorities noted above.
39. Though, as we have already discussed, neither aforesaid doctrine is applicable in the case nor there is any fraudulent activity or creation of artificial bodies for evasion of tax etc. so as to justify application of doctrine of "lifting of veil" but even otherwise, we find that aforesaid doctrine is not at all attracted in the case in hand particularly considering the fact that even A.O. neither has doubted nature and objective of Company, i.e., Mutual Benefit Company, nor the factum that loans were actually advanced to members and also rate of interest but on notional assumption of a prudent businessman it has applied a higher notional interest which actually did not exist at all.
40. Doctrine of "lifting of veil" is not to be applied on mere asking unless relevant facts, circumstances and conditions exists. Just to recapitulate the concept of Companies and when doctrine of "lifting of veil" can be applied, we may go in historical backdrop of history of incorporation of companies.
41. The history of Modern Company Law can be traced back to 14th century (see Gower's Principles of Modern Company Law 4th Edition at page 24) when in England, under Royal Charters, Merchant Organisations were allowed to be engaged in Foreign Trade and Settlement. Formal incorporation was not essential and each member of Association traded with his own stock and on his own account subject to obeying Rules of the Company. Charters were normally obtained to acquire monopoly of trade for members of Company, and, Governmental power over the territory, the Company got right to trade. Loosely, this kind of trade used to be known as "Trading on joint stock in partnership". They were more in the nature of trade protection associations. In fact, East India Company which received its first Charter in 1600 was granted monopoly of trade with the Indies. These kinds of Charters became more prevalent in 16th century. With the passage of time, since number of foreign trading companies and Charters declined, there was a substantial growth in formation of such companies for domestic trade. With such increase, number of speculative enterprises increased. It was found that in a number of cases certain persons

constituting an association, calling it to be Corporation or Company, and thereby had indulged in fraudulent and speculative activities defrauding the public at large. It resulted in enactment of Bubble Act, 1720 prohibiting generally the use of Corporation unless the Corporation was authorised to act as such by the Act of Parliament or Royal Charter. This enactment could not suppress formation of company. Moreover, unincorporated associations were formed, which, in law, were large partnerships but by ingenious legal devices, approximated to the form of company having transferable shares. The Bubble Act, 1720 thus was repealed in 1825. At that time, following three types of companies were known: (1) Companies incorporated by Royal Charter, (2) Companies incorporated by Special Act of Parliament; and (3) Deed of Settlement Companies.

42. British Parliament passed “Joint Stock Companies Act, 1844” which prohibited large unincorporated companies and admitted creation of Joint Stock Companies by registration. This Act, however, did not provide immunity to the members of incorporated company from direct liability and on the contrary expressly imposed on the members, liability for the debts of company, akin to the partnerships.

43. For the first time by virtue of Limited Liability Act, 1855, the company was allowed to secure limited liability of its members to the nominal amount of shares held by them but it depended on certain conditions, and, some of those were (1) the company should have atleast 25 members holding at least 3/4 of the nominal capital, each member having paid upto atleast 20% (2) the word 'limited' should be the last component of the company's name; (3) the auditor of company should be approved by Board of Trade.

44. The aforesaid Act of 1855 was superseded by “Joint Stock Companies Act, 1856” and considered to be the beginning of a new era in Company Law by certain recognised authors like Sir Francis Palmer in his 'Company Law', 23rd Edition, page 10. This Act made formation of company simpler providing that seven signatories to a document called 'Memorandum of Association' can proceed for incorporation of company. The deed of settlement was done away but it was provided that in addition to Memorandum of Association, it should adopt the model articles attached to the Act and was to be registered in the Register of the Companies.

45. First Companies Act came to be enacted in 1862 which has been described by Sir Francis Palmer as the “Magnacarta of Cooperative Enterprise”. Since then the aforesaid Act has been replaced by several Companies Act in England as well as in India.

46. Here, in India the first enactment was Indian Companies Act,

1866 which was replaced by Indian Companies Act, 1913, Companies Act, 1956 and now Companies Act, 2013.
47. The Act mainly contemplates two kinds of companies namely, Private Company and Public Company. Besides, it also applies to existing companies namely, as were formed and registered under various enactments prior to enforcement of the Act. A “Private Company” is a company which by its articles restricts the right to transfer its share, if any; limits the number of its member to 200 (not including the persons who are in the employment of company and persons who having been formerly in the employment of company were members of the company and have continued to be member after the employment cease); and prohibits any invitation to the public to subscribe for any shares, or debentures of, the company. A company which is not a “Private Company” is a “Public Company”.
48. Section 12 of the Act provides that any seven or more persons associated for any lawful purpose may, by subscribing their names to a Memorandum of Association and by complying with the requirement of Act in respect of registration, form an incorporated company with or without limited liability. For the companies incorporated with unlimited liability, the liability of the members like unincorporated company is unlimited but the difference is that an unlimited company registered under the Act is a legal person with perpetual succession and a common seal capable of borrowing, suing and being sued and holding property in its own name i.e. has its own legal personality; while in an unincorporated association, the individual members alone have right and duties; and the association has no legal entity.

49. For the purpose of the present case, however, we are concerned with a company incorporated under the Act with limited liability. In respect to such companies, the memorandum is required to be submitted at the time of incorporation. It shall specifically state that the liability of its members is limited by shares or guarantee, as the case may be. The persons who subscribe the memorandum of the company are “members” of the company and their names are required to be registered in the register of members.
50. The subscribers, therefore, are deemed to be the first “members” of company. The word 'shareholder' is synonymous to the term 'member' since there can be no membership except through the medium of shareholding. (see **Hawrah Trading Co. Ltd. Vs. C.I.T., AIR 1959 SC 775; Balkrishan Gupta and others Vs. Swadeshi Polytex Ltd. and another, AIR 1985 SC 520**). The position of shareholder in a company with limited liability by shares is that when company earn profits and declare dividends, as per its Articles, he is entitled to participate in it

and get his share in the dividend. In the event of winding up, he has a further right to participate in the distribution of company's assets in accordance with the rights given to him under the Articles. Beyond this he acquires no interest in the assets of company (See **Mrs. Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay, AIR 1955 SC 74**). Besides, he has all such rights as available to a member namely, voting right.

51. For management of affairs of company, Act requires for appointment of Directors who are collectively known as “Board of Directors” or “Board”.

52. Section 149 of Act, 2013 provides that every public company shall have atleast three Directors. Director must be only an individual and no body, corporate, association or firm shall be appointed as Director. The

purpose is evident. The entire business and management of company is in hands of the Directors. They hold office of trust and, therefore, legislature with a view to make them accountable thought it proper that some individual human should be appointed as Director and not one who is not an individual human being. At the time of incorporation of company, articles of company must provide for first Directors.

53. One of the Directors of the company may be appointed as “Managing Director” who is entrusted with substantial power of management by “Board of Directors” or the “company”.

54. The position of a Director vis a vis company has been equated with an Agent inasmuch as, company cannot act on its own but has to act only through Directors who, therefore, have the relationship of an Agent qua company. However, Managing Director has been held to have a dual capacity inasmuch as being a Director he is an agent of the company but he is also an employee. 56. From the above discussion the position as culled out is that the

word “Company” imports an association of number of individuals formed for a common purpose. When such an association is incorporated, it becomes a body corporate, a legal entity, separate and distinct from such individuals. Such incorporation must owe its existence to a statutory authority. The corporation/Company, in law, is equal to a natural person and has a separate legal entity of its own. Once incorporated, the entity of Corporation is entirely separate from that of the its share holders. It bears its own name; has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; liability of members or share holders is limited to the capital invested by them; creditors of Company cannot obtain satisfaction from the assets of share holders/members of company and similarly creditors of members/share

holders have no right to the assets of Company. This position was recognised in **Salomon Vs. Salomon and Co., 1897 AC 22** and since then has always been well recognised as a principle of common law.

57. The difference among the members/shareholders of a company and incorporated company to the understanding of a layman can be demonstrated by a simple illustration, that if members of an incorporated company are collected in a room together, we do not see the person of company but the members. It has to be remembered that company is intangible; it exists only in contemplation of law; it has no physical body. Lord Chancellor Selborne said in one case "*it is a mere abstraction of law*". A Company being an "artificial juridical person" cannot act by its own. It acts through Directors. The executive authority of Company is vested ordinarily in the Board of Directors which is responsible for proper management of Company. There are several duties and obligations of Board of Directors and Directors of Company which are enshrined in detail in various provisions of Act. The Directors are paid remuneration for services they render but cannot claim remuneration as of right and, instead, if it is provided in the memorandum or Article of Association, they would be entitled for such remuneration as provided therein. Company is a separate entity qua Directors also inasmuch as, Directors represent company and may enter into a contract of employment with himself in his individual capacity and simultaneously acting for company.

58. Similarly, where same set of shareholders have formed two companies, both the companies are distinct and separate entities and it cannot be said that mere identity of shareholders would mean that both the companies are one and the same. A company can contract with its shareholders. Death, bankruptcy or lunacy of any or some of the members would not affect the life of the company in any manner for the reason that company is a distinct person. Today if a company has ten members holding the entire shareholding and tomorrow if they transfer their shares to ten other members, company would retain the same person though the members would change. Similar is the position with respect to change of Directors. Perpetual succession means company never dies until it is wound up. Company is not equated with estate and undertakings owned by it though all are intangible. If the estate of a company is taken over by government, it would not constitute as taking over of management of the company.

59. The juristic personality of company is recognised for approaching Courts under the Constitution of India also for protection of fundamental rights which are guaranteed to 'persons'. However, they may not seek protection in respect to fundamental rights which are guaranteed to a 'citizen' for the reason that the company is a person but

not a citizen (**State State Trading Corporation of India Ltd. Vs. The Commercial Tax Officer and others, AIR 1963 SC 1811**). Whenever, there is an infringement of fundamental right under Article 19 which are guaranteed to a 'citizen', causing a grievance to a shareholder of the company, it was held in **Bennett Coleman and Co. Ltd. and others Vs. Union of India and others, AIR 1973 SC 106** that a shareholder may approach Court for protection of such right, though company itself cannot claim protection of such right.

60. It also leads to the conclusion that a company incorporated under the Act is not created by the Act but comes into existence in accordance with the provisions of the Act. Thus it is not a statutory body nor is created by the statute but is a body created in accordance with the provisions of the statute (**Sukhdev Singh and others Vs. Bhagatram Sardar Singh Raghuvanshi and another, AIR 1975 SC 1331**).

61. It would be useful to refer the observations of Lord Diplock in **Lennard's Carrying Co. Ltd. Vs. Asiatic Petroleum Co. Ltd., 1915 AC 705** noticing the position of Director as under:

"A Corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority coordinate with the board of directors given to him under the articles of association."

62. In brief, we can cull out the following:

(1) Company is a distinct and separate juristic personality having its own rights of right to property etc;

(2) The shareholders have no interest in any particular asset of the company or the property of the company except of participating in profits, if any, when the company decides to divide them or to claim his share when the company is wound down in accordance with the articles of the company;

(3) A company is distinct from its Board of Directors who cannot enforce a right in their individual capacity which belongs to the company (**TELCO Vs. State of Bihar, AIR 1965 SC**

40). (4) The liability of company simultaneously is also not liability of shareholders. Shareholders cannot be made liable under a decree against a company, as held in **Nihal Chand Vs. Kharak Singh Sunder Singh, (1936) 2 Company Cases 418** and **Harihar Prasad Vs. Bansi Missir, (1932) 6 Company Cases 32**.

Doctrine of Piercing of Veil (Lifting the Corporate Veil): Exception to the Law of Separate Entity:

63. The aforesaid doctrine of separate juristic personality of Company, however, with the passage of time has been subjected to certain exceptions, sometimes on account of specific provisions of the statute, and, sometimes by judicial pronouncements.

64. The most important exception in this regard is that of "piercing the veil" or "lifting the corporate veil" to find out who is the real person, beneficiary or in controlling position of the Company. The doctrine of "lifting the veil" has marked a change in the attitude, the law had originally adopted, towards the concept of separate entity or personality of the corporation, but the same has not been applied in general or routine manner. It has been adopted exceptionally whenever and wherever situation has warranted. The circumstances in which said doctrine has been invoked, vary from case to case.

65. Lord Denning M.R. in **Littlewoods Stores Vs. I.R.C., (1969) 1 W.L.R. 1241** said:

"The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit...."

66. One of the most important circumstance in which veil has been lifted is the case of fraud or improper conduct of Promoters. Where

dummy companies were incorporated by a promoter and his family members to conceal profits and avoid tax liability, separate entity of company has been ignored by looking through the veil and identifying those individuals who have deviced such method for their own benefits.

67. In **Juggilal Kamlapat Vs. Commissioner of Income Tax, (supra)** it was found that three brothers who were partners in the Assessee Firm were carrying on the managing agency in a dominant

capacity in the guise of a limited company. Court held that the corporate entity has to be disregarded if it is used for tax evasion or to circumvent tax obligation or to perpetrate fraud.

68. In **C.I.T. Vs. Associates Clothiers Ltd., AIR 1963 Cal. 629** there was a sale by a company to another having some shareholders and the former company owning all shares in the latter. It was held that it would not escape liability of tax under Income Tax Act by taking recourse to the concept of separate legal entity.

69. In **Gilford Motor Co. Vs. Horne, (1933) Ch. 935, C.A.** one Horne covenanted not to solicit the customers of M/s Gilford Motor Company. In his attempt to evade this obligation he formed a company which undertook the soliciting. Court granted injunction against Horne as well as the company formed by him describing the company formed by him "a device, a stratagem," and a "mere cloak or sham".

70. In **Jones Vs. Lipman, (1962) 1 W.L.R. 832,** defendant, to avoid sale of his house to the plaintiff attempted to convey to a company formed by him for the said purpose. Granting specific performance in favour of the plaintiff, Russell, J. describe the said company as creator of the defendant, a device and sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. 71. In **The Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar Vs. The Associated Rubber Industry Ltd., Bhavnagar and another, AIR 1986 SC 1** Court held where ingenuity is expended to avoid taxing and welfare legislation, it is the duty of Court to get behind the smokescreen and discover true state of affairs. There, a new company was created, wholly owned by principal company, without having assets of its own, except of those transferred to it by principal company and with no business or income of its own except of receiving dividends from shares transferred to it by the principal company. The purpose evident from the entire action was to reduce amount to be paid by way of bonus to workmen. In the circumstances, Court lifted veil and held principal company responsible for payment of bonus on the entire amount without making any distinction between new company and principal company. It upheld application of lifting of veil to prevent device to avoid welfare legislation and said that it may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. Court said that the list cannot be given exhaustively but lifting of veil must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the

involvement of the element of the public interest, the effect on parties who may be affected etc. 91. So far as application of doctrine is concerned, irrespective of the
nature of dues, we are of the view that whenever there is an attempt on the part of an individual or group of individuals to defraud public revenue by taking recourse to corporate personality, Court would always stand against such attempt by piercing the veil and finding out the real beneficiary behind the said design so as to make him responsible for payment of such dues.
92. The next category is, where entire shareholders belong to enemy country and permitting company to trade would amount to trade with enemy country. It was held that the device of incorporation cannot be allowed to use for illegal and improper purpose i.e. benefit to enemy country.
93. Wherever legislature has intended, has provided statutory provision empowering Tax authorities to recover dues of a corporate body from its Directors, shareholders or others. For illustration, we may refer to Section 179 of Act, 1961 which reads as under:

94. A perusal of Section 179 shows that it has been given an overriding effect over the various provisions of the Act and makes Director of a Private Company responsible for payment of tax dues outstanding, of the period, he was Director, provided he proves that non recovery is not attributed to any gross neglect, misfeasance or breach of duty on his part. The said provision, therefore, while making Director of the private company responsible for payment of tax dues jointly and severally, makes an exception that in case he proves that the assets of the company are not sufficient to meet tax dues and have reduced for reasons not attributable to him on account of any gross neglect, misfeasance or breach of duty, then such person would not be responsible. *The legislature thus has also recognised even in the said statute the principle that the doctrine of lifting of veil in the matter of tax dues is to be applied to prevent fraud etc. and not where the company has suffered despite its normal bona fide function. The persons responsible for its management are not to be made responsible for normal depreciation of capital or assets merely because the dues are of Tax. Further even the said provision is applicable only to private companies and not to public companies other than those which are converted from private to public.*

96. The legal position as discerned from the above is that in a case where the corporate personality has been obtained by certain individuals as a cloak or a mask to prevent tax liability or to divert

public funds or to defraud public at large or for some illegal purposes etc., to find out as to who are those beneficiaries who have proceeded to prevent such liability or to achieve an impermissible objective by taking recourse to corporate personality, the veil of the corporate personality shall be lifted so that those persons who are so identified are made responsible. However, this doctrine is not to be applied as a matter of course, in a routine manner and as a day to day affair. If such a course is permitted, it would lead to not only disastrous results but would also destroy completely the concept of juristic personality conferred by various statutes and would make several enactments and their effect, redundant and illusory.

98. In brief, we can categorize cases in which corporate personality of the incorporate body can be ignored and it would be better to refer the renowned author Palmer's Company Law 23rd Edition where he has categorised the cases, in which the principle of separate entity of the Company has been discarded by adopting the doctrine of lifting the veil, in 15 categories and some of which are as under:
"(1) where companies are in relationship of holding and subsidiary (or subsubsidiary)
companies; (2) where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; (3) in certain matters pertaining to the law of taxes; death duty and stamps, particularly where the question of the "controlling interest" is in issue; (4) in the law relating to exchange control; (5) in the law relating to trading with the enemy where the test of control is adopted; (6) where a holding company or a subsidiary company were not working in an autonomous manner and thus were treated as forming an economic unit; (7) where the new company was formed by the members of an existing company holding 9/10 shares in the existing company and only with an object of expropriating the shares of minority share holders of the existing company; (8) where the device of incorporation is used for some illegal or improper purpose; (9) where several companies promoted by the same controlling share holders for defeating or misusing the loss pertaining to labour welfare; (10) where the facts or equitable considerations justify an exemption from the strict rule in Salomon Vs. Salomon and Co. Ltd."

100. In nutshell, the doctrine of lifting of veil or piercing the veil is

now a well established principle which has been applied from time to time by the Courts in India also. There is no doubt about the proposition that whenever the circumstances so warrant, the corporate veil of the company can be lifted to look into the fact as to whose face is behind the corporate veil who is trying to play fraud or taking advantage of the corporate personality for immoral, illegal or other purpose which are against public policy. Such lifting of veil is also has to implemented whenever a statute so provided. However, it is not a matter of routine affair. It needs a detailed investigation into the facts and affairs of the company to find out as to whether the veil of the corporate personality needs to be lifted in a particular case.

Initial burden for application of the doctrine of "Piercing of Veil":

101. Whether in respect to tax dues or other public revenue or in other cases, if one has to discard the corporate personality, then the initial burden would lie upon it to place on record relevant material and facts to justify invocation of doctrine of lifting of veil and to plead that the corporate shell be not made a ground of defence. A personality conferred by the statute cannot be overlooked or ignored lightly and in a routine manner or on a mere asking. In fact whenever the veil is to be pierced, it would mean that somebody, individual or group of individuals, have obtained the shell of corporate personality as a pretext or mask to cover up a transaction or intention of those individual/individuals is neither legal nor otherwise in public interest. In effect the attempt of those individuals have to be shown akin to fraud or misrepresentation. The legal personality of the corporate body thus can be ignored in such cases since it is well settled that fraud vitiates everything and, therefore, the benefit of legal personality obtained by someone for purposes other than those which are lawful or even if lawful but not otherwise permissible, the corporate personality being the result of such fraudulent activity would have to be discarded but not otherwise. These are the things based on positive factual material and cannot be presumed in the absence of proper pleadings and material to be placed by the person who is pleading to invoke the doctrine of piercing the veil and to ignore the juristic personality of the corporate body. Once relevant material is made available by the authority or person concerned, thereafter it would be the responsibility of the other side to place material to meet the aforesaid attack.

102. Thus whenever doctrine of "lifting of veil" has been applied as, as we have already discussed, there have been compelling reasons therefor and many a times even statutory provision permits. In the present case it is not disputed that basic objective of Company was to take deposit and lend loans to its members and further that loans were actually

advanced to members. The mere fact that some members were also holding certain position or status in Company, would make no difference. So long as there is no material evidence or otherwise findings recorded by A.O. that advancement of loan to members of particular category was for reasons other than bona fide, we do not find anything therein to justify application of doctrine of "piercing of veil".

107. Therefore, submission that here is a case where this Court must pierce veil and find out sophisticated device of tax evasion on the part of Assessee, in our view, is a misconceived proposition inasmuch as without appreciating nature of Assessee Company, and its business etc., actual transactions cannot be doubted. Only a part of rate of interest was questioned, hence this broad proposition of invoking doctrine of lifting of veil is not justified to be raised in this case and we have no hesitation in rejecting the same.

108. In view of above, both substantial questions of law raised in this appeal, are answered in favour of Assessee and against Revenue.
109. The appeal lacks merit. Dismissed

In the High Court of Judicature at Madras
Dated: 07.03.2017

Case (Appeal) No.82 of 2017
Commissioner of Income Tax
Chennai
.... Appellant
Vs.
M/s.Anand Transport

10. As indicated right at the outset, the Tribunal has returned a finding of fact that the Jetty/Loading platform was a temporary structure. It cannot, but be submitted that, if, Jetty/Loading platform is held to be a temporary structure, then, the Assessee would be entitled to depreciation at the rate of 100%.
11. Therefore, to appreciate the contours of the issue at hand, one may have to set out the relevant entry incorporated in the appendix No.1 appended to the Act, as obtaining in the relevant A.Y.,

i.e., A.Y.2005-06.
11.1. In paragraph 7 of the judgment of the Tribunal, the

relevant Entry has been extracted. For the sake of convenience, the same is extracted hereunder:
".... 7. ..... For the assessment year 2005- 06, under "Part-A" heading "tangible asset", and subheading I "Building" ***temporary erections such as wooden structure*** *are falling 5 I.T.A. No.737/Mds/2014 under the classification "building" and 100% depreciation was prescribed. Old Appendix-1 Part A (1)(4) reads as follows:-*
"purely temporary erection such as wooden structure"*....."*
(emphasis is ours)
12. We have examined the record. According to us, the matter would turn on what is the nature of the structure, purpose for which it is erected, the periodicity for which, it is put in place, and lastly, the use to which the structure is put by the person/entity responsible for its erection.
12.1. Therefore, first and foremost, one needs to discern is, what exactly is a "Jetty". The dictionary meaning of Jetty, as found, in the Oxford English Dictionary, is, as follows:
"a landing stage or small pier at which boats can dock or be moored; a bridge or staircase used by passengers boarding an aircraft; a breakwater

constructed to protect or defend a harbour, stretch of coast or riverbank."
12.2. A bare perusal of the meaning of the word Jetty would show that, it is, in the nature of a construction, which is used, either as a landing stage, a small pier, bridge, staircase or a construction, built into the water to protect the harbour.
12.3. The utility of a Jetty is limited by its construct. It is used to obtain either access to a Vessel, or, protect the harbour.

The fact that the Jetty had other contraptions attached to it, such as, a conveyor belt, to facilitate the process of loading, cannot convert such a structure into a plant. Therefore, even, if, the functional test is employed, the main function of a Jetty, in the facts of the instant case, was to provide a passage or, a platform to ferry articles onto the concerned Vessels. This could have been done manually. That it was done by using a conveyor belt, would not, to our minds, convert a Jetty into a plant.
15. In sum, the Tribunal has reached the same conclusion and,

thus, reversed the decision of the Assessing Officer and CIT(A) by allowing depreciation at the rate of 100%.

16. For the foregoing reasons, we agree with the conclusions reached by the Tribunal, which, according to us, is a pure finding of fact, reached on the basis of the appreciation of the material placed before the Tribunal.

IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ITA 186/2017
PR. COMMISSIONER OF INCOME TAX-6, NEW DELHI
..... Appellant
Through : Sh. Asheesh Jain, Sr. Standing Counsel.
versus
NALWA STEEL & POWER LTD. ..... Respondent

This Court is of the opinion that the ITAT's findings are sound. As noticed by CIT(A), steel and power ingots manufacturing is power- intensive, necessitating continuous power generation. For this purpose, the assessee had installed certain electrical sub-stations, towers etc. and other supporting equipment. These were an integral and critical part of its manufacturing process and cannot be compared with electrical fittings which have been defined in Note 5 to Appendix 1(E) & (G) which talks of electrical fittings as including electrical wiring, switches, sockets, other fittings and fans etc. A clear demarcation, therefore, is essential; wherever electricity generation or continuous power supply is essential for the basic industrial activity of an assessee or unit, the heavy equipments so used cannot fall within the rubric of fitting such as fans, switches etc. as to disqualify

for depreciation
For the foregoing reasons, we find no merit in the appeal. It is accordingly dismissed.

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "L", MUMBAI

BEFORE SHRI JASON. P. BOAZ, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.2493/Mum/2012 (Assessment Year- 2001-02)

DCIT -3 (1),

Room No. 136, 1st Floor,

Scindia House, N.M. Road,

Ballard Estate,

Mumbai-400038

Vs.

M/s KPMG

Date of Pronouncement : 07.04.2017

We have considered the rival submissions of the parties and gone through the record of the case. Before, discussing the facts of the case we may refer certain relevant provision of Income Tax Act related with the treatment of income with regard to mutual concern, the concept and the Principle of Mutuality, the relevant clauses of agreement of assessee with KPMG International and the relevant Article of India- Switzerland DTAA. Section 2(24) defines "income". As per S. 2(24)(vii), the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society; are to be treated as part of income liable to tax under the Income-Tax Act, 1961. Section 28 deals with the

income chargeable under the head "profits and gains of business or profession". Under S.28, various types of incomes are chargeable to income-tax under the head "profits and gains of business or profession". Under S. 28(iii), income derived by a trade, professional or similar association from specific services performed for its members is chargeable to income-tax under the head "profits and gains of business or profession". This clause makes an exception to the general rule that income of a mutual association is not subject to charge of income-tax. In order words, the concept behind S. 28(iii) is to cut at the mutuality principle being relied upon in support of a claim for exemption, when the assessee actually derives ncome for making profits as a result of rendering its specific services for its members in a commercial manner. The computation of such income is to be computed in accordance with the provisions of S.44 of the Act or any surplus is to be taken as profits and gains by virtue of the provisions contained in the First Schedule to the Income-Tax Act.

9. The 'Principle of Mutuality' is based on the concept that income earned by a person from external sources is taxable. Thus, income derived from oneself cannot be treated as income thus cannot be taxed. This concept has evolved over a period of time, be it through legal precedents. Concept of mutuality was developed centuries back. Mutuality organizations have been in existence since period unknown and have played vital role in the development of the society. Presently, we can see such organizations existing in the shape of insurance companies, societies, clubs, associations etc. Initially mutual organizations were created with the sole purpose of compensating members by providing insurance without any

motive to earn profits or gains. Thus, the essential elements of a mutual organization are; (i) it is an association of people called members; (ii) there is a common cause (iii); every member makes his contribution and (iv) the aim of the activity is not to earn profits or gains.

We have independently examined the facts of the present case in view of the various decisions of the Hon'ble Apex Court and the various High Courts. Thus, it is debatable to review the appropriateness of the application of the mutuality principle as an instrument of Government policy. The position can easily be understood in a very simple way as referred by Hon'ble Delhi High Court in Yum! Restaurants (Marketing) Private Limited versus Commissioner of Income Tax (ITA No.1433/2008 dated 01-04-2009). The brief facts as summarized is that : Parent company , having license arrangement with foreign companies , used to market ready to eat food items through franchisees, formed a new subsidiary company to take care of publicity on behalf of the franchisees with the proper permission of the state authorities. The parent company was granted permission on the condition that the subsidiary would be a non-profit enterprise and that it would not repatriate its dividends. Thus a new company was formed under tripartite agreement with the condition that all the franchisees will be members and will pay 5% of the gross sales in order to carry on co-operative advertisements to promote all the brands of which parent company was a licensee for the mutual benefit of the franchisees. It was expressly stated that surplus if any left in the accounts will not be distributed but will be carried forward for future use as per the terms of the agreement. A return was filed showing income as nil

despite the fact that there was a surplus but as per the views of the company the same was not taxable on the principles of mutuality and on no-profit basis. The case was discussed at the assessment stage and the assessing officer was of the view that despite the fact that the company was being run on the basis of mutuality concept, but contributions received were not in accordance with the terms of agreement and the existence of the company was not to deal with a social/charitable cause. The main object of the said company was to promote business on behalf of members for better sales and consequently to earn more and more profit. An appeal was filed with the commissioner of income tax (appeals). The observations made by commissioner of income tax appeals were that the company was set up with a commercial purpose to take care of activities which are crucial for running a successful business and is linked to the profit on sale of franchisees. Further, the company was in no way created for any social or cultural activity where the idea of profit or trade does not exist. The only restriction as per the agreement was not to deal with the outside body to make it a mutual concern. Thus the CIT (A) was of the view that the underlying purpose was solely for commercial consideration and excess of income over expenditure should be brought to the tax. The above view was confirmed by the Tribunal as well as the High Court of Delhi while dealing with the appeals filed by the aggrieved assessee-company.

14. Thus, the concept of Mutuality postulates that all the contributors to the common

fund must be entitled to participate in the surplus and that all the participators in

the surplus are contributors to the common fund. It is in this sense that the law postulates that there must be a complete identity between the contributors and the participators. The essence of the doctrine of mutuality lies in the principle that what is returned is what is contributed by a member. 'A person cannot trade with himself' is the basic idea in the principle of mutuality. It is on the hypothesis that the income which falls within the purview of the 'doctrine of mutuality' is exempt from taxation.

15. The basic principle underlying the principle of mutuality is that no one can make

profit out of himself as held by Hon'ble apex Court in CIT Vs. Royal Western India Turf Club Ltd., 24 ITR 551 (SC). In other words, no one can enter into a trade or business with himself. The essence of mutuality is complete identity between contributors and participators.

16. In a famous case the Commissioner of Income Tax V. Bankipur Club Ltd [1997] 226ITR 97 (Supreme Court) the Supreme Court considered as to whether a surplus of receipts over expenditure generated from the facilities extended by a club to its members were exempt on the ground of mutuality. The Supreme Court reiterated the principle that in the case of a mutual society, there must be a complete identity between the class of contributors and of participators. In Sports Club of Gujarat Limited V. Commissioner of Income Tax - 2009 -TMI 77939 - (Gujarat High Courts) the High Court held that one of the essential requirements of mutuality is that the contributors to the common fund are entitled to participate in the surplus thereby creating an identity between participators and

the contributors. Once such identity is established, the surplus income would not be exigible to the tax on the principle that no man can make a profit out of himself.

19. With the above discussion we may conclude that in the case in hand, there is a complete identity between the contributors and participators; the actions of the participators and contributors are in furtherance of the mandate of the association. There seems be no element of profit by the contributors from a fund made by them, which could only be expended or returned to themselves. Based on these conditions and respectfully relying on the case laws as the Hon'ble Apex Court and various High Courts laid down that the case of the assessee falls within the four corner of the ambit of the 'Principle of Mutuality'. Thus, we do not find any reason or ground to interfere in the order passed by learned Commissioner (Appeals) hence the appeal filed by the revenue is dismissed.

Allahabad high court Court No. - 3

Case :- INCOME TAX APPEAL No. - 90 of 2016

Appellant :- Principal Commissioner Of Income Tax-II, Lucknow

Respondent :- M/S U.P. Projects Corp. Ltd., Lucknow

The appeal was admitted on following substantial questions of law:

"(1) Whether the Income Tax Appellate Tribunal is justified under the facts and circumstances of the case in upholding that

unabsorbed depreciation of earlier years can be set off against the current's year income under the head 'Income from other sources'.

(2) Whether the Income Tax Appellate Tribunal is justified in upholding the order of CIT(A) without answering that why not the carried forward unabsorbed depreciation is allowed to be set off against the profits and gains of the business or profession of the subsequent year. When statute (Sec.72) specifically provides for the same."

9. The question that such unabsorbed deprecation cannot be allowed to be absorbed from income from other sources and it should be confined to income from business as held by AO stand answered otherwise by Supreme Court in Commissioner of Income Tax, Meerut Vs. Virmani Industries Private Limited, 1995(6) SCC 466. Court in para 17 of the judgment said as under:

"17. We may first consider the meaning of the expression "profits or gains chargeable". On first impression, the said expression appears to refer only to profits or gains of business or profession chargeable under Section 28. But this court has repeatedly held that the said expression is not so confined and that it refers to income

under all the heads of income specified in Section 14."

10. While referring to decision in Commissioner of Income Tax Vs. Jaipuria China Clay Mines (P) Ltd., (1966) 59 I.T.R.555 Court observed that expression "profits or gains chargeable" is not confined to profits or gains from business or profession but takes within its ambit all heads of income.

11. When confronted with aforesaid judgment, learned counsel appearing for appellant could not dispute that aforesaid judgment clearly supports the view taken by Tribunal and, therefore, the questions formulated in this appeal are answered against Revenue and in favour of Assessee.

IN THE HIGH COURT OF DELHI AT NEW DELHI
13
+ ITA 398/2016
PR. COMMISSIONER OF INCOME TAX-12 ..... Appellant
Through Ms. Lakshmi Gurung, Standing Counsel for Income Tax
versus
LAKSHYA SETH ..... Respondent

1. While admitting this appeal by the Revenue, against the impugned order dated 7th October 2015 of the Income Tax Appellate Tribunal (ITAT) in ITA No. 218/Del/2015 for the Assessment Year (AY) 2011-12, this Court by order dated 24th November 2016 framed the following question of law for consideration:
"Did the Income Tax Appellate Tribunal (ITAT) fall into error in

interfering with Commissioner of Income Tax (Appeals) [CIT (A)] findings with respect to the contentions made under Section 263 A of the Income Tax Act, 1961, in the circumstances of the case? 6. Mr Laxmi Gurung, learned Standing counsel appearing for the Department sought to point out that in fact the AO had merely accepted the version of the Assessee and had not conducted any enquiry of his own. She submitted that cogent reasons were given by the CIT for exercising the revisional power under Section 263 of the Act. She relied on the decision in ***ITO v. DG Housing Projects Ltd.*** (order dated 1st March, 2012 in ITA 179/2011)

7. The ITAT has in the impugned order noted "the AO inquired from the assessee about the amount of cash deposited during the relevant financial period and after considering the reply of the assessee wherein the assessee stated that he had lost his books of accounts and other records, then the AO had no alternative but to estimate the business income of the assessee by taking a reasonable and appropriate recourse. Thereafter, the AO proceeded to estimate the business income of the assessee @8% of gross receipts by merely referring to Section 44 AF of the Act. We cannot ignore this fact that in the letter dated 20.12.2013, the assessee pressing into service his revised computation of income pleaded that the surrendered amount may be considered as business income being 5% of gross receipts but the AO adopted higher percentage of 8% for estimation of business income which is very favourable to the revenue. It is also relevant to point out that the AO has taken 5% on gross turnover for A Y 20 I 0-11 viz. preceding assessment year to the present assessment year in the assessment order passed u/s 143(3) of the Act."

8. In ***ITO v. DG Housing Projects Ltd.*** (*supra*), this Court held that: "In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/enquiry is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in law." In the instant case, the order of the CIT did not fulfil the above test. 9. The Court is unable to discern any legal infirmity in the impugned order of the ITAT. The question framed is answered in the negative i.e. against the Revenue and in favour of the Assessee. The appeal is accordingly dismissed with no order as to costs.

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ITA no.1 of 2017
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE
Deeplok Financial Services Ltd.
Versus
Commissioner of Income Tax-II, Kolkata

Date: 4th April, 2017.

So it was that the appeal was admitted on the following substantial question of law formulated.
"Whether the Tribunal was correct in holding that the profit arising from the sale of the said shares is chargeable to tax in the hands of the assessee as its business income and not long term capital gain since in the assessee's own case in the previous assessment year the conversion of the shares was not accepted by the Tribunal?"
We however intend to answer both the above questions upon having heard the parties in this appeal.

The Act however does not provide for the conversion of stock-in-trade into capital asset.
Whether or not such omission would operate as a bar on an assessee is a question that can be answered on the basis of a view taken by a learned Single Judge of this Court in the case of **Maniruddin Bepari vs.**
The Chairman of the Municipal Commissioners, DACCA decided on 16th April,
1935 and reported in **40 Calcutta Weekly Notes (CWN) 17** being as follows:-
"It is a fundamental principle of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed
by some rule of law. It is equally a fundamental principle that in the case of a statutory corporation it is just the other way. The corporation has no power to do anything unless those powers are conferred on it by the statute which creates it."
This view finds support from **Kikabhai Premchand** (supra) where the situation at hand was contemplated as would appear from the following as expressed in the dissenting view…

In **Dhanuka & Sons** (supra) the same situation was contemplated where on stock transferred in investment account, the question of capital loss
or capital gain, was held, would arise if such shares be disposed of at
a value other than the value at which it was transferred from the business stock. We, on noticing that the Tribunal did not really hold otherwise but had held against the assessee on the point of resjudicata,

had formulated the above question. Nevertheless for the reasons aforesaid we answer the question suggested by the assessee in the affirmative and in its favour. In that regard the said circular dated 29th February, 2016 has no application because the assessee's stand was not accepted by the Revenue.

that to the Tribunal it appeared there is no provision in the Act in respect of conversion of stock-in-trade into investment and its treatment. Hence, it held that the lower authorities rightly made the addition as there was understatement of income by analyzing the assessee's trading and investment account in shares. Thus, before us there is no impediment for the assessee to seek adjudication on the point. The question formulated is answered accordingly and in favour of the assessee.

Sir Kikabhai Premchand vs. CIT reported in **(1953) 24 ITR 506 (SC)**

CIT vs. Dhanuka & Sons reported in **(1980) 124 ITR 24 (Cal)**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1975 OF 2016
IN
INCOME TAX APPEAL NO. 51 OF 2016

The Principal Commissioner of Income Tax17,
Mumbai .. Applicant/Original Appellant.
v/s.
Sushil Gupta
Legal representative of late
Mahabir Prasad Gupta .. Respondent

DATE : 26 AUGUST, 2016.

By the impugned order dated 31 October 2014, the claim of the Respondent Assessee that the payment of Rs.75,00,000/be redemption fine is an expense allowable under Section 37 of the Act, was accepted. Consequently, deleting the addition made on the above account.

3. The grievance of the Revenue is that the impugned order warrants a stay as it is contrary to and in defiance of this Court's order in **Rohit Pulp And Paper Mills Ltd. vs. Commissioner of IncomeTax** [1995], 215 ITR 919 **,** wherein, according to the Revenue, in identical circumstances a

redemption fine paid to the Customs Department was not allowed as an expenditure under Section 37 of the Act. Besides, in view of the conduct of the Respondent Assessee, the grievance of the Revenue is the apprehension that the amount due to the Revenue will not be paid, even if the Revenue succeeds.

4. We are of the prima facie view that the impugned order of the Tribunal is an order, which has taken into account the decisions of this Court in **Rohit Pulp And Paper Mills** (supra), as it relied upon its decision in **DCIT vs. Dimexon** (1999) 65 TTJ (Mumbai) 2. The Tribunal in **Dimexon** (supra) had on consideration of various decisions of this Court, including **Rohit Pulp And Paper Mills** (supra) observed that where penalty/fine has been imposed in view of carrying out business in an unlawful manner then such payment of fine is not allowed as a deduction under Section 37 of the Act. However, where an Assessee has acted in good faith without any intention to contravene the law, then such redemption fine is allowable as an expenditure under Section 37 of the Act. In this case, the impugned order of the Tribunal records the fact that the import policy, under which "Almonds in Shell" were imported, and on which redemption fine was imposed was found by the Customs Tribunal to suffer from ambiguity. It is in the above view that the Customs Tribunal in proceedings before it challenging the imposition of penalty and redemption fine had waived the entire penalty while reducing the redemption fine. In the aforesaid circumstances, the impugned order of the Tribunal on facts held that the conduct of the Assessee was bonafide and he could not be said to have indulged in any act, which he knew was prohibited in law . In view of the above, the Revenue on merits has not been able to show any perversity or defect in the impugned order, which would warrant stay at this stage, before consideration of the appeal for admission.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1250 OF 2014

Commissioner of Income Tax ..Appellant

Versus

M/s. Ganga Developers ..Respondent

DATE : 10th JANUARY, 2017

(c) In appeal, the CIT(A) held that the rejection of the Books of Account was not justified. This view has been upheld by the Tribunal and we have in response to question no.(i) above refused to interfere with the order of the Tribunal. Therefore Books of Accounts once being accepted then unless it is the case of the Revenue that the expenses claimed are not for the purposes of business or that expenses are bogus, the expenses claimed in the audited accounts have to be allowed. The Assessing Officer was directed to allow business expenditure by reducing the disallowance, if any. In appeal, the Tribunal by the impugned order upheld the finding of the CIT(A).

(d) We find that once the accepted Books of Accounts have been admittedly subjected to audit, then expenses claimed therein have to be allowed. Unless of course, it is the Revenue's case that the expenses were not incurred for the purposes of the business or that the expenses were bogus. Even before us the Revenue does not urge that the expenses claimed were bogus and/or not incurred for the purpose of business.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 8040 OF 2015
DIRECTOR OF INCOME TAX (IT) – I .....APPELLANT(S)
VERSUS
A.P. MOLLER MAERSK A S .....RESPONDENT(S)

FEBRUARY 17, 2017.

In these appeals, which are filed by the Revenue challenging the validity of the judgment passed by the High Court of Bombay, the appellant-Revenue has posed the issue that arises for consideration in the following manner:
"Whether the High Court is correct in holding that the income from the use of Global Telecommunication Facility called 'Maersk Net' can be classified as income arising out of shipping business and not as fees for technical services?"
Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasised that neither the AO nor the CIT (A) has stated that there was any profit element embedded in the payments receiv by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro-rata division thereof among the agents for reimbursement. Not only that, the assessee have even submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. ***Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax Pertinently, the Revenue itself has given the benefit of Indo-Danish DTAA to the assessee by accepting that under Article 9 thereof, freight income generated by the assessee in these Assessment Years is not chargeable to tax as it arises from the operation of ships in international waters. Once that is accepted and it is also found that the Maersk Net System is an integral part of the shipping business and the business cannot be conducted***

without the same, which was allowed to be used by the agents of the assessee as well in order to enable them to discharge their role more effectively as agents, it is only a facility that was allowed to be shared by the agents. By no stretch of imagination it can be treated as any technical services provided to the agent *In such a situation, 'profit' from operation of ships under Article 19 of DTAA would necessarily include expenses for earning that income and cannot be separated, more so, when it is found that the business cannot be run without these expenses. This Court in Commissioner of Income Tax-4, Mumbai v. Kotak Securities Limited4 has categorically held that use of facility does not amount to technical services, as technical services denote services catering to the special needs of the person using them and not a facility provided to all.*

In the present case, a common facility of using Maersk Net System is provided to all the agents across the countries to carry out their work using the said system.

After the arguments were concluded, additional written submissions were filed by Mr. Radhakrishnan on behalf of the Revenue wherein altogether new point is raised viz. the payments made by the agents to the assessee for use of that Maersk Net System can be treated as royalty. However, this desperate attempt on the part of the Revenue cannot be allowed as no such case was sought to be projected before the High Court or even in the appeals in this Court. We have already mentioned in the beginning the issue raised by the Revenue itself which shows that the only contention raised is as to whether the payment in question can be treated as fee for technical services. Having held that issue against the Revenue, no further consideration is required of any other aspects in these appeals. These appeals are, therefore, bereft of any merit and are accordingly dismissed.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).9611 OF 2016

(Arising out of SLP(C)No. 31962 of 2011)

M/S. SHASUN CHEMICALS AND DRUGS LTD. APPELLANT(S)

VERSUS

COMMISSIONER OF INCOME TAX-II, CHENNAI RESPONDENT(S)

SEPTEMBER 16, 2016.

Two issues are raised in these appeals by the appellant/assessee, which is a public limited company engaged in the business of manufacture and sale of bulk drugs and intermediates. The first issue is regarding the amortization of expenditure under Section 35D of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). The second issue pertains to the deduction for payment of bonus by the assessee to its employees. The Assessment Years in question are 1999-2000 and 2001-02.

Question No. 1: Whether expenditure incurred on issue of shares is eligible to be amortized under Section 35D of the Act?

It is on this satisfaction that for the Assessment Year 1996-97 also the expenses were allowed. Once, this position is accepted and the clock had started running in favour of the assessee, it had to complete the entire period of 10 years and benefit granted in first two years could not

have been denied in the subsequent years as the block period was 10 years starting from the Assessment Year 1995-96 to Assessment Year 2004-05. The High Court, however, disallowed the same following the judgment of this Court in the case of Brook Bond India Ltd (supra). In the said case it was held that the expenditure incurred on public issue for the purpose of expansion of the company is a capital expenditure. However, in spite of the argument raised to the effect that the aforesaid judgment was rendered when Section 35D was not on the statute book and this provision had altered the legal position, the High Court still chose to follow the said judgment. It is here where the High Court went wrong as the instant case is to be decided keeping in view the provisions of Section 35D of the Act**. In any case, it warrants repetition that in the instant case under the very same provisions benefit is allowed for the first two Assessment Years and, therefore, it could not have been denied in the subsequent block period. We, thus, answer question No. 1 in favour of the assessee holding that the assessee was entitled to the benefit of Section 35D for the Assessments Years in question.**

Question No. 2: Whether deduction on account of payment of bonus to the employees of the assessee is not eligible under Section 36 of the Act, as it is hit by Section 40A(9) of the Act? This Section deals with deductions in respect of the amount paid by the assessee as an employer towards the setting up or formation of, or as contribution to, any fund, trust, company etc. The condition is that such sum has to be paid for the purpose and to the extent provided by or under clause (iv) or clause (iva) or clause (v) of Sub-section(1) of Section 36. However, we are here concerned with the payment of bonus which is not covered by any of the aforesaid clauses of sub-section (1) of Section 36 but is allowable as deduction under clause (ii) of sub-section (1) of Section 36. Therefore, Section 40A(9) has no application. Therefore, the High Court was wrong in disallowing this expenditure as deduction while computing the business income of the assessee and the decision of the ITAT was correct.

18. On both counts the order of the High Court is set aside and the appeals are allowed.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 893 OF 2014
Director of Income Tax (International Taxation) II, Mumbai ..Appellant
Vs.
M/s. Marks & Spencer Reliance India Pvt. Ltd. ..Respondent

The Tribunal after having noted all these facts found that the first appellate authority by its order dated 28th November 2011 for the assessment year 2010-2011 rightly interfered with the order of the Assessing Officer. The finding of fact of the Tribunal is that the Commissioner was right that the assessee paid sum of Rs.4866187/- to M/s. Marks & Spencer PLC towards salary expenditure of four employees deputed to the assessee for providing assistance in the area of management, to setting up of business, property selection and retail operations etc. There was a service agreement drawn up and for providing such assistance between these two companies. It was essentially a joint venture. Having noted all the clauses in the agreement, the Tribunal rendered a finding of fact that there is no rendering of service within the meaning of the double tax avoidance treaty. This was a clear case of deputing the officials / employees for the promotion of the business of the assessee which is Indian arm of

M/s. Marks & Spencer PLC, UK. Since the said payment to the employees is already subjected to tax in India, therefore there is no question of treating the assessee in default for non deduction of tax at source. Once the facts were clear, as these, there was no illegality in the order of the Commissioner of Income Tax (Appeals) which was maintained by the Tribunal. The appeal of the Revenue was rightly dismissed by the Tribunal.
4] We do not find that the order of the Tribunal is perverse or vitiated by any error of law apparent on the face of the record. Hence, we do not entertain this appeal. It is dismissed but without any order as to costs.

THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'C' KOLKATA
[Before Hon'ble Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]
ITA No.601/Kol/2014

9. We have carefully considered the rival submissions. On careful consideration of the facts of the case and the provisions of Sec.70(1) of the Act, we are of the view that the order of the CIT(A) does not call for any interference. The only basis on which the AO could have successfully denied the claim of the Assessee was to show that the forex loss and finance cost were incurred post search with a view to reduce the income surrendered in the course of search. The finding of fact by the CIT(A) in this regard is that forex loss incurred by the Assessee was not post search event to reduce the taxability of additional income as alleged by him as forex transactions were carrie out by the Assessee throughout the relevant financial year and not post search period.
He also found from the details of the forex loss that both in pre and post search period there was gain as well as the loss in foreign exchange transactions. But, at the year end, there was overall loss which was debited by the Assessee to the profit and loss account and that the AO did not find any discrepancy or fault in the details submitted by the Assessee. The CIT(A) also found that the Assessee had taken loan from the banks and the financial institutions for the purpose of its business and incurred the financial costs and that they were for the purpose of business of the Assessee was not disputed by the AO. These costs were also not post search event. The CIT(A) also found that similar costs were incurred in the earlier financial years and allowed by the Revenue as deduction in the earlier assessments of the Assessee for those Assessment years. This finding of fact was not challenged before us as these facts were not disputed even by the AO in the order of Assessment. Therefore forex loss and financial costs were not incurred by the Assessee in the year under consideration for the first time to reduce the taxability of the additional income offered for taxation.
10. Once the above conclusions are not disputed than the provisions of section 70 of the Act which provide for the set off of loss from one source against income from another source under the same head of income will automatically come into operation. It is not disputed that the sum of Rs.30 crores offered to tax in the course of search was duly credited in the profit and loss account. Thus the Assessee has complied with the surrender made at the time of surrender. There is nothing brought on record by the revenue to show that the sum of Rs.30 crores offered in the course of search as undisclosed income was net of any other loss of the Assessee. In the circumstances, as per the provisions of section 70(1) of the Act, which provides that where the net result for any assessment year in respect of any source falling under any head of income, other than "Capital gains", is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head, will apply. In the case of Assessee there is no dispute that the loss of Rs.14,90,97,080/- computed by the AO as per the assessment order is business loss and the additional income of Rs.30 crores admitted by the Assessee in the course of

search operation is the business income. Thus they are income and loss under the

same head from different sources. Both the loss and income are assessable under the head "Profit and gains from Business or Profession". Thus, as per the provisions of section 70(1) of the Act, loss incurred by the Assessee from one source is allowable as set off from the income of another source under the same head. Therefore, in view of specific provision under the Act, there is no reason to assess the business income of Rs.30 crores separately and allow the carry forward of the business loss of Rs.14,90,97,080/-. The action of the AO in doing so was contrary to the provisions of the Act. We therefore find no grounds to interfere with the order of the CIT(A) which is in accordance with the provisions of law rightly applied to the facts of the case. Consequently, we dismiss the appeal by the revenue.
11. In the result, the appeal by the revenue is dismissed.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1761 OF 2014

The Commissioner of Income Tax6

.. Appellant.

v/s.

M/s. Faze Three Ltd., .. Respondent.

DATE : 16th MARCH, 2017.

iii) Mr. Chanderpal, learned Counsel appearing for the Revenue contends that the issue of FCCBs had inherent in it the option to convert bonds into equity. Therefore, same would have an effect on the capital base of the Respondent. In the circumstances, the expenditure incurred on the issue of FCCBs should be considered as capital expenditure and not be allowed as revenue expenditure.

(iv) Mr. Thakkar, learned Counsel appearing for the Respondent points out that FCCBs issued by the RespondentAssesssee were

convertible at the option of the bond holders. It was not compulsorily convertible into equity.

(v) Mr. Thakkar, learned Counsel appearing for the Respondent invited our attention to the decision of the Delhi High Court in ***CIT v/s. Havells India Ltd., 352 ITR 376*** – wherein on an identical fact situation, the appeal of the Revenue was dismissed

The Revenue has not been able to show any reason which would require us to take a view different from that taken by the various High Courts in the country on an identical issue.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 1030 OF 2014

The Commissioner of Income Tax .. Appellant

v/s.

M/s. Johnson & Johnson Ltd. .. Respondent

DATED : 7th MARCH, 2017.

We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in Section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical know how has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know how royalty paid by the

Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical know how royalty by the TPO was adhoc
and arbitrary as held by the CIT(A) and the Tribunal.
(e) In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

(d) Mr. Malhotra, learned counsel for the Revenue submits that the order passed by the Tribunal in respect of Assessment Year 200102 which has been relied upon in the impugned order was a subject matter of appeal before this Court in Income Tax Appeal No.2441 of 2013. This Court by an order dated 4th July, 2016 did not disturb the findings of the Tribunal in respect of the applicability of Section 40A(2)(b) of the Act in the context that the onus to prove unreasonableness of payments made to persons covered thereunder. However, according to him, the above case would not apply to the present facts as that was case where the payments were made by the respondent to its holding company. The principle laid down in the above case to our mind would apply

with greater force as the dealing here is with an independent party except its one director being a partner of the firm receiving the fees. In any case, in terms of Section 40A(2) of the Act, the burden is upon the Assessing Officer to form an opinion that the payment is excessive. Besides the above, as held by impugned order that in the absence of any standard fees charged by the advocates / solicitors in respect of the services rendered by them, it would be impossible for the respondent assessee to prove the reasonableness of the fees charged by

the advocate. The onus would necessarily first be upon the Revenue before it disallows the payment made to persons covered under Section 40A(2)(b) of the Act in respect of professional services to establish that the payment was excessive. This it could do by calling for the details of the services rendered and making enquiries of the fees for such services in comparable cases i.e. taking into account the Advocates involved i.e. the experience and expertise. Thereafter, it would be for the assessee to show why the comparison is not proper. No such exercise was done. Therefore, the disallowance
of 10% is adhoc.
Thus, in the present facts, the Revenue has not even remotely attempted to establish that the payment made to the Advocates for professional services was excessive. In the circumstances, no fault can be found with the orders of the CIT(A) and the Tribunal.

(d) Mr. Malhotra, learned Counsel for the Revenue in support of the appeal relied upon the order of the Assessing Officer .
(e) The addition on account of unaccounted production and sales has been made in the absence of the regular books of accounts maintained by the respondent assessee, being found to be defective in any manner. More particularly, in the absence of any evidence that there were purchase and sales outside the regular books of accounts, it is not permissible to disregard the normal books of accounts. So far as the production loss is concerned, the CIT(A) as well as the impugned order of the Tribunal has followed an earlier order of its coordinate bench in respect of the same respondent assessee for A.Y. 199192
to

hold that the production loss depends on number of factors and in the absence of any comparable data to show that the loss claimed was in excess, the same cannot be disallowed.

(f) We note that the finding of the CIT(A) as well as the Tribunal are essentially findings of facts. The same has not been shown to be perverse in any manner so as to give rise to any substantial question of law. Thus, the proposed question is not entertained.

IN THE INCOME TAX APPELLATE TRIBUNAL

DIVISION BENCH, CHANDIGARH

ITA No.319/Chd/2015

(Assessment Year : 2008-09)

M/s Jain Brothers

Date of Pronouncement : 16.12.2016

We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record.We find merit in the contentions of the Ld.Counsel for the assessee. It is not disputed that the cash found as on the date of search was Rs.33,260/- while as per books of

account the cash was Rs.6,32,851/-. Thus the actual cash found with the assessee as on the date of search was less as compared to that shown in the books, which means that the assessee may have utilized the cash available with it in some manner which has not been reflected in the books of account. It cannot, by any stretch of logic, mean that the assessee has earned any income. Even if the cash has been withdrawn by the partners for their personal use ,as alleged by the Ld.DR, it does not become the unaccounted income of the assessee. It is only a utilization of cash which has not been accounted for in the Books of the assessee. We have not been enlightened as to under which section such shortage of cash found during search would be brought to tax under the Income Tax Act,1961. The argument of the Ld.DR that the assessee first withdrew cash which resulted in actual cash in hand getting reduced and thereafter reintroduced the same in the Books only, from income earned from

undisclosed sources, appears to be a very farfetched and illogical argument, with no basis at all. Except for the cash found short, no other incriminating material has been brought to our notice which could lend credence to such inferences. Moreover, if as per the DR, the cash was reintroduced in the Books, the Income wherefrom it was earned, must have also been accounted for. Therefore we find that there is no basis for making the addition in the present case, which appears to be based on mere presumptions.

In view of the above ,the order of the CIT(A) ,upholding the addition of Rs.5,99,591/- is set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED 22.12.2016
Date of Reserving the Order Date of Pronouncing the Order
03.10.2016 22.12.2016
Coram
The Hon'ble Mr.Justice **T.S. SIVAGNANAM**

W.P.No.37565 of 2015
Institute of the Fransican Missionaries of Mary
Rep., by its President

The common issue which falls for consideration in these batch of cases is as to whether the respondent, the Income Tax Department, is justified in

insisting upon recovery of tax at source from the salary payable to Nuns/Fathers/Priests working in various Teaching Institutions established and administered by the petitioners. Some of the Writ Petitions have been filed by the Congregation, some by the Institutions and some by the individual Priests/Nuns, however, since common issues have been raised in all these Writ Petitions, they were clubbed and heard together. The submissions made on behalf of the Revenue/Income Tax Department and the authorities of the State Government were common to all the Writ Petitions and therefore, the Court heard all matters together and are disposed of by this common order. With the consent on either side, W.P.No.37565 of 2015, is taken as the lead case and it would suffice to refer to the facts stated therein for the purpose of deciding the issues raised in these batch of cases.

10.Heard the learned counsels appearing for the parties and perused the materials placed on record.

11.The legal issue which falls for consideration in these cases is whether tax has to be deducted at source from the salary payable to priests and nuns working in teaching and non-teaching posts in various Insitutions run by religious congregation or diocese. The case of the petitioner is that by applying the principle of diversion of income by overriding title tax should not be deducted at source. The case of the revenue is that such principle will not apply as it is a case of application of income only. This controversy has to be resolved in these cases.

12.The revenue has raised a preliminary objection with regard to the maintainability of the Writ Petition. Their objections are two fold, that the petitioners who are religious congregation/machinery/ dioceses/institution are not aggrieved persons and therefore, they have no *locustandi* to challenge the

impugned clarification. Secondly, the individual priests and nuns who are employed as teachers in the educational institutions and are paid salary for their avocation are not aggrieved persons, as tax has to be deducted by the payer which is the Government of Tamil Nadu. The plea of *locus standi* and the maintainability of the Writ Petition cannot be decided purely as a question of law as factual aspects are required to be looked into.

13.The case of the petitioners is that the Priests and Nuns on wearing the religious cloak, loose their original identity thereby, resulting in a civil death and as they profess vows of charity, obedience and poverty and the code of Canon Law clearly states that persons who are professed religious totally renounce their goods, loose the capacity to acquire and possess goods and actions of religious contrary to the vow of poverty are invalid. Whatever, they acquire after renunciation belongs to the institution in accordance with the institutes own law. Whatever a religious acquires by personal labour, or on behalf of the institute, belongs to the institute. Whatever, come to a religious by way of pension grant or insurance also passes to the institute, unless the institutes' own law declares otherwise [Refer Canon 668 (3) and (5)]. By applying the Canon Law, the petitioner institutions and religious congregation would submit that whatever payable to the Priests and Nuns as salary can never belong to them nor acquired or possessed by them, but it shall belong to the institution. This is so because, they have taken the vow of poverty and anything done contrary to such vow would be invalid. By virtue of the impugned clarification, the Revenue has advised the Pay and Accounts officer of the State Government to deduct tax at source from the salary paid to be Priests and Nuns treating them as recipients of the salary paid to them on account of their individual capabilities and education. Thus, what is required to be seen is whether the taxation law could ignore the religious principles

adopted by a religious sect codified in the form of laws binding the religious eternally to such code. If the code followed by the religious to which they are bound by the vows taken by them, it cannot be stated that the institutions to which they belong do not have *locustandi* to question the impugned circular. Viewing this aspect from a slightly different angle would make things clear. The Priests and Nuns having taken vow of poverty, bound over by the code of Canon Law would at best be treated as an intermediary for the receipt of the financial benefit, which may be payable on account of the educational or other capabilities of the individual Priests and Nuns, but the Canon Law, which binds the Priests and Nuns clearly lays down that whatever the religious acquires by personal labour shall belong to the institute. Therefore, while testing the validity of the impugned circular, it cannot be stated that the institutions of the Priests and Nuns do not have *locustandi* to question the circular. The Priests and Nuns would contend that they cannot be treated in a manner which is contrary to the religious vows and the binding Canon Law. The institutions would contend that the Revenue cannot ignore the law, which binds the religious and seek to give a different connotation to the whole concept. Therefore, this Court holds that the petitioners have *locustandi* to challenge the impugned circular. Accordingly, the Writ Petitions are held to be account of their individual capabilities and education. Thus, what is required to be seen is whether the taxation law could ignore the religious principles adopted by a religious sect codified in the form of laws binding the religious eternally to such code. If the code followed by the religious to which they are bound by the vows taken by them, it cannot be stated that the institutions to which they belong do not have *locustandi* to question the impugned circular. Viewing this aspect from a slightly different angle would make things clear. The Priests and Nuns having taken vow of poverty, bound over by the code of

Canon Law would at best be treated as an intermediary for the receipt of the financial benefit, which may be payable on account of the educational or other capabilities of the individual Priests and Nuns, but the Canon Law, which binds the Priests and Nuns clearly lays down that whatever the religious acquires by personal labour shall belong to the institute. Therefore, while testing the validity of the impugned circular, it cannot be stated that the institutions of the Priests and Nuns do not have *locustandi* to question the circular. The Priests and Nuns would contend that they cannot be treated in a manner which is contrary to the religious vows and the binding Canon Law. The institutions would contend that the Revenue cannot ignore the law, which binds the religious and seek to give a different connotation to the whole concept. Therefore, this Court holds that the petitioners have *locustandi* to challenge the impugned circular. Accordingly, the Writ Petitions are held to be maintainable and this question is decided against the Revenue.

17.The first issue would be as to whether the Principal Chief Commissioner of Income Tax could have issued the impugned clarification without reference to circulars issued by the Board. To consider this question, it would be beneficial to refer to the decision of the Hon'ble Supreme Court in ***R&P Falcon*** (supra). One of the questions, which arose for consideration was with regard to the interpretation given by the CBDT and the value and effect of such interpretations/circular. The Hon'ble Supreme Court pointed out that the CBDT has requisite jurisdiction to interpret the provisions of the Act and that being in the realm of executive construction, should ordinarily be held to be binding, save and except where it violates any provision of law or its contrary to any judgment rendered by courts. It was further held that the

reasons for giving effect to such executive construction is not only same as contemporaneous which would come within the purview of the maxim *temporania caste pesto*, even in certain situation a representation made by an authority like Minister presenting the Bill before Parliament may also be found bound thereby.

18.In ***Commr., of Customs vs. Indian Oil Corporation*** (supra), the Revenue challenged the decision of the CEGAT, which held that the Central Board of Excise and Customs (CBEC), had issued a circular on 14.08.1991, in which it was said that demurrage did not form part of the assessable value of the goods imported; the circular was binding on the Revenue and the department could not contend otherwise. While considering the effect of the circular issued by the Board, it was pointed out that the circulars issued by the Board under Section 151A of the Customs Act or Section 37B of the Central Excise Act are generally binding on the revenue; normally the instructions issued by the superior authority on the administrative side cannot fetter the exercise of quasi judicial power and the statutory authority invested with such power has to act independently in arriving at a decision under the Act. However, when there is a statutory mandate to observe and follow the orders and instructions of the Board in regard to specified matters, that mandate has to be complied with. It is not open to the adjudicating authority to deviate from those orders or instructions, which the statute enjoins that it should follow and any order passed contrary to those instructions are liable to be set aside on that very ground. It was further pointed out that the Board has been empowered to issue orders or instructions in order to ensure uniformity in theclassification or in respect of levy of duty and the need to issue such instruction arises when there is a doubt or ambiguity in relation to those matters. However, once the relevant issue is decided by the Court at the

highest level, very basis and substratum of the circular, itself disappears and the law laid down by the Hon'ble Supreme Court will ensure uniformity in the decisions at all levels.

19.Thus the question would be whether the Principal Chief Commissioner of Income Tax was justified in ignoring the Board circulars, which have held the field since 1944, by issuing the impugned clarification, that too, without reference to those circulars. The only answer to this question should be in the negative. That is to say that the Principal Chief Commissioner was bound by the circulars of the Board and the impugned clarification being contrary to the circular of the Board has to be definitely set aside.

21.Though the conclusion arrived at by this court in the preceding paragraphs holding that the impugned clarification could not have been issued contrary to the circulars of the Board, this Court proceeds to examine as to whether in the facts and circumstances of the case principle of diversion of income by overriding title would apply or principle of application of income.

22.In ***CIT, Gujuarat vs. Ashokbhai Chimanbhai*** (supra), it was pointed out that under the Income Tax Act, income is taxable when it accrues, arises or is received or when it is by fixation deemed to accrue, arise or is deemed to be received. Receipt is not only test of chargeability to take; if income accrues or arises, it may become liable for tax.

23.In the said judgment, reference was made to ***Bhogilal Laherchand vs. CIT*** reported in ***28 ITR 919,*** wherein Chagla, C.J., while delivering the judgment referred to the case in ***E.D.Sasson Company Limited vs. CIT*** reported in ***26 ITR 27*** and observed that though income may accrue or arise to an assessee before he actually receives it, income cannot accrue or arise to

him until he acquires a right to receive it; and unless and until there is created in favour of the assessee a debt due by somebody, it cannot be said that he has acquired a right to receive the income. Following passage from the ***E.D.Sasson Company Limited's*** case reads as follows:

"..... income may accrue to an assessee without the actual receipt of the same. It is the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed *debitum in praesenti solvendum in future*.....

Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to rceive the income or that income has accrued to him."

24.In ***CIT vs. Sitaldas Tirathdas*** (supra), the assessee had many sources of income and the chief among them being property, stocks, share in a firm, etc. For the assessment years 1953-54 and 1954-55 the said assessee claimed certain deductions on the ground that under a decree he was required to pay sums as maintenance to his wife and children. The assessee placed reliance on the decision of the Hon'ble Privy Council in ***Bejoy Singh Dudhuria vs. CIT*** reported in ***(1933) 1 ITR 135.*** Those contentions of the assessee was disallowed by the Income Tax Officer, whose decision was affirmed on appeal and on further appeal to the Tribunal, the Tribunal observed that the Income Tax Act does not permit any deduction from the total income in such

circumstances. On appeal to the High Court, it was held that even though there was no specific charge upon the property so long as there was an obligation upon the assessee to pay, which could be enforced in a Court of law is one of the test and it was held that the income to the extent of the decree must be taken to have been diverted to the wife and children and never become the income in the hands of the assessee. The correctness of this decision as well as two earlier decisions in ***Seth Motilal Manekchand vs. CIT*** reported in ***1957 31 ITR 735*** and ***Prince Khanderao Gaekwar vs. CIT*** reported in ***1948 16 ITR 294*** were challenged before the Hon'ble Supreme Court.

25.Thus the test is whether the amount sought to be deducted, in truth reaches the assessee as his income. Though obligations may be there in every case, it is the nature of the obligation which is the decisive fact. Thus if an amount which by nature of the obligation results in deduction, it cannot be said to be a part of the income of the assessee. Thus in cases where income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and behalf of the person to whom it is payable. The above referred decision point out to us the true test which has to be applied and decide whether it is a diversion of income by overriding title or an application of income. The said principle has been tested in cases pertaining to priests and nuns and it would be relevant to refer few decisions in that regard.

31.Thus the legal principles deductable from these decisions is that a monk or nun cannot acquire or have any proprietary rights upon embracing into a religious order, the same operates as a civil death, they can make no contract and incapable of inheriting any assets. It is not in dispute that the

petitioners are the members of the diocese or priest and nuns who have embraced religious order and they are incapable of owning any property. In the preceding paragraphs, the Court has noted as to the true test that should be adopted to ascertain as to whether it is a case of diversion of income or an application of income. To examine this point, it would be necessary to collate the decisions which were referred to with regard to the diversion of income by overriding title, namely, ***Ashok Bhai, Rani Pritam Kunwar and Sital Tirthdas.*** The salaries or fees received by the nuns and priests are sought to be subjected to tax deducted at source on the ground that it is being received as wages or remuneration for the qualification of particular individual and it is on her/his own volition income is diverted to the diocese or congregation to which he/she belongs and it is because of application of income. Thus, we need to apply the correct test to ascertain as to what is the nature of income. As pointed by the Hon'ble Supreme Court in ***Sital Tirthdas's*** case, the correct test is whether the amount from which tax is sought to be deducted, in truth, reaches the assessee as his or her income. The obligations no doubt is there in every case but it is the nature of obligation which is the decisive factor. If these tests are applied to the facts of the present case, there can hardly be any doubt to the fact that the fee paid to those Nuns and Priests never reaches their hands and reaches the congregation or diocese to which they belong.

38.Thus the question would be whether the precepts of Canon Law to which the nuns and priests are bound over could be ignored by the revenue and take a stand that the salaries are paid to the nuns and priests and has to be treated as income in the hands. In the considered view of this Court, the answer to such question should be in the negative. It was argued on behalf of the revenue that the nature of receipts in the instant case would have to be

looked into to determine whether they constitute the income of the member of the religious congregation who received it, the income having been earned by the staff based on their individual capacity and educational qualification, the staff alone have the right to receive the earned income and to deal with the income received and it is only on exercising their discretion the staff allow the monies to be by the Societies and Institutions and on exercising such option only the amounts are paid over by the Government to the Societies and Institutions, therefore, it is clear case of application of income only and in a case of diversion of income at source and therefore, in a diversion of income by overriding title. 39.To test the correctness of this submission once again, we are required to fall back and what would be the test to determine the transaction as a case of application of income or diversion of income by overriding title. When the revenue does not deny the fact that the priests and nuns can own no asset to themselves on account of the precepts of Cannon Law, the obligation which they are bound over cannot be ignored by the Department. On account of the vow of poverty taken by the priests and nuns and by virtue of the operation of the Canon Law, none of them are entitled to own any properties or hold any income to themselves and this being a condition implicit in the religious order, cannot be brushed aside. By virtue of the personal law which operates in the field the income gets diverted directly to the Societies and Institutions even before it reaches the concerned priests or nuns. Therefore the test is not with regard to qualifications or the individual capacities of those priests and nuns but the test in the instant case is whether tax is liable to be deducted at source. When the revenue states that the amounts are paid over by the Government to the Societies and Institutions by virtue of option exercised by the priests and nuns, it is required to be seen as to whether it is an option exercised by the priests and nuns post receipt of the salaries.

Factually it has been established that as soon as they become members of the religious order the precepts of Canon Law operate by virtue of said personal law there is no exercise of option by the priests or nuns but it is an obligation as per their codified law. This has been taken into consideration by the Central Board and has clarified that fees received by the missionaries has been made over to the congregation concerned, there is overriding title to the fee which would entitle the missionaries to exemption from payment of tax. The revenue has not been able to point out as to the incorrectness of the circulars issued by the CBDT nor it has been demonstrated as to how and in what manner it is conflict with any decided case. In such circumstances, the circulars issued by the CBDT are binding upon the respondents, as long as these circulars and clarifications having not been withdrawn or modified, they have to be followed by the officers subordinate to the Central Board. Even in the impugned notification the Income Tax Department has not dealt with circulars which have been holding the field since 1944 nor there is any attempt to distinguish the earlier decision taken nor it is pointed out that those circulars are contrary to any settled legal position.

45.For all the above reasons, all the writ petitions are allowed and it is held that no tax can be deducted at source from the salaries and other monetary benefits effected to persons who are the members of the religious congregation and it would be sufficient if the head of the Institution concerned certifies the names of the staff members, who were members of the religious body and the period during which they have served and the designation of the post. No costs. Consequently, connected miscellaneous petitions are closed.

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "B", MUMBAI
ITA NO.3232/Mum/2012

Assessment Year: 2008-09

Mumbai International Airport P. Ltd

Date of Order: 30/11/2016

14.6. We have gone through the orders passed by lower

authorities, submissions made and documentary evidencesproduced before us by both the sides as well as judgements

relied upon by both sides. In our considered opinion, we have

been called upon to decide the following three issues to decide

this ground:

(1) Whether, the amount of PSF-SC collected by the

assessee will be taxable in the hands of the assessee

merely because the same has been offered to tax by

the assessee during the course of assessment

proceedings irrespective of correct position of its

taxability in accordance with law?

(2) Whether, office memorandum / clarifications issued by

the CBDT or MOCA observing that the aforesaid

amount is taxable in the hands of the assessee have

been issued after considering provisions of Income-tax

Act and whether the opinion expressed therein is

binding upon the appellate authorities including the

Income-tax Appellate Tribunal?

(3) Whether, the impugned amount of PSF-SC collected by the assessee company on behalf of MOCA as per the relevant regulations for the purposes of meeting security expenses can be characterised as income in the hands of the assessee company and made liable to tax in its hands as per provisions of Income Tax Act, 1961?

14.17. Thus, in view of the aforesaid legal discussion and facts of this case as discussed above, it is held that the amount in question cannot be taxed in the hands of the assessee merely because the same was offered to tax during the course of assessment proceedings under certain circumstances. 14.18. The aforesaid discussion takes us to the second issue wherein we have been called upon to decide about the binding legal force of the opinion expressed by CBDT and MOCA vide their office memorandum/ instructions for determining taxability of the impugned amount. It is admitted fact on record that the assessee company collected PSF-SC in view of the order issued by MOCA vide its order dated 09th May, 2006. The terms of the order have been modified / amended from time to time as per the requirements. One such order issued

by MOCA was issued on 20th June, 2007. Subsequently, CBDT issued an Office Memorandum dated 30/06/2008 in pursuance to the request made by the concerned officials of MOCA regarding taxability of PSF–SC, wherein it has been observed that since the assessee company was collecting this amount in the course of business and assessee was rendering facilitation and securities services whether in-house or outsourced, therefore, the amount collected by the assessee in the form of PSF-SC was in the nature of income of the assessee and liable to be taxed in its hands. In support of its view, reliance has been placed by the Board on the judgement of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs CIT 87 ITR 547 (SC) with a view to fortify its opinion.

14.19. The assessee challenged before us, the validity and binding force of the aforesaid Office Memorandum issued by the CBDT and clarification received by MOCA. It has been noted by us firstly that in none of these documents, thereseems to have been made any application of mind by the concerned authorities while expressing their opinion. None of the authorities have considered the aspect that the impugned amount was collected in the fiduciary capacity by the assessee. None of the authorities have stated that under what

provisions of law, the aforesaid amount can be brought to tax in the hands of the assessee. The CBDT in its Office Memorandum has made a reference to the judgment of the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (supra). But facts of that case have not been discussed. The aforesaid judgment has different facts, wherein, the amount of sales-tax was received by the said assessee and deposited in its bank account. The funds got mixed in assessee's accounts. Thus, in case of non payment by the said assessee, the same became income of the seller (the said assessee), whereas the facts are totally different in the case before us. The amount here was collected purely in fiduciary capacity and the same was deposited in escrow account on which assessee had no control at all; the assessee had no discretion at all upon its usage. No reasoning has been made out by the CBDT while issuing its opinion as to how the said judgment was applicable on the facts of this case. It is noted by us that aforesaid judgment came up for consideration before many courts wherein its true meaning and scope of its applicability was explained time to time. In one such matter having similar facts as to the assessee before us, Hon'ble Allahabad High Court explained correct

application of aforesaid judgment in the case of CIT vs. SitaRam Sri Kishan Das 141 ITR 685 (All). 14.20. Thus, at the outset, it is clearly visible that both the authorities expressed their opinions without proper application of mind and without examining the nature of impugned receipt within the framework of provisions of Income-tax Act, 1961.

14.24. Thus, taking guidance from the aforesaid legal discussion as has been clarified by the Hon'ble jurisdictional High Court as well as by Hon'ble Supreme Court, it is clear that the Office Memorandum issued by CBDT to MOCA cannot hold an amount as taxable, if the same is otherwise not taxable as per the provisions of the Income-tax Act, 1961. Further, as far as the clarification issued by MOCA is concerned, it is noted that the role of MOCA was confined to issuing Standard Operating Procedures and other guidelines to the airport operators to ensure that funds collected by the assessee company in the fiduciary capacity on behalf of MOCA are properly kept and disbursed for the designated purposes only. It has no jurisdiction to determine the taxability of the impugned amount. It clearly had no jurisdiction in holding the same as taxable and, therefore, to that extent its order / clarification has no authority in the eyes of law and the same has been rightly ignored by the assessee as well as by the

appellate courts while determining the taxability of the impugned amount.

14.25. Thus, the aforesaid discussion take us to the third issue wherein we have been called upon to decide whether the impugned amount of PSF-SC collected by the assessee company on behalf of MOCA as per the relevant regulations for the purposes of meeting security expenses can be characterised as income in the hands of the assessee company and made liable to tax in its hands. Turning back to the facts of the case before us, if we apply the aforesaid principles, we will find that the impugned amount cannot be treated as taxable income in the hands of the assessee. If we apply the first principle, we find that as soon as the amount was collected from the passengers @ Rs.200/- per ticket, a portion of it, i.e. Rs.130/- per ticket became payable to CISF and/or any other agency designated for the purposes of security at the airport. The same was liable to be deposited in a separate 'Escrow Account' and the assessee had no right, whatsoever, in the same account. The aforesaid amount was axed or sliced at its very source. The amount was permitted or directed to be collected from the passengers with this clear understanding and prior stipulation that 65% of the same is meant for security agencies. Thus, the

assessee merely acted as a collection agent. Thus, applying the first principle, the impugned amount would fall in the category of diversion of income. As far as the other three principles are concerned, the crux of these three principles is to find out whether the assessee had, in substance, earned any income. In other words, these three principles suggest application of the concept of 'real income', which suggests that unless the income has been earned by a person in real sense, the same cannot be held as taxable income. There has to be first income and only then its taxability could be determined. It is noted by us that in the facts before us, no portion of the amount collected on behalf of AAI / MOCA is reported to have been retained by the assessee as its income in as much as nothing belonged to it. Thus, the impugned amount is clearly not taxable in the hands of the assessee.

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 34

Case :- WRIT TAX No. - 773 of 2013

Petitioner :- Commissioner Of Income Tax, Central Circle, Kanpur
Respondent :- Income Tax Settlement Commissioner, IV Floor And Another
Counsel for Petitioner :- Ashok Kumar(S.S.C.in.Tax),Bharat Ji Agarwal,S. Chopra, Manish Goel
Counsel for Respondent :- S.D. Singh,Ashish Bansal,Nishant Mishra,S.K. Garg

Hon'ble Sudhir Agarwal,J.
Hon'ble Dr. Kaushal Jayendra Thaker,J.

6. None of the above authorities therefore, bars an Assessee from admitting or agreeing for a higher amount of disclosure then what is mentioned in the application, during course of proceeding before ITSC, if it is a part of negotiation before ITSC and Assessee in a bonafide manner, to purchase peace, agree for such a suggestion made by ITSC. The only restriction is that, whatever disclosure has been made by Assessee in his application or subsequently accepted before ITSC, should not be an income which was disclosed before Assessing Officer earlier or has already been discovered by income-tax authorities establishing the same to be an undisclosed income supported with due material. In all other cases where jurisdiction has been exercised by ITSC and order has been passed, such enhancement has been held valid.
47. Even otherwise, we should also keep in mind that scope of judicial review in respect of final orders of ITSC is extremely limited. ITSC is a kind of statutory authority. Background facts with regard to consititution of ITSC have been considered in Shreeram v.Settlement Commission 118 ITR 169. It was held that purpose is to settle a tax dispute expeditiously which will serve cause of nation needing huge resources for its vast welfare schemes. ITSC is to be manned by persons of impeccable integrity and unquestioned competence. Great expertise and greater responsibility in the decision-making process are integral parts of its independent functioning. It has to free itself from extraneous considerations or alien influences. It is not reasonable for an Assessee or Revenue to expect that ITSC should function as if it is a mere rubber stamp or yet another limb of ordinary executive mechanism of tax-gatherers. Neither Revenue nor taxpayer can, therefore, play truant with that high, responsible, purpose-actuated an result-oriented mechanism.
48. In Director of Income-Tax (internatinoal Taxation) versus Income-Tax Settlement Commission and others (2014) 365 ITR 108(Bom), a Division Bench held that a suggestion made by ITSC, if accepted by Assessee to bring an end that dispute with Revenue, it cannot be said to be a case of revised application or multiple disclosures by Assessee. Assessee has not detracted disclosure made in application but further amount offered by ITSC, as a gesture of bonafide or goodfaith, if accpeted by Assessee, cannot be treated at par with a case where Assessee has withdrawn earlier application and filed another application disclosing additional income. Acceptance of certain amount before ITSC on its suggestion would not amount to, as if, original application did not contain full and true disclosure.
49. Nothing of that sort has been shown to us also during course of arguement by Shri Manish Goel as to how application filed by Assessee did not contain true and full particulars discloses of his income.
50. So far as valuation of stock is concerned, even on broader side we asked him to show as to how an inventory of stock with Assessee by itself can be said to be an "income". Nothing could be substantiated by him to show that valuation of stock by itself can be treated to be "income", liable for tax under Act 1961. The entire dispute on account of additional income accepted by Assessee before ITSC is in respect to valuation of stock. Act 1961 does not contain any specific provision for valuation of stock. Profit and gain, however, must be computed in the manner provide by Act 1961. It is the duty of Officer concerned to determine profit and loss of Assessee

according to correct principles of accounting. For that purpose he may depend upon nature of business and its special character, allow certain adjustments but primary purpose and object is to deduce correct income, profit and gains. The Revenue Official cannot do without taking into account value of stock entered at the beginning and at the end of the year by assertaining difference between two.

51. In Commissioner of Income Tax versus British Paints India Ltd. (1991) 188 ITR 44, Court said, that a well recognized principle of commercial accounting to enter in the profit and loss account is the value of stock-in-trade at the beginning and at the end of the accounting year at cost or market price whichever is lower. Court cited an observation of Lord President in Whimster and Co.versus CIR (1925) 12 Tax Cases 813, It says: "..... in computing the balance of profit and gains for the purposes of incomes-tax, ...two general and fundamental common places have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profits & loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable and in conformity with the rules of the Act, 1961, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, principles of commercial accounting require that in the profit and loss accounts of merchant's or manufacturer's business, the values of the stock- in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is lower, although there is nothing about this in the taxing statute....."

52. In Commissioner of Income Tax versus British Paints India Ltd.(Supra) Court also said, where market value has fallen before the date of valuation and on that date, market value of article is less than its actual cost, Assessee is entitled to value the articles at market value and thus anticipate loss which he will probably incur at the time of sale of goods.

53. Valuation of stock-in-trade at cost or market value, whichever is lower, is a matter entirely within the discretion of Assessee. But whichever method he adopts, it should disclose a true picture of his profit and gains. If, on the other hand, he adopts a system which does not disclose true state of affairs for determination of tax, even if ideally suited for other purposes of his business, such as the creation of a reserve declaration of dividends, planning and the like, it is duty of Assessing Officer to adopt any such computation as he deems appropriate for proper determination of true income of Assessee. This is not only a right but a duty that is placed on the Officer, in terms of first proviso to Section 145 which concerns a correct and complete account but which, in the opinion of Officer does not disclose a true and proper income.

54. In Chainrup Sampatram versus Commissioner of Income Tax (1953) 24 ITR 481 (SC), Court said that it is not correct to assume that valuation of closing stock at market rate has, for its object, to bring into charge any appreciation in the value of such stock. The true purposes of crediting the value of unsold stock is to balance the cost of those stock entered on the other side of the account at the time of their purchase so that cancelling out of entries relating to the same stock from both sides of the account would leave only the transaction on which there have been actual sales in the course of the year, showing profit or loss, actually realised on the year's trading.

55. In Shakti Trading Company versus Commissioner of Income Tax (2001) 250 ITR 871 (SC), Court observed that as no prudent trader would care to show increased profit before its actual realization, that is the theory underlying the rule that closing stock is to be valued at cost or market price whichever is lower. (Cost here means raw material plus expenditure).
56. In Commissioner of Income Tax versus Bannari Amman Sugars Ltd. (2012) 349 ITR 708 (SC) Court observed that valuation of opening and closing stock is a very important aspect of ascertainment of true profits. An improper valuation could result in rejection of books of account though all that is needed for rectifying it, is to make an addition or necessary adjustment based on proper valuation. Valuation of stock, whatever be the method, should be consistently followed. Method of valuation is generally at cost or the market value, whichever of the two is lower. However, it is open to the Assessing Officer to probe accounts so as to arrive at the real income.
57. Profits of business could only be ascertained by comparison of assets and liabilities of the business at the opening and closing of the accounting year. The method that an Assessee adopts for closing is an integral part of accounting, within the meaning of section 145. There are different methods of valuation of closing stock. The popular system is cost or market, whichever is lower. However, adjustments may have to be made in the principle, having regard to the special character of assets, the nature of the business, the appropriate allowances permitted, etc., to arrive at taxable profits.
58. In Commissioner of Income Tax versus Ponni Sugars and Chemicals Ltd.(Supra) (2008) 306 ITR 392 (SC) closing stock of incentive sugar should be allowed to be valued at levy price, was upheld though it was less than the cost of manufacture of sugar, this is one example of adjustment in special cases.
59. Similar views have been expressed in Commissioner of Income Tax, Delhi versus Woodward Governor India Private Limited (2009) 13 SCC 1 observing that Act 1961 makes no provision with regard to valuation of stock. The ordinary principle of commercial accounting requires that in profit and loss account, value of stock-in-trade at the beginning and at the end of the accounting year should be entered at cost or market price whichever is lower. This is how business profits arising during the year need to be computed. Court observed "For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profit/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of closing stock is not brought into account, as no prudent trader would care to show increased profits before actual realisation. This is the theory underlying the rule that closing stock is to be valued at cost or market price, whichever is lower. As profits for income tax purposes are to be computed in accordance with ordinary principles of commercial accounting, unless such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining unsold at the end of the accounting year and carried over to the following year's account in a continuing business are not brought to the charge as a matter of practice, though as stated above, loss due to fall in the price below cost is allowed even though such loss has not been realized actually.

60. There are dozen of authorities on the question as to how value in stock is to be taken but our purpose is not to write down a thesis on

***the subject but only to highlight the fact that as a matter of fact, method of determination of valuation of stock in the case in hand by taking tag price of the goods lying in stock was something which has never been recognized either in any recognized system or for the purposes of computation of tax under the fiscal statute*.** Revenue in the case in hand determined valuation of stock on the basis of tag price of goods and raised dispute. If contested, Assessee might have got success to a larger extent but his intention appears to be quite bonafide and reasonable that he wanted to give a quietus to the entire dispute, and therefore, whatever determination was made giving a marginal discount towards commision, when it was offered by ITSC to Assessee to accept as additional income, he accepted and agreed for payment of tax thereon

61. Before ITSC it was not the case of Revenue that valuation of stock represented income not already disclosed by Assessee, or that the Assessee has concealed income by under valuation of stock.

62. Be that as it may, real objection on the part of Revenue raised before us is the acceptance by Assessee of an offer made by ITSC during proceedings for accepting an additional income and submission is that it amounts to withdrawal of application disclosing particular income and substituting the same by another quantum of income. This submission, in our view is not correct. During proceeding before ITSC, it has ample power, to go for such offer as that is the process implicit in 'settlement' and such settlement cannot be read or interpreted in a restricted and narrow manner as suggested by Shri Goel on the part of Revenue.

63. Looking to these facts in its entirety, we do not find any manifest error or infirmity in the decision taken by ITSC being contrary to any provision of statute so as to warrant interference.

64. Even otherwise, Scope of judicial review against order passed by ITSC is extremely limited. Court would not be justified in re-appreciating findings based on record. In Jyotendrashinhji versus S.I.Tripathi (1993) 201 ITR 611/68 Taxman 59, it was held, if the order of ITSC is contrary to any provision of Act or is directed on account of bias, fraud and malice, only then judicial review is permissible and not otherwise. Similar view was expressed in Union of India & Ors.v.Ind-Swift Labouratories Ltd. (2011) 4 SCC 635 where Court said that an order passed by Settlement Commission could be interfered with only if said order is found to be contrary to any provisions of Act.

65. In the ultimate result, we are of the view that order of ITSC in the case in hand warrants no interference as there is no contravention of any provision of statute and ITSC has not committed any manifest error so as to warrant interference in writ jurisdiction under Article 226 of the Constitution of India.

66. Writ petition lacks merits and is dismissed.

67. No order as to costs.

Order Date:29.8.2016

IB

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

Kamdhenu Real Estate's Pvt. Ltd.,

/ ITA No. 1471/PN/2014

Assessment Year : 2009-10

Date of Pronouncement : 16-09-2016

The second ground of appeal relates to disallowance of payment

of compensation to flat owners for delay in handing over of possession to the flat owners. The authorities below have disallowed the claim of

assessee for the following reasons :

i. The original agreement executed between the assessee and the

flat owners does not contain any covenant with respect to

payment of compensation for delay in handing over of possession

of flats.

ii. The assessee has self assumed the liability of payment of

compensation. The delay in possession of flat was for few days

and for reasonable delay in handing over of possession of flats no

compensation was required to be paid.

iii. The assessee could not show commercial expediency for payment

of compensation.

iv. If at all there was liability to pay it was on account of 'Breach of

contract' for which the payment is in the nature of penalty and

not compensation.

9. In so far as the objection raised by the Department that there was no covenant in the agreement for payment of compensation is concerned, we observe that the assessee being a developer and builder of flats was governed by the provisions of Maharashtra Ownership Flat Act, 1963. As per the provisions of section 8 of the said Act the assessee was liable to refund the amount paid by the allottee of the flat with interest in case of failure to give possession within the specified time. hus, a perusal of the above provisions of the said Act clearly show that whether the covenant for payment of compensation for delay in handing over of possession of flat is contained in the agreement or not, the assessee was bound to compensate the flat owners in the case of delay in handing over of possession of the flats beyond a reasonable time.

10. The Mumbai Bench of the Tribunal in the case of M/s. Malabar Industries Pvt. Ltd. Vs. ITO (supra) has upheld the observations made by the Commissioner of Income Tax (Appeals) that even if there was no clause permitting payments of compensation to the original allottees in case of cancellation of bookings, the payment of compensation should be allowed as deduction on the principle of business expediency. It is a well settled proposition that business expediency has to be decided by

the assessee and not the Department. The ld. AR of the assessee has shown that under the provisions of Maharashtra Ownership Flat Act,

1963 the assessee would have been liable to refund the amount deposited by the allottees of the flats along with interest @ 9% from the date of deposit for delay in handing over of possession of flats, on the demand of flat owners. In that eventuality the liability of the assessee would have been much more than what has been paid by the assessee as compensation. The assessee was justified in compensating the flat owners as there was delay of more than 20 months in handing over of possession of flats from the date specified in the agreement between the assessee and the flat holders. As per the agreement the due date for handing over of possession was on or before 31-05-2008, whereas, the assessee could give possession of the flats to the flat holders in February-March, 2010.

The Courts are now taking a very serious view against the delay in handing over of possession of flats by the builders. The Consumer Courts as well as Civil Courts are directing the builders, promoters to pay heavy compensation to the flat holders for delay in handing over of possession of flats. Recently, the Parliament has enacted the Real Estate (Regulation and Development) Act, 2016 to leash the builders and put on hold the unethical practices followed by developers to harass the consumers. The Real Estate Act also aim to curb the practice of delay in handing over of possession of flats to the flat

holders. Section 18 of the Real Estate (Regulation and Development) Act, 2016 provides for the payment of compensation by the developer to the allottees of the flats in case the developer fails to complete or is unable to give possession of the apartment/flat, in accordance with the terms of the agreement on or before the specified date. The relevant extract of the provisions of section 18 are reproduced here-in-under :

"18. (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be

prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act."

Thus, the assessee was justified in compensating the allottees of the flats for delay in handing over of possession. The amount paid by the assessee was certainly on account of business expediency. Another reason for disallowing the payment of compensation was that the amount paid by the assessee was in the nature of penalty for Breach of contract. The Delhi Bench of the Tribunal in the case of DCIT Vs. M/s. Achiever Builders (P) Ltd. (supra) where the Department

disallowed the amount paid by the assessee to the customers for delay in handing over of possession of properties holding it to be penal in nature held, that the amount paid by the assessee to customers is compensatory in nature and not penal. The compensation was paid for delay in handing over of possession of the property, the liability to pay such compensation arose in the course of business of assessee. In the present case the assessee paid compensation to the assessee under similar circumstances and not out of any liability arising from invoking of penal provisions of any statute. Thus, the compensation paid by the assessee cannot be held to be penal in nature.

IN THE INCOME TAX APPELLATE TRIBUNAL,

MUMBAI BENCH "A", MUMBAI

ITA No.310/M/2012

Assessment Year: 2008-09

M/s. Ashish Builders Pvt. Ltd.

Date of Pronouncement : 23.09.2016

A) Interest on unsecured loans and fixed deposits: It is the claim of the assessee that the entire interest expenditure is allowable as it is a time related fixed finance cost on the borrowed capital. The claim of the assessee should be allowed in full in view of the various decisions on

this issue. To start with, we perused the order of the Tribunal in the case of Rohan Estates Pvt. Ltd. (supra) which is one of the sister concerns of the assessee. We perused the para 3.2 of the said order of the Tribunal and find it is a self explanatory and the decision of the Tribunal supports the case of the assessee. Under comparable facts of the assessee, interest cost was allowed in favour of the assessee relying on binding jurisdictional High Court judgment in the case of M/s. Lokhandwala Construction Industries Ltd. (supra). We have also perused the said binding High Court judgment in the case of M/s. Lokhandwala Construction Industries Ltd. (supra) and find the same is relevant for the following conclusion – "construction project undertaken by the assessee builder constituted its stock in trade and the assessee was entitled to deduction under section 36(1)(iii) of the Act in respect of the interest on the loan obtained for execution of said project". Relying on the another judgment of Hon'ble Bombay High Court in the case of Calico Dyeing and Printing Works 34 ITR 265 Bombay, Hon'ble Bombay High Court concluded that the interest expenditure relating to the borrowed capital is allowable under section 36(1)(iii) of the Act. Considering the above settled position in the matter we are of the opinion that the assessee is entitled to claim entire interest deduction relatable to the capital borrowed and utilized for business purposes in the year under consideration. Resultantly, we disapprove the decision of the Assessing Officer/CIT(Appeals) in transferring the interest expenditure to WIP account. Therefore, assessee is justified in debiting the same to the P&L accounts of the

respective assessment years. Thus, we order the Assessing Officer to accept the claim as made in the return of income. Accordingly, this part of the ground No.1 is allowed in favour of the assessee.

B) Regarding advertisement expenditure amounting to Rs.17,92,052/- as stated by Ld. Counsel, we perused the order of the Tribunal in the case of "M/s. Vardhaman Developers Ltd." 35 Taxman.com 370 and we find such expenses are found allowable as discussed by the Tribunal in the para 4 of the said order of the Tribunal. From the above it is evident that the advertisement expenses is an allowable expenditure in the year of spending as the same is the nature of selling cost of the construction business. Considering the same, we are of the view that the finding of the Assessing Officer and the decision of the CIT(Appeals) on this issue is required to be reversed and allow the same in favour of the assessee. Regarding other claim of expenditure on account of brokerage and loan processing fee, we find the said claims should be allowed in favour of the assessee as they are otherwise found allowable under section 37(1) of the Act. In our view, these expenses constitute some kind of administrative expenses. The said administrative expenses are allowable as they are relatable to the business activities of the assessee. As such, it is not the Assessing Officer's case that the claims are ingenuine and not qualified the conditions specified in the provisions of section 37 of the Act.

In the result, the ground No.1 raised by the assessee is allowed in favour of the assessee.

IN THE INCOME TAX APPELLATE TRIBUNAL

"K" Bench, Mumbai

M/s. Dow Agrosciences

India Private Limited
I.T.A. No. 8092/Mum/2011

(Assessment Year 2005-06)

Date of Pronouncement 20.9.2016

We have heard the parties on this issue. It is the contention of the assessee that the advances have been received from its regular customers through banking channels and the same has been adjusted against subsequent sales made to those customers in most of the cases. The assessee has also submitted that due to high volume of customers, it could not obtain confirmation letters from all the parties. Further Ld A.R submitted that the assessee cannot also enforce the customers to furnish their PAN. We notice that learned DRP has directed the Assessing Officer to delete the addition , if the advances have been adjusted against subsequent sales made to the parties. We are of the view that the direction given by learned DRP is reasonable one. *At the same time, there is merit in the contention of the assessee that the assessee cannot enforce its customers to furnish their PAN*.

However, if advances have been adjusted against subsequent sales, it would be reasonable to accept the genuineness of the advances since they have been received from regular customers who were not related parties of the assessee.

Accordingly we direct the AO to delete the addition, if the advances have been adjusted against the subsequent sales

Karnataka high court in case titled as CIT vs G Balraj

Order dated 31/08/2016

On issue of difference between sub contract and joint venture and related tax implications under business head and TDS chapter Held in favor of assessee by ruling that:

i) **That contract of simple sharing of proceeds between two persons cannot be labeled as sub contract for purposes of section 194C in oppugnation to joint venture which is revenue neutral; Otherwise it may lead to clear Double taxation where both joint ventures have included their shares in their returns; (onus on revenue to prove contrary)**

ii) **That expense u/s 40(a)(ia) cannot be disallowed when there is no claim for any expense (refer 323 ITR 351)**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 728 OF 2014
WITH
INCOME TAX APPEAL NO. 777 OF 2014

M/s. KSB Pumps Ltd. .. Respondent

DATED : 5th OCTOBER, 2016.

9. The grievance of the Revenue before us is that the acquisition of computer software programme such as SAP in terms of Income Tax Rules, is entitled for depreciation. In that view, it is submitted that fees paid to M/s. KSB Germany cannot be considered to be a revenue expenditure.

10. We find that the CIT(A) as well as the Tribunal have concurrently rendered a finding of fact that there was no acquisition / purchase of the SAP programme by the respondent assessee. Consequently, occasion to apply depreciation in accordance with the Income Tax Rules would not arise in the present case.

11. Be that as it may, the impugned orders of the CIT(A) as well as the Tribunal record the fact that the professional charges paid for upgrading the software has made the respondent assessee's operation more efficient. It did not result in any profit making apparatus coming into existence.

12. Our attention was also drawn to the decision of this Court in ***Commissioner of Income Tax Vs. Geoffrey Manners & Co. Ltd. 226 Taxman 135*** wherein in the context of installation of software programme, the Court *inter alia* has observed as under :*"*

12. …. The assessee in such cases installs the computers. This technology is now said to be acceptable in changing world. The rapid advancement of research also contributes a small degree of endurability, but that by itself does not mean that the expenses incurred cannot be revenue in nature. Since technology advancement is an aspect which must be taken judicial note of, so also, machinery becoming obsolete that there is necessity of acquiring further technology. This is to meet the growing competition and considering trends in the market. Therefore, such expenditure will have to be treated as revenue expenditure."

13. Therefore, in view of the Court taking note of rapid technological development, purchase of technology may not lead to any enduring benefit as the same may have to be upgraded very soon. In any case, the finding of fact in this case is that there is no purchase of technology by the respondent assessee.

14. In the above view, the impugned order essentially renders a finding of fact that question as proposed does not give rise to any substantial question of law. Thus, not entertained.

15. Therefore, both the appeals are dismissed.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 516 OF 2015
Commissioner of Income Tax-3 } Appellant
versus
M/s. Idea Cellular Ltd. } Respondent

DATED :- SEPTEMBER 30, 2016

We have carefully perused the memo of the appeal. We have also perused the order of the assessing officer and that of the first appellate authority. Mr. Malhotra has elaborately taken us through these orders to submit that the assessing officer found from the record itself and particularly from a document, namely, a letter or response from the assessee that the purpose of the expenditure cannot be said to be other than bringing up a capital asset into existence. The fact that later on the site was not chosen for hoisting the tower is immaterial. However, we find that the tribunal applied the correct test. The tribunal found that there is no dispute that the expenditure in question was incurred for the purpose of construction of a cellular tower, but the project was then abandoned due to the reason that the site was not suitable. The reasons assigned by the assessing officer and the first appellate authority are unsustainable, according to the tribunal for the simple reason that cellular towers were being erected for the purpose of assessee's own business of providing cellular services to the customers. The towers are meant for the business of providing cellular services. It is by utilising these towers that such services are provided. It is not an independent source of income. It is only to make the cellular services provided more efficient, convenient and profitable. When the towers are not exclusively meant for leasing out to third parties for earning the revenue, but used for transmission of telephone signals of assessee's own cellular services, then, it cannot be said that the towers, which are used for the assessee's own business, are new source of income. A cellular tower can be a new independent source of income, if it is erected exclusively for leasing out to the other operators. However, on facts, this was not the position and the tribunal, therefore, rightly concluded that in series of decisions, the High Courts and the Hon'ble Supreme Court of India has laid down the principle that if an expenditure is incurred for

doing the business in a more convenient and profitable manner and has not resulted in bringing any new asset into existence, then, such expenditure is allowable business expenditure. In the present case, no new business was set up, but towers in addition to which were already set up were proposed at site, which project was later on abandoned. 10. We do not find that the tribunal has committed any perversity or applied incorrect principles to the given facts and circumstances. When the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that questions (a) and (b), as pressed, are substantial questions of law. The appeal is devoid of merits and it is dismissed. There would be no order as to costs.

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 28 OF 2016
THE PR. COMMISSIONER OF INCOME
TAX, PANAJI. ... Appellant
Versus
M/S. PUTZMEISTER INDIA PVT. LTD., ... Respondent

Date:- 26th September, 2016

We have considered the submissions of the learned Counsel. With the assistance of the learned Counsel, we have also gone through the record. The learned CIT(A) while examining the challenge to the disallowing of such expenses claimed by the respondent has come to the conclusion that as the appellant-Revenue has failed to challenge the authenticity of the vouchers produced by the respondent, as well as the agreement between the parties, the question of disallowing such expenses would not arise. The CIT(A) has examined the materials on record to come to the conclusion that there was no challenge to the genuineness of the expenses incurred by the respondent which are stated to be towards advertisements.
The ITAT, whilst examining the appeal preferred by the appellants has confirmed such findings of fact arrived at by the CIT(A) to come to the conclusion that as the appellant-Revenue has not disputed the genuineness of such payment, the question of disallowing such expenses would not at all arise. In such circumstances, we find that

the fact finding Authorities have categorically come to the conclusion that the amounts were actually spent towards advertisements as the genuineness thereof was not disputed by the appellant and, as such, there are no substantial questions which arise for consideration in the above appeal under Section 260A of the Income Tax Act. The learned Counsel appearing for the appellants, based on the material on record, was unable to point out that such findings of fact arrived at by the Authorities were by misreading or overlooking any specific material which would disclose that the genuineness of such payments were doubtful. In such circumstances, as there is no perversity in such findings of fact, there are no substantial questions of law for consideration in the present appeal under Section 260A of the Income Tax Act.

GuJARAT HIGH COURT TAX APPEAL NO. 1905 of 2008
With
TAX APPEAL NO. 1906 of 2008
With
TAX APPEAL NO. 1605 of 2009
COMMISSIONER OF INCOME TAX-III....Appellant(s)
Versus
PARLE INTERNATIONAL LTD....Opponent(s)

Date : 08/08/2016

"**Tax Appeal No. 1905 of 2008**
1. Whether the Appellate Tribunal has not exceeded its jurisdiction while passing the order dated 28.3.2008 and thereby deleting the addition sustained by the CIT(A), being addition on account of goodwill of Rs. 47,02,500/which
was shown in the agreement
and Rs. 4,70,25,000/being
30% of the value
of Rs. 15,67,50,000/?
2. Whether the Appellate Tribunal has correctly appreciated the facts available on

record so as to delete the addition sustained by the CIT(A), being addition on account of
goodwill of Rs. 47,02,500/which
was shown
in the agreement and Rs. 4,70,25,000/being
30% of the value of Rs. 15,67,50,000?

Tax Appeal No. 1906 of 2008

Whether the Appellate Tribunal is right in
law and on facts in not confirming the
addition of Rs. 8,30,77,000/made
by the
Assessing Officer on account of goodwill ?"

11. We have heard learned counsel for both the sides and perused the documents on record. It is an undisputed fact that all transactions were supported by duly executed legal Agreements, having been acted by both the parties. Under the circumstances, the Revenue had no right or legal justification to doubt its genuineness, particularly when, there was no material on record to support the stand of Revenue.

12. In the case of ***Mangalore Ganesh Beedi Works*** *(supra)*, the Apex Court has categorically held that the I.T. Act does not clothe the taxing authorities with any power or jurisdiction to rewrite the terms of the Agreement arrived at between the parties with each other at arms length and with no allegation of any collusion between them.

13. Considering the facts of the case and the principle laid down in the aforementioned judgment, we are of the opinion that the Tribunal has not committed any error in allowing the appeal filed by assessee. Consequently, we answer all the questions raised in Tax Appeal Nos.1905/2008 and 1906/2008 in favour of the assessee and against the Revenue.

IN THE HIGH COURT OF DELHI AT NEW DELHI 10. +
ITA 161/2016
NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA LTD. ..... Appellant Through: Mr. M.S. Syali, Senior Advocate with Mr. Satyen Sethi and Mr. Arta Trana Panda, Advocates. versus
COMMISSIONER OF INCOME TAX, DELHI-XI & ANR. ..... Respondents

2. On 23rd February, 2016, while admitting this appeal the Court framed the following question of law for consideration:
"Whether on the facts and circumstances of the case and in law, the Special Bench was right in law in holding that the Appellant did not incur the liability to pay interest to Alimenta, directed to be paid by the decree dated 28.1.2000?

17. The reasoning of the Special Bench of the ITAT in the impugned order is that under the mercantile system of accounting, a deduction can be granted only where the incurring of liability is a certainty. A distinction has been drawn between a contractual liability and a statutory liability. The latter is said to be incurred on the mere issuance of a demand notice which becomes deductible with the issuance of such notice. In such a case, the fact that the Assessee may have raised a dispute against such a demand "does not ruin the incurring of liability." It arises only "when such a claim is either acknowledged or in a case of non-acceptance when a final obligation to pay is fastened coupled with the claimant acquiring a legal right to receive such an amount." It is further noted that "a legal obligation to pay is attached on an Assessee when a competent court passes order and a suit is decreed against him and not during the pendency of litigation."
18. On the basis of this reasoning, it was concluded that as a result of the stay order granted by the DB of this Court, the liability of NAFED to pay interest @ 18% to Alimenta remained suspended from the date of such stay. It is stated that it is only upon passing of the consequential judgment by the DB of this Court in September, 2010 that NAFED incurred a legally enforceable liability to pay interest to Alimenta. Reference was made by the ITAT to the decisions in ***CIT v. Hindustan Housing & Land Development Trust Ltd.(1986) 161 ITR 524 (SC)*** and ***Jasjeet Films (P) Ltd. v. CIT (2007)* 165 *Taxmann* 599 *(Del)***. The alternative point of view regarding the deduction being hit by Section 40(a)(i) of the Act was held to be non-applicable "as the underlining condition for its applicability, being the otherwise eligibility of deduction for expense, becomes wanting." 19. The Court is

unable to agree with the above reasoning of the ITAT as it runs contrary to the well-settled legal position explained by the Supreme Court in several decisions. In ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association (1992) 3 SCC 1***, the effect of an interim order was explained as thus: "While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. **It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence**." (emphasis supplied) 20. In ***Haji Lal Mohd. Biri Works v. CIT (1997) 3 SCC 659 SC*** it was explained by referring to the decisions in ***Kedarnath Jute Mfg. Co. Ltd. v. CIT (1972) 3 SCC 252*** and ***CIT v. Kalinga Tubes Ltd. (1996) 2 SCC 277*** that "when the assessee is following mercantile system of accounting, in case of sales tax payable by the assessee, the liability to pay sales tax would accrue the moment the dealer made sales which are subject to sales tax and, at that stage, the obligation to pay the sales tax arises and the raising of the dispute in this connection before the higher authorities would be irrelevant."

23. In the present case, with the Award having been made rule of the Court by a learned Single Judge of this Court, the mere fact that the said judgment and decree was stayed by a DB would not relieve NAFED of its obligation to pay interest in terms thereof to Alimenta. Such liability commenced in the previous year in which the said judgment and decree was passed by the learned Single Judge. To borrow the phraseology of the Supreme Court in ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association*** (*supra*), it cannot be said that merely because there is a stay granted by the DB of this Court that the order of the learned Single Judge has been "wiped out from existence."

24. For the aforementioned reasons, this Court is unable to sustain the impugned order of the Special Bench of the ITAT. Accordingly, the question framed is answered in the negative i.e., in favour of the Assessee NAFED and against the Revenue.

JUDGMENT
ITA NO.134 OF 2001
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME-TAX)
ORIGINAL SIDE
M/S.SHIVLAXMI EXPORTS LTD.
Versus
COMMISSIONER OF INCOME TAX,W.B.-

The Court : After hearing the appellant-assessee, we admit the appeal on the following two questions as suggested by the assessee.

"1. Whether on the facts and in the circumstances of the case Tribunal was right in confirming the addition of interest, though waived by the assessee on account of the debtors' inability to pay the interest for years simply on the score that the assessee follows the mercantile method of accounting.
2. Whether the Tribunal's order is replete with incongruities and vitiated for being founded on a wrong premise that there was no resolution passed by the Board of Directors for the waiver and such premise being based on no evidence and inconsistent with the orders of the lower authorities as also the circumstances of the case, renders the order perverse."

10. As would be evident from the questions framed in that appeal, the resolutions relinquishing interest were taken subsequent to accrual of interest in the financial years in question. The Hon'ble Supreme Court recorded the following facts as being involved in that decision, distinguishing the applicability of the ratios of the judgments in the case of Birla Gwalior (supra) and Poona Electric (supra) and Shoorji Vallabhdas (supra):-

"Before we refer to the decisions of this Court, it is necessary to reiterate the basic facts of the case. For the previous two assessment years, viz., 1966-67 and 1967-68, the assessee-company did charge interest on the loan advanced by it to the firm which shows that the loan was an interest bearing loan. The second circumstance to be noticed is that the resolution waiving interest was passed after the expiry of the relevant accounting year in the case of the three subsequent assessment years, viz., the assessment years 1969-70, 1970-71 and 1971-72. Only in the case of the assessment year 1968-69, was the resolution passed before the expiry of the accounting year. Thirdly, the assessee-company was maintaining its accounts on the mercantile basis. Yet, another circumstance to be noticed is that the Tribunal has found it as a fact that the waiver was not based upon any commercial considerations. Of course, no entries were made in the accounts of the assessee-company, or for that matter in the accounts of the firm, in respect of the four assessment years concerned herein, that any interest was received or paid. On these facts, it has to be held that in the case of the three subsequent assessment years, the interest had accrued to the assessee notwithstanding the fact that no entries may have been made in the accounts of the assessee to that effect. The

waiver of interest after the expiry of the relevant accounting year only meant that the assessee was giving up the money which had accrued to it. It cannot be said, in the circumstances, that the interest amount had not accrued to the assessee. Therefore, the Tribunal was right in taking the view it did in respect of the assessment years 1969-70, 1970-71 and 1971-72. In the case of the assessment year 1968-69, however, the resolution was passed before the expiry of the accounting year and though the finding of the Tribunal is that the said waiver was not actuated by any commercial considerations, yet learned counsel for the Revenue did not press the Revenue's case so far as this assessment year is concerned."

11. One basic distinguishing feature so far as the factual background of the present appeal is concerned vis-à-vis the case of the assessee in the decision of the Hon'ble Supreme Court in the case of Shiv Prakash (supra) is that the assessee in this appeal had taken resolution prior to the assessment year under consideration. There is no dispute that it was a decision of the assessee based on commercial consideration. Unlike the case of Shiv Prakash (supra) in which it was found that partners of the borrowing firm and the shareholders/directors of the assessee company were same, the records of this appeal do not show any linkage or nexus between the assessee and its two borrowers.

12. In this perspective, we find the points of law involved in this appeal are covered by Shoorji Vallabhdas (supra) and Poona Electric (supra). The interest income could not said to have had accrued for the appellant for the assessment year in the background of the resolutions taken for waiver of interest.

We, accordingly, answer the questions in favour of the assessee. The appeal and the application are allowed in the above terms, and the decision of the Tribunal is set aside.

C.I.T. vs. Shoorji Vallabhdas & Co., [1962] 46 ITR 144 and Poona Electric Supply Co. Ltd. vs. CIT [1965] 57 ITR 521. Sri Kewal Chandra Bagri vs. Commissioner of Income Tax, [1990] 53 Taxman 536 [Cal] of Commissioner of Income Tax vs. Shiv Prakash Janak Raj and Co. Pvt. Ltd., [(1996) 222 ITR 583].

JSW Steel Ltd vs. ACIT (ITAT Mumbai)

S. 41(1)/ 115JB: Entire law explained whether remission of a loan can be assessed as income u/s 41(1) and if not whether the same can be added to "book profit" for purposes of MAT tax u/s 115JB

(i) Waiver of loan taken for acquisition of a capital asset and on capital account cannot be taxed u/s 41(1), as it is neither on revenue account nor a remission of a trading liability so as to attract tax in the year of remission.

(ii) Now we come to the core issue, whether the amount of waiver amount would at all form part of the 'book profit' of the company for the purpose of levy of MAT under section 115JB.

(iii) The purpose and legislative intent behind introduction of provisions of section 115J/115JA/115JB was to take care of the phenomenon of prosperous zero tax companies which had continued but were paying no income tax even though they had profits and were declaring dividends. It was therefore, sought that minimum corporate tax should be paid by these prosperous companies and accordingly, MAT was introduced. The Hon'ble Kerala High Court in case of Karimtharuvi Tea Estate Ltd. and another vs. DCIT (supra) as reproduced above explains the main purpose and intent behind these sections. It was never the intention of the legislature that any receipts which is not taxable per se within the income tax provision or not reckoned as part of net profit as per the profit & loss account as per Companies Act can be brought to tax as a book profit. This has been held so by Spl. Bench in case of Sutlej Cotton Mills Ltd. vs. ACIT (supra) and by Cochin Bench of ITAT in the case of ACIT vs. Nilgiri Tea Estate Ltd., reported in (2014) 65 SOT 14, wherein the Tribunal held that, an item of income which does not come within the purview of the Income Tax cannot be subjected to tax under any other provision of the Act.

(iv) Now whether the surplus arising on account of waiver of the principal amount of loan is required to be credited to the profit & loss account in terms of provisions of Part II & III of VIth Schedule of the Companies Act needs to be seen. The starting point for computation of book profit under

section 115JB is the 'net profit' as per the profit & loss account prepared in accordance with the provisions of the Companies Act.

(v) From the harmonious reading of the above provisions of the Companies Act, it can be gathered that firstly, the Profit & Loss account must disclose the result of the working of the company during the period covered by the account; secondly, it should disclose every material feature including credits or receipts and debits or expenses in respect of non-recurring transaction or transaction of an exceptional nature; thirdly, the profit and loss account should set out the various items relating to the income and expenditure of the company arranged under the most convenient heads and disclose all such information as set out therein; fourthly, profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, should also be disclosed; and lastly, profit & loss account should give the fair view of the working result and accounting standards should be complied with. A clear cut distinction has been made for disclosing the true working result of the company and a disclosure of non-transaction or transaction of an exceptional nature. One has to keep in mind that the aforesaid provisions mainly requires a broad disclosure of the exceptional items or non-recurring transactions referred to therein and if for some reason or the other they have been accounted for in the profit & loss account then those provisions do not require that those items must necessarily be accounted as a part of the profit & loss account. Separate disclosure is intended to ensure that the reader of the profit & loss account gets a fair and clear picture of the result of the working of the company during the period covered by the profit & loss account. The aforesaid provision cannot be so read so as to require that every non-recurring transaction or transaction of an exceptional nature to be debited/credited to the Profit & Loss account. Accounting Standard-5 prescribes the classification and disclosure requirements of certain items in the statement of profit & loss account, whereas the Accounting Standard-9 gives the illustration of revenue recognition. AS-5 defines Profit or Loss for the period in the following manner: "All items of income and expense which are recognised in a

period shall be included in the determination of the net profit or loss for the period unless an Accounting Standard requires or permits otherwise." Thus, what is contemplated is that, all items of income and expenses which are recognised in a period alone are reckoned as net profit or loss. The recognition criteria of revenue by a company in the profit & loss account is however determined as per Accounting Standard-9. Clause 3 of AS-9 gives illustration of the items which are specifically not to be included within the definition of 'Revenue',

(vi) As can be seen, clause (iv) clearly excludes the cases of remission of liability, because it is nothing but gains realised from discharge of an obligation at less than carrying amount, which herein this case is gain on account of waiver of part of obligation to repay the loan. Further, Accounting Standard – 5 also states that, extra-ordinary items should be disclosed separately in the profit and loss account. The objective of AS-5 is to prescribe the classification and disclosure requirements.

(vii) A con-joint reading of the above accounting standards suggests that, there are two types of compulsions while preparing annual accounts, one are accounting compulsions and second are disclosure compulsions. The accounting compulsion comes into play since there is a double entry system of accounting, for instance, when a loan amount is waived, a debit goes to the liability account and a credit has to go to any of the liability/ reserve account, which in the present case has been taken to the Profit and Loss account. The disclosure compulsions merely require the assessee to disclose the material items in the Profit & Loss account. A mere disclosure of an extraordinary item in the profit & loss account statement does not mean that the said item represents the 'working result' of the company, when the accounting standard, especially AS-9 clearly provides that remission of a liability is not to be recognized as revenue, then it has to be reckoned that it cannot be treated as revenue for the purpose of either net profit or consequently book profit. The primary purpose of preparing the Profit &Loss account in Part II of the Companies Act is to find out the result of the company, during the period covered by the profit & loss account and the

exceptional nature items are required to be disclosed separately so as to assess the correct impact on the profit & loss account of the company. What is required under clause (3) of Part II of Schedule VI of the Companies Act, is that, a profit & loss account should set out various items relating to the income and expenditure of the company arranged under the most convenient heads and then it provides to list out the various information which needs to be disclosed in the profit & loss account. The profit & loss account contains income and expenditure of a company in respect of the period covered by the account and therefore, there cannot be any question for including a capital surplus in that account which cannot be reckoned as income. Clause (3)(xii)(b) of Part II of schedule also shows that what is to be included in the profit & loss account is in respect of transactions of an account, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount. This clearly indicates that only those items can be regarded as part of the profit & loss account which is in respect of similar type of transaction and not which are exceptional in nature. Waiver of a loan certainly cannot be reckoned as transaction of a kind usually taken but it is an item of exceptional and non-recurring nature. A capital surplus on account of waiver of loan in no way can be recorded as operational profit or profit which is to be included in the profit & loss account. There can be absolutely no question for accounting in the Profit and Loss Account something which cannot be regarded as income, profit or gain.

(viii) A capital surplus thus, in respect of waiver of loan amount cannot be regarded as being amount available for distribution through the profit & loss account. This follows from the very definition of expression 'capital reserve' that it must be accounted directly to the credit of the capital reserve account instead of being credited to the profit & loss account so as to ensure that it is not left for being distributed through the profit & loss account.

(ix) From our above analysis and discussion of the various provisions of the Companies Act as well as Accounting Standards it can be ostensibly

deduced that an item of 'capital surplus' can never be a part of profit & loss account albeit it is a part of a capital reserve as the waiver of a loan taken for acquisition of a capital asset is a capital receipt falling within the category of capital surplus which is non-recurring and exceptional item which to be disclosed as per the requirement of the Companies Act. Further it is quite pertinent to note that, clause (ii) of Explanation -1 of section 115JB is also an indicator of the intention of the legislature and also the scheme of the section that the incomes which are treated as exempt under the Income Tax Act are to be excluded from the profit & loss account. The said clause excludes; (ii) the amount of income to which any of the provision 0f section 10 or section 11 or section 12 apply, if any such amount is credited to the profit and loss account; When the said clause requires exclusion from the book profit all that amount of income which are exempt and are not in the nature of income, if any such amount is credited to the profit & loss account, then on same logic it would be inconceivable that this provision intends that 'book profit' should include something which is in the nature of a capital surplus on account of waiver of a loan. Even if a company has credited the amount of remission to its profit & loss account, then such a profit &loss account needs to be adjusted with the amount of remission so as to arrive at the net profit as per the profit & loss account prepared in accordance with provisions of Part II & III of VIth Schedule of the Companies Act and this is what has been envisaged in the operating lines of Explanation-1 to section 115JB, that, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year. Net profit as per profit and loss account can never meant to include capital reserve or capital receipts. The object of enacting of section 115J, 115JA & 115JB was never to fasten any tax liability in respect of something which is not an income at all or even if it was income but is not taxable under the normal provisions of the Act. The provisions of section 115JB cannot be so interpreted so as to require accounting of what in substance is capital in nature to the credit of the profit & loss account and get indirectly taxed under book profit.

(x) From the above discussion we are of the opinion that surplus resulting in the books of the assessee company consequent upon waiver of loan amount is not required to be credited to the profit & loss account for the year in which waiver is granted and in any case it cannot be reckoned as working result of the company during the period covered by the account, so as to be treated as part of book profit of the company for that year under the Companies Act.

(xi) Before us the Ld. CIT D.R. has strongly contended that the when the assessee itself has shown the waiver of loan as part of the book profit therefore, it is precluded from claiming the deduction from the book profit, because once it has been shown and declared as part of book profit then neither the Assessing Officer nor the assessee can tinker with such a result and any adjustment if at all can only be made as provided in Explanation- 1 to sub section (2) of section 115JB. First of all, from the perusal of the Profit &Loss account for the year ending 31.03.2004 it is seen that assessee had shown profit before exceptional item at Rs.571.84 crores. Thereafter, it has disclosed exceptional item of Rs.390.76 crores which is on account of waiver of dues. However, while computing the book profit and tax payable under section 115JB the assessee included the said amount for calculating the tax under MAT.

(xii) Thus, at the very initial stage itself the assessee had disclosed all the particulars and had also given a detailed note as to why the said amount will not form part of the 'book profit'. Once that is so, then such notes qualifying the computation of book profit has to be read into it, that is, notes accompanying computation of income cannot be segregated or completely ignored. It is not the case of the assessee that an adjustment should be done while arriving at the book profit as provided in Explanation-1,albeit its claim is that correct amount of net profit as per the profit & loss account should be taken as 'book profit' which is the starting point of computation under section 115JB. As discussed in detail in our earlier part of the order that, a receipt which could never enter the stream of taxation either under the normal provisions of the Act or under the MAT provisions under section 115JB, then the said receipt neither

constitutes profit nor revenue nor income nor any kind of gain which needs to be included in the net profit. It is a equally a trite proposition of law that an income cannot be taxed by an acquiescence or consent of the assessee but as per the mandate of the statutory provision and if assessee shows that a particular income is not taxable then he can always demonstrate and satisfy to the authorities that a particular income was not taxable in his hand and it was returned under an erroneous impression of law. There cannot be imposition of tax without the authority of law. One has to look what is envisaged under the Act to be taxed and there is no room for intendment or tax authorities can capitalize on acquiescence by assessee sans any authority by law. The court and taxing authorities have bounden duty to decide as to whether a particular category of assessee is to pay a particular tax or not. Even if we agree that Assessing Officer could not have entertained such a fresh claim but in view of the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. vs. CIT (supra) as heavily relied upon by the Ld. CIT D.R., however, it does not impinge upon the powers of the appellate authorities including Ld. CIT(A) and Tribunal. This has been clarified by the Hon'ble Supreme Court itself in the concluding part of the said judgment. There is no such bar or statutory restrain on the appellate authorities to permit/entertain such additional claims which has been raised by the assessee before them. This proposition is strongly supported by the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd., (2012) 349 ITR 336 (Bom.). It is also equally a salutary principle of tax laws that entries in the books of account or in the profit & loss account is not a determinative factor for taxing the income because income can be taxed only by the express provisions of law. We have already discussed in detail in our earlier part of the order that waiver of a loan is a capital receipt which is part of the capital reserve and cannot be reckoned as working result of the company and therefore, it does not form part of the net profit as per the profit & loss account. Thus, such a capital receipt cannot be taxed as 'book profit' as envisaged in terms of section 115JB.

Cases referred:

Sutlej Cotton Mills Ltd. V ACIT (1993) 45 ITD 22 (Cal) (SB)

Sipani Automobiles Ltd. V DCIT (1993) 46 ITD 280 (Bang)

NCL Industries Ltd. V JCIT (2004) 88 ITD 150 (Hyd)

Indo Rama Synthetics (I) Ltd. vs. CIT, (2011) 330 ITR 363 (SC)

Sain Processing & Weaving Mills (P) Ltd (2010) 325 ITR 565 (Del)

Karimtharuvi Tea Estates Ltd. and Another vs. DCIR and Others (247 ITR 22),

Shivalik Venture (P) Ltd. vs. DCIT (2015) 173 TTJ (Mum) 238

ACIT vs. Shree Cement Ltd. (ITA Nos.614, 615 & 635/JP/2010)

ACIT vs. L.H. Sugar Factory Ltd. and vice versa in ITA Nos.417, 418& 339/LKW/2013 dated 9 February 2016

DCIT vs. Binani Industries Ltd. in ITA No.144/Kol/2013 dated 15 February 2016

DCIT vs. M/s. Garware Polyester Ltd. (ITA No.5996/Mum/2013).

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA

/ITA No.322/Kol/2014

Assessment Year:2010-2011

Mohata Coal Company Pvt.Ltd

Date of Pronouncement 04/01/20174.3 Heaving Heard the rival submissions, perused the material available

on record, we are of the view that there is merit in the submissions of the

assessee, as the propositions canvassed by the ld AR for the assessee

are supported by the facts narrated by him. As ld AR pointed out that Miss Megha Goyal was working with the company prior to her higher study.

Miss Megha Goyal had executed a bond stating that after her higher study

she would work in the company. In fact she worked in company for 32

Months after her higher study. The company had reaped the benefits and

expertise to promote its business operations and maintain labour

harmony. The ld CIT(A) relied on certain judgments which are not

applicable to the facts under consideration. Therefore, we are of the view

that the addition made by the Assessing Officer and confirmed by the ld

CIT(A) needs to be deleted. Accordingly, we delete the addition.

4.4 In the result, the appeal filed by the assessee is allowed

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1749 OF 2007

Commissioner of Income Tax, Salem ...Appellant

VS.

Rekha Bai ...Respondent

Date : 21/03/2017

The Department has failed to bring on record any

material to the contrary except the seized documents which, in our considered opinion, could not absolve the Department or give any right to negate the view taken by the first Appellate Authority and the Tribunal. So far as the income divided among the family members of the respondent-assessee is concerned, we find that all of them were carrying on same business from the same premises. Therefore, it is but natural that if any concealed income has been found at the time of search and survey, it has to be distributed among all the family members who were carrying on business.

In this view of the matter, the impugned order of the High Court does not call for any interference. The appeal fails and is dismissed.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).3891/2017

(Arising out of Special Leave Petition (C) No(s). 30221/2015)

M/S PRADEEP SINGH WAZIR APPELLANT (s)

VERSUS

COMMISSIONER OF INCOME TAX AND ANR. RESPONDENT(s)

MARCH 10, 2017.

The appellant/assessee is involved in undertaking transport contracts. During the relevant year, it entered into a contract with the army for carriage of goods and personnel etc. In this regard, an amount of Rs. 74,81,106/- is said to have been received from the army including interest element of Rs. 1043/-. An amount of Rs. 57,98,885/- was debited by the assessee as hiring charges. Upon verification, the Assessing Officer found that the details of the vehicles provided by the assessee through which the contract was supposed to be executed and hiring charges paid were cars, scooters, tractors etc. Confronted with the situation, the assessee withdrew the details of the vehicles furnished earlier, which were stated to have been hired by it, and furnished another list of vehicles with some details of trips undertaken by each vehicle. Return of income was filed by the appellant for the Assessment Year 2008-09. The Assessing Officer vide its order dated 27.12.2010 by invoking the provisions of Section 40(a) (ia) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), disallowed the amount of Rs.55,59,585/- and added it back to the income of the assessee. The Assessing Officer computed the income of the assessee as per the provisions of Section 144 of the Act which worked out to RS.9,93,069/-. Against the order of the Assessing Officer, an appeal was preferred by the assessee. The Commissioner of Income

Tax (Appeals) vide its order dated 09.07.2012 reduced the net profit rate from 12.5% to 5% and held that the Assessing Officer could not have made any disallowance under Section 40(a) (ia) of the Act. Aggrieved by the said order, the Revenue filed an appeal before the Income Tax Appellate Tribunal(hereinafter referred to as the 'Tribunal'). The Tribunal vide its order dated 29.11.2012 set aside the findings of disallowance under Section 40(a)(ia)of the Act. The assessee being aggrieved filed an appeal before the High Court. The High Court vide impugned judgment dated 01.06.2015 dismissed the appeal. Hence, the present appeal.

In the process the High Court has failed to notice that even that aspect of not filling Form No. 15J is kept aside, in the present case, the income of the assessee on the total contract receipts of Rs.74,81,106/- had been reached at by applying the net rate of profit after reduction and, thus, no further addition could be made under Section 40(a)(ia) of the Act. This is the reason which is rightly ascribed by the Commissioner of Income Tax (Appeals)to the order.

As a result, this appeal is allowed

IN THE INCOME TAX APPELLATE TRIBUNAL, VISAKHAPATNAM BENCH, VISAKHAPATNAM

I.T.A.No.393/Vizag/2015

Assessment Year: 2011-12)

Sri Bharath Kumar Jain,

Date of Pronouncement : 30.12.2016

Having heard both the sides and considered material on record, we find that the A.O. has re-worked closing stock by holding that weighted average cost price method cannot be followed for valuation of closing stock. According to the A.O., cost or market price, whichever is less is the method of valuation of closing stock. We do not find any merits in the findings of the A.O. No doubt, all assessees have to follow cost or market price to determine value of closing stock. But, when it comes to cost price method, there are 3 methods of valuation of closing stock, i.e. FIFO method LIFO method and average cost price method. The assessee can follow one of the methods to value the closing stock, however, the same method should be followed consistently without any change. In case, any changes are made in the method of valuation of closing stock, the effect in the valuation of closing stock has to be suitably disclosed in the accounts to arrive at a true and correct profit from the business. Once the assessee is following one of the accepted methods of valuation of closing stock and which was followed consistently for past several years, the A.O. was incorrect in changing the method of valuation of closing stock without suitable modification to the opening stock, because the closing stock of this year becomes the opening stock of the next year and in the like manner, the closing stock of the preceding year becomes the opening stock of the current year. Though there may be difference in valuation of closing stock because of

change in method of valuation, the effect of which is neutralized in the subsequent year because the closing stock of this year becomes the opening stock of subsequent year. Therefore, we are of the view that the A.O. was erred in making addition on account of under valuation of closing stock without making any adjustments to the opening stock.

9. In the present case on hand, on perusal of the facts, we find that the assessee is following weighted average cost method of valuation consistently for past several years and in the year under consideration, he had followed the same method which was certified by the tax auditor in his tax audit report. The assessee has followed cost or market price whichever is low for valuation of closing stock, however, for adopting cost method, he had chosen, weighted average cost price method. Therefore, we are of the view that the A.O. without brought on record any evidence to prove that the assessee has changed his method of valuation from the earlier method, cannot disturb method of valuation followed by the assessee for valuation of closing stock. The CIT(A) after considering the relevant facts has rightly deleted additions made by the A.O. We do not find any error or infirmity in the order passed by the CIT(A), hence we inclined to uphold the CIT(A) order and dismiss the *appeal filed by the revenue.*

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

/I.T.A.No.31/Vizag/2014

Assessment Year: 2009-10)

Date of Pronouncement : 30.12.2016

Sri M. Gopala Reddy

The first issue that came up for our consideration is additions towards peak negative cash balance of ` 7,12,610/-. The Ld. D.R. submitted that the CIT(A) ought to have appreciated the fact that when the deficit cash balance was worked out on date specific at the time of assessment proceedings, the assessee could not prove the availability of cash with supporting evidences. The D.R. further submitted that the CIT(A) has erred in not appreciating the fact that the assessee himself admitted income u/s 44AD of the Act and that the assessee did not maintain any books of accounts and has simply filed balance sheet by mentioning the closing balance on estimate basis. The A.O. has worked out the peak negative cash balance by taking into account the submissions of the assessee and as per which arrived at a negative cash balance for which assessee failed to offer any sources, therefore, the CIT(A) was erred in considering the advances returned from the customers to delete the additions made towards negative cash balance.

7. The Ld. A.R. of the assessee, on the other hand, strongly supporting the order of the CIT(A) submitted that the A.O. arrived at negative cash balance without considering total business transactions including advances received from the sub contractor. The A.R. further submitted that the assessee had given advances to sub contractors, out of which received back part of advances, after adjusting against bills which has not been considered to arrive at negative cash balance. Alternatively, it was further submitted that when net profit is declared under the provisions of section 44AD of the Act, the assessee need not to maintain books of accounts and hence, additions towards peak credit

balances without the books of accounts and also without considering over all business transactions is incorrect.

8. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The A.O. made additions of ` 7,12,500/- u/s 69 of the Act, towards peak negative cash balance. The A.O. observed that the assessee is not having enough sources for credits in the bank account. The A.O. further observed that though assessee claims to have received advances from sub contractors failed to substantiate the claim with necessary evidences, therefore, opined that the assessee is not having sufficient source of income to explain the deficit cash balance. It is the contention of the assessee that when the assessee is following the provisions of section 44AD of the Act, for computing profits & gains of business on presumptive basis need not to maintain books of accounts and hence additions towards peak negative cash balance without the aid of the books of accounts is incorrect. The assessee further contended that while arriving at the peak negative cash balance, the A.O. has not considered advances received back from the sub contractors and also income of the current year. If the income of the current year as well as advances received from the customers are considered, there would not be any negative cash balance.

9. Having heard both the sides and considered material on record, we find that the A.O. has arrived at peak negative cash balance based on the entries found in the bank account without considering the overall business transactions including advances received from the sub contractors. We further observed that the assessee has followed special provisions for computing the profits & gains of business on presumptive

basis under the provisions of section 44AD of the Act. When assessee is following the provisions of section 44AD of the Act, he need not to maintain regular books of accounts. Once there is no regular books of accounts, the A.O. was erred in computing negative cash balance based on the credits found in bank accounts, without considering other business transactions including advances received from sub contractors. We further observed that the assessee claims to have received ` 17,46,000/- advances received back from the sub contractors and if advances received from the sub contractors has been considered, the negative cash balance arrived by the A.O. would turn to be positive cash balance. The CIT(A) after considering the facts of the case, has rightly directed the A.O. to delete additions made towards peak negative cash balance. We do not find any error or infirmity in the order passed by the CIT(A) and hence, we inclined to uphold the CIT(A) order and reject the ground raised by the revenue.

10. The next issue that came up for our consideration is additions towards disallowance of expenditure of ` 30,62,500/-. The A.O. disallowed expenditure claimed against contract receipts as unexplained expenditure u/s 69 of the Act, by holding that the assessee has failed to explain the sources for expenditure. It is the contention of the assessee that he had given advances to sub contractors for execution contract and the sub contractors have carried said work by incurring such expenditure and raised bills for the same. The assessee further contended that he had estimated net profit from the business under the provisions of section 44AD of the Act on presumptive basis. Once the net profit is estimated on presumptive basis, he need not to prove the expenditure, therefore, the A.O. was erred in making additions towards

expenditure as unexplained expenditure u/s 69 of the Act.

11. Having heard both the sides, we find force in the arguments of the assessee, for the reason that the assessee has awarded sub contracts to various parties and given advances. The sub contractor has executed the works and submitted bills to the assessee. The assessee has adjusted contractor's bills against advances given to them in the earlier occasion. Therefore, once again explaining sources for expenditure which was incurred by the sub contractors directly does not arise. We further observed that the assessee has estimated net profit u/s 44AD of the Act on presumptive basis. Once, net profit is estimated u/s 44AD of the Act, he need not to process the expenditure. Therefore, we are of the view that the A.O. was erred in disallowing expenditure. The CIT(A) after considering the explanations of the assessee, held that the assessee directly not incurred any expenditure against works contractsand it was incurred by the sub contractors. The facts remain unchanged. The D.R. fails to brought on record any evidence to prove the findings of facts recorded by the CIT(A) is incorrect. Hence, we inclined to uphold the CIT(A) order and reject the ground raised by the revenue.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 608 of 2016

With

TAX APPEAL NO. 609 of 2016

With

TAX APPEAL NO. 741 of 2016

TO

TAX APPEAL NO. 744 of 2016

PRINCIPAL COMMISSIONER OF INCOME TAX-2....Appellant(s)

Versus

GULMOHAR GREEN GOLF AND COUNTRY CLUB LTD....Opponent(s)

Date : 16/11/2016

[8.0] Heard the learned Counsel appearing for respective parties at length.

[*8.1] The short but interesting question of law which arise for etermination of this Court is whether the receipt of membership fees, which is refundable after a period of 25 years but without interest, is required to be treated as income / revenue in the hands of the assessee or the same is to be treated as Capital Receipt?*

[8.2] While considering the aforesaid question Article of Association of the assessee and the relevant Rules, Regulations and Bye-laws of the assessee with respect to the club members and security deposit are required to be referred to which are as under:-

[8.3] Considering the Articles of Association and the relevant Rules, Regulations and Bye-Laws of the assessee, the security deposit collected by the assessee at the time of enrollment of the club members is refundable after a period of 25 years and/or on happening of the eventuality in Rule / Bye Law No.2 i.e. if a club member dies or institutional member is dissolved or wind up as the case may be. In other

cases the security deposit shall be refunded to the member on expiry of 25 years and the said period may be extended by maximum period of 15 years at the discretion of the club member to avail club facilities for the extended period. It is also true that the said security deposit shall be non-interest bearing refundable security deposit. In light of the above the question posed for consideration of this Court is required to be considered i.e. whether such refundable security deposit shall be considered as revenue / income as sought to be contended on behalf of the revenue or Capital Receipt as contended on behalf of the assessee.

[8.4] It is the case on behalf of the Revenue that as security deposit is non-refundable interest deposit and that the same is utilized / used by the assessee for construction and providing other facilities at the club and that the said security deposit has not been kept apart the same cannot be treated as Capital Receipt, but the same is required to be considered as revenue / income in the hands of the assessee. In support of their above submissions, the Revenue has heavily relied upon the decision of the Hon'ble Supreme Court in the case of Bazpur Co-op. Sugar Factory Ltd. (Supra).

On the other hand it is the case on behalf of the assessee that merely because the security deposit is non-refundable interest security deposit and merely because the same is not kept apart and merely because the same is used by the assessee for some other purpose, the same does not denude the amount of its character of "deposit" carrying

with it the obligation to repay. In support of their above submissions learned Counsel appearing on behalf of the assessee has heavily relied upon the decision of the Hon'ble Supreme Court in the case of S.S. Sakhar Karkhana Ltd. (Supra).

[8.6] Applying the above test to the present case and considering the fact that the security deposit is refundable after a period of 25 years or on occurrence of the contingencies mentioned in the bye-laws and it cannot be said that the assessee club had absolute dominion over the impugned deposits, the case on behalf of the Revenue that the same be treated as revenue income cannot be accepted. Merely because the security deposit is not kept apart and/or subsequently the amount of security deposit is utilized by the club for other purposes such as construction and providing other amenities at the club, the same shall not loose the "character of deposit", which as observed hereinabove is refundable on occurrence of the contingencies as mentioned in the bye-laws. No error has been committed by the learned Tribunal in holding the same as Capital Receipt in view of the decision of the Hon'ble Supreme Court in the case of S.S. Sakhar Karkhana Ltd. (Supra).

[8.7] Now, so far as the decision of this Court in the case of Unique Mercantile Services Pvt. Ltd. (Supra) is concerned, it is required to be noted that infact before the Division Bench it was the case of fees and the question was whether the fees collected and recovered is required to be spread over in the span of 15 years and/or the same is required to be

considered in the first year. In the case before the High Court as such there was no question as to whether such refundable security deposit shall be treated as an income or not.

[9.0] In view of the above and for the reasons stated above and considering the fact that the security deposit recovered from the members at the time of their enrollment as a club member is refundable on occurrence of the contingencies mentioned in the Rules, Regulations and Bye-Laws, same is required to be treated as a deposit and therefore, the same is required to be considered as capital receipts. We confirm the impugned judgment and order passed by the learned Tribunal. The substantial question of law raised in the present appeals is answered in favour of the assessee and against the Revenue. Present Tax Appeals stand disposed of accordingly. No costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on : 07.12.2016
Pronounced on : 19.12.2016

Mr.C.Subba Reddy,

The order of the CIT(A) was carried in appeal before the Income Tax Appellate Tribunal ('Tribunal') which confirmed the aforesaid factual findings, dismissing the appeal of the Revenue by order dated 09.02.2007, assailed in appeal before us. The appeal raises the following Substantial Question of Law for our consideration:

'*i)Whether on the facts and circumstances of the case, the Tribunal was right in holding that the provisions of Section 2(22)(e) treating a loan or advance as a deemed dividend does not apply if the loan is given as part of a contractual obligation?*
ii)Whether on the facts and circumstances of the case, the Tribunal was right in interpreting the Section on the basis of

intention of the legislature, when the words of the Section are clear and unambiguous?
iii)Whether on the facts and circumstances of the case, the Tribunal was right in looking at the transaction between the two companies in other years to arrive at the conclusion that the loan granted in the relevant financial year does not amount to deemed dividend under Section 2(22)(e)of the Act?'

7. The provisions of Section 2(22)(e) impose a deeming fiction and the conditions imposed therein call for strict and concurrent satisfaction being – (i) payment by closely held company, (ii) of the nature of an advance or loan, (iii) to a share holder or beneficial owners of shares, (iv) with more than 10% voting power, (v) for his individual benefit.

8. In the present case, the credit arises by virtue of a contractual obligation and a business transaction and has been settled the very next year. There is no individual benefit derived by the Assessee. Moreover, the credit does not satisfy the definition of 'advance' or 'loan'. The fiction thus fails on several counts. The Revenue relies upon the judgment of the Supreme Court in the case of *Miss P.Sarada vs. Commissioner of Income Tax (229 ITR 444)* and the decision of the Calcutta High Court in *M.D.Jindal vs. Commissioner of Income Tax* (164 ITR 28). 11. The Substantial Question of Law is answered in favour of the
Assessee and the Department Appeal stands rejected.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO.392 OF 1999

The Commissioner of Income Tax

Bombay City-I, Bombay. ..Applicant

Versus

M/s. Likproof India P. Ltd. ..Respondent

PRONOUNCED ON : 23RD DECEMBER, 2016

Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount of Rs.1,00,000/- cannot be assessed as 'undisclosed' income of the assessee?

We have heard Mr. Suresh Kumar, the learned counsel for the Revenue and Mr. Atul Jasani, the learned counsel appearing for the respondent. According to Mr. Suresh Kumar the Tribunal was not right in concluding that no compensation was received by the assessee. According to him the fact that the assessee was engaged for the purpose of constructing the building would mean that the assessee would have been entitled to some compensation. If the construction was to be completed the assessee's stood to gain but since the project was abandoned, the assessee was deprived from earning its profits and viewed from this aspect the likelihood assessee having received compensation was much higher. He relied upon the fact that entries in the bank's pay in slips clearly indicate why the amounts received. The fact that the assessee's bank records indicated that the amount was received as compensation could not be overlooked specially when the Managing Director's statements were vague and contradictory.

8. Mr. Jasani, on the other hand, supported the decision of the Tribunal and contended that entries made in the bank pay-in-slips cannot be determine the nature of the payment and the treatment of the amounts in the books of the company is what was material. This statement of the Managing Director though vague, they could not be relied upon by the revenue since at one stage

he clearly admitted that he did not know whether it was a compensation or loan. He also admitted that he was unaware whether there was a board resolution passed in respect of the issuance of capital.

9. In our view the statements recorded of the Managing Director of the company are not reliable. We find that the consideration by the Tribunal of the records was appropriate. The conclusion drawn by the Assessing Officer that the amount received was compensation and amount which was undisclosed income of the assessee cannot be sustained since the treatment of the receipts in the books of account of the company should prevail being maintained in the usual course of business. There is nothing on record to establish the contrary and beyond reasonable doubt. Equally there is nothing on record to establish that the entries made in the books of account cannot be relied upon. It is pertinent to mention that the Revenue had not brought on record any material indicating that the amount received by the assessee was by way of compensation. On the other hand, the employees of the assessee were cross examined in respect of the entries made in the pay-in-slips and this cross examination had revealed that narrations in the pay-in-slips accompanying the two cheques of Rs.50 lakhs each were made by them on their own without any directions or instructions from the assessee. Considering the overall picture we are of the view that the order of the Tribunal cannot be faulted. However, we are in agreement with the view taken by the Tribunal to the effect that the entry made in the pay-in-slips cannot prevail over the entry in the books of account since the books of account would reflect the appropriate record

wherein treatment of receipts would be found. In the circumstances, we have no hesitation coming to our conclusion and as a result we find that the Tribunal was justified in holding that the amount of Rs.1 crore cannot be assessed as undisclosed income. In the result, the question referred to us for our opinion is answered in the affirmative i.e. in favour of the assessee and against the revenue.

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

INCOME TAX APPEAL No.103 of 2016 (O&M)

DATE OF DECISION: 11.11.2016

Pr. Commissioner of Income Tax, Panchkula

…..Appellant

versus

M/s Haryana Warehousing Corporation

.....Respondent

Whether on the facts and in the circumstances of the case, the order passed by the Ld. Income Tax Appellate Tribunal was right in law in allowing the appeal of the Respondent-Assessee on the issue on account of revision of pay scales as prior period expenses and not allowable under Section 37 of the Income Tax Act, 1961? The appeal is admitted only with respect to question (ii) and the question is answered in favour of the

assessee/respondent. The other questions do not raise a substantial question of law. In the result, we have dismissed the appeal . In our view, however, the Tribunal rightly held that the entire liability was incurred in the assessment year in question; had been estimated with reasonable certainty and that it was not a contingent liability. The assessee was, however, liable to discharge a part of that liability at a future date. What is relevant is when the assessee's decision that the amount was payable was taken. The provision for the payment of the salary including arrears was not a contingent liability. It arose on account of the sixth pay commission which was approved by the Haryana Government and adopted by the assessee. We are in agreement with this finding of the Tribunal.

16. The concluding part of the Minutes adopted the letter dated 07.01.2009. The Minutes also referred to the arrears. As we mentioned earlier, the word "arrears", absent anything else, indicates that the liability had been incurred and had also been agreed to be discharged. The liability, thus, arose in praesenti and not in futuro. A part of the liability was to be discharged in future. The accrual of a liability and the time for the discharge thereof are different matters. In the mercantile system, the mere postponement of the date of payment of a liability already incurred, acknowledged and agreed to be met arises in the year it

is stated to be so incurred and met. r. Garg, the learned senior counsel appearing on behalf

of the assessee, relied upon the judgment of the Supreme Court in

Bharat Earth Movers vs. Commissioner of Income Tax, Karnataka,

(2000) 6 Supreme Court Cases 645, which is also referred to by the

Tribunal. The liability, in the case before us, arose in the

assessment year 2009-10. Sixty percent of it was liable to be

discharged in the next assessment year. It is, undoubtedly,

estimated with more than just reasonable certainty. The liability

was, therefore, not a contingent one but one in praesenti. A part

of it was to be discharged at a future date. The judgment supports

the assessee's case. Question (ii) is, therefore, answered against the

appellant and in favour of the assessee.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 5 OF 2002

Parmanand Builders Pvt. Ltd. .. Applicant.

v/s.

Commissioner of Income-Tax Mumbai City-VI .. Respondent.

PRONOUNCED ON : 15 NOVEMBER, 2016.

The real question which falls for our consideration both in the

reference and the petition is whether the Tribunal is duty–bound to grant

relief to the assessee as claimed during the hearing on the basis of the

case eventually found by it, even if there is no specific ground of appeal raised before it in support of such relief.

11. When an appeal from an assessment is brought before the Tribunal under Section 254(1) of the Act, all questions arising therefrom, including questions which are incidental or consequential to such assessment, are open to be agitated before the Tribunal. The Tribunal is empowered to "pass such orders thereon as it thinks fit". It is one thing to say that the Tribunal must confine itself to the subject matter of the appeal and not go beyond it, but quite another to say that whilst deciding such subject matter it cannot consider questions which are incidental to, or would follow as a consequence of, its determination. If the Tribunal rejects the assessee's case on a particular ground, and if such ground affords a certain relief to the assessee without his having to aver any new facts, such relief cannot be denied on the footing that the assessee never claimed it. If the assessee did not claim it, the Tribunal must grant it suo motu, as a matter of law, if the relief does follow as a legal incident.

Our Court in CIBA of India Ltd. Vs. CIT1 was concerned with an assessee, a pharma company, which had set up a new plant for manufacturing additional pharmaceutical goods. The assessee claimed this plant to be part of its existing business and on that footing claimed deduction of certain travelling expenses in connection with this plant as revenue expenditure. The assessing officer disallowed that claim on the

ground that the expenditure was not incurred wholly and exclusively for its existing business. The CIT(A) allowed a part of the expenditure as revenue expenditure. The tribunal, however, affirmed the order of the assessing officer and held the entire expenditure to be capital expenditure. In a reference from that order, our Court upheld the tribunal's order. Having done so, it considered the further question, namely, whether the amount of expenditure (disallowed as revenue expenditure) should have been added to the "actual cost" of the plant and benefits allowed accordingly. The assessee's plea was that if the expenditure was held to be apital expenditure, suitable directions be given to the lower authorities to include the same in the cost of the asset and to allow the assessee the benefit of development rebate and depreciation accordingly. This alternative submission made before the tribunal was turned down by it on the ground that it amounted to raising of an additional ground of appeal. Our Court did not countenance this approach and held that the alternative submission did not amount to raising of an additional ground of appeal but the submission was a different facet of the same controversy; it was merely consequential to the finding of the tribunal against the assessee. The submission would not arise in case the tribunal accepts the assessee's contention for deduction of the amount as revenue expenditure; but where the tribunal turns down the assessee's claim and holds it to be capital expenditure, "it is the duty of the Tribunal, even without an alternative submission, to pass necessary consequential orders, suo motu, to

give further directions in the matter as the situation may warrant". This is what our Court observed in this connection, quoting the decision of the Supreme Court in CIT Vs. Mahalakshmi Textile Mills Ltd.2.

13. In the foregoing premises, we are of the view that the Tribunal was bound in law to consider the alternative plea raised by the assessee at the hearing of the appeals. The question now is, what relief should be granted on the applications before us. The miscellaneous application taken out before the Tribunal by the assessee clearly brings out an error apparent on record insofar as the original order passed by the Tribunal is concerned. It is particularly so since both the decisions in CIBA India (supra) and Mahalakshmi Textile Mills (supra) were already available when the Tribunal considered the matter. We are, therefore, of the view that it would be more appropriate to allow the miscellaneous application and direct the Tribunal to consider the alternative plea of the assessee in the light of what we have stated above. Since the final order of the Tribunal on the appeal can only be crystallized after the plea is so considered by the Tribunal, the Reference may have to be returned unanswered.

14. The writ petition is, accordingly, allowed and the impugned order dated 29 June 1998 passed by the Tribunal on the miscellaneous application to the extent it relates to assessment years 1987-88 and 1988-89, is set aside and the miscellaneous application is allowed by directing the Tribunal to consider the alternative plea raised by the assessee in the

light of what we have observed above. The Tribunal shall now decide the appeal on merits. The reference is returned unanswered.

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 300/2016

PR. CIT-6 ..... Appellant

Through : Sh. Raghvendra Singh and Sh. Rahul Chaudhary, Advocates.

versus

MACHINTORG (INDIA) LTD. ..... Respondent

% 08.11.2016

Learned counsel for the revenue contends that the explanation afforded could not be considered bona fide or the issue debatable in any circumstance which may justify the discharge of notice under Section 271(1)(c). Relying on the judgment in CIT v. N.G. Technologies Ltd. 2015 (370) ITR 7, learned counsel submitted that the explanation of mistake on the part of the Chartered Accountant [hereafter referred to as "the CA"] in this case was specious. It is submitted that every company is under a duty to have its account audited and the fact that the CA's services were utilised and that he

made some alleged mistake did not absolve the assessee from its primary duty cast in law to reveal the correct income.

The ITAT, we notice, took note of the Explanation 1(A) and 1(B) to Section 271(1)(c). Under Explanation 1(A), penalty would be attracted if an assessee fails to offer an explanation or offers a false explanation. Under Explanation 1(B), an unsubstantiated explanation or failure to prove that the explanation is bona fide attracts penalty. In this case, the narrow question is whether the explanation by the assessee that the non-reporting of income was on account of the belief held that the benefit accrued under Section 54G, on account of the advice of the CA was either a false explanation or no explanation at all [explanation 1(A)] or whether it was not bona fide [Explanation 1(B)]. This Court is of the opinion that the exposition made in N.G. Technologies (supra) has to be applied in a fact-specific manner and not in the amplitude that the learned counsel for the revenue suggests. The Court cannot be oblivious of the fact that the companies are advised by experts and CAs who, more often than not, finalise reports. To expect assessees to scan each assessment with a fine comb, as is suggested by the revenue, and thereafter be told that the explanation about its reliance upon expert advice is not bona fide, in the facts of this case, at least do not appeal to this Court. Being a finding of fact based upon broad probabilities, the Court is of the

opinion that no substantial question of law arises.

Karnataka high court in Karanataka Municipal Data Society order dated 5/10/2016 Held *As and when assessee is to act as custodian of money and utilization thereof is fully controlled by Govt., interest earned thereon is to be utilized for earmarked purpose, taxability of interest in hands of custodian assessee is impermissible reversing ITAT order in assessee favor*

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.573 OF 2014
The Commissioner of Income Tax, TDS, Mumbai ..Appellant
Versus
M/s.Oberoi Constructions Pvt.Ltd.

DATE : 1 OCTOBER 2016

The grievance of the Revenue before us is that no fault could be found with the order dated 11 February 2011 of the ACIT(TDS) at the date when he passed the order holding the Respondentassessee to be an assessee in default liable to tax and interest under Section 201(1) and 201(1A) of the Act. As on that date, the recipient of amount of Rs.10.35 crores i.e. M/s.Siddhivinayak Realities Pvt.Ltd. on substantive basis and Mr.Vikas Oberoi on protective basis, were held liable to tax. In the above view, no fault could be found with the order of ACIT (TDS) holding the Respondent assessee as an assessee in default under Section 201(1) and 201(1A) of the Act.

8. We find that both the CIT (Appeals) as well as the Tribunal in these (TDS) proceedings have held that as the very basis for holding the Respondent assessee liable for failure to deduct tax did not subsist, the TDS proceedings must also fail. This was in view of the orders passed in the case of recipients i.e. M/s.Siddhivinayak Realities Pvt.Ltd. and Mr.Vikas Oberoi in appeal by the authorities under the Act including this Court that they were not liable to any tax as they had not received any deemed dividend under Section 2(22)(e) of the Act. Once the foundation is removed, the superstructure falls (sublato fundamento Cedit opus). The grievance of the Revenue is that in TDS proceedings, one must ignore the orders passed in the hands of the recipients i.e. M/s.Siddhivinayak Realities Pvt.Ltd. and Mr.Vikas Oberoi. The officers of the Revenue

administering the TDS provisions are not outside the scope of the Act and orders passed under the Act in respect of the character of the payment made under the Act are binding upon them. The fact that at the time the order of the ACIT (TDS) was passed, there was basis to do so does not mean that orders passed on income in the hands of the recipients will have no bearing in deciding its validity. One must not ignore the fact that this order of the TDS officer is tentative in nature and its existence would depend upon the nature of receipt in the hands of the recipient and subject to the orders passed in respect thereof by appropriate court. In the above view, the question, as proposed by the Revenue,
does not give rise to any substantial question of law. Thus, not entertained.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 278 OF 2014
Commissioner of Income Tax16,
Mumbai ..Appellant
Versus
M/s.D. Chetan & Co.

DATE : 1 OCTOBER 2016

Mr.Malhotra, learned Counsel appearing for the Revenue submits that this appeal had to be admitted as the impugned order has ignored its order in the case of **S. Vinodkumar Diamonds Pvt.Ltd. vs. Addl.CIT3** rendered on 3 May 2013 which on similar facts is in favour of the Revenue. He further submits that the impugned order of the Tribunal is suspect because it accepts the Respondent assessee's claim without calling upon it to prove that the same was not speculative. Lastly, he sought to place reliance upon Accounting Standard11 to claim that such a
loss is not allowable thereunder.

The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the

nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard11 is concerned, it would not by itself determine whether the activity was a part of the Respondentassessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in **S. Vinodkumar** (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in **S. Vinodkumar** (supra) are identical / similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in **S. Vinodkumar** (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in **CIT vs. Badridas Gauridas (P) Ltd.4** was not brought to the notice of the Tribunal when it rendered its decision in **S. Vinodkumar** (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained.

Recent Hon'ble Supreme Court decision in case of Godrej & Boyce Manufacturing Company Ltd., order dated 08.05.2017 (Civil Appeal no. 7020/2011)

Relevant Extract:

"35. We may now deal with the second question arising in the case.

36. Section 14A as originally enacted by the Finance Act of 2001 with effect from 1.4.1962 is in the same form and language as currently appearing in sub-section (1) of Section 14A of the Act. Sections 14A (2) and (3) of the Act were introduced by the Finance Act of 2006 with effect from 1.4.2007. The finding of the Bombay High Court in the impugned order that sub-sections (2) and (3) of Section 14A is retrospective has been challenged by the Revenue in another appeal which is presently pending before this Court. The said question, therefore, need not and cannot be gone into. Nevertheless, irrespective of the aforesaid question, what cannot be denied is that the requirement for attracting the provisions of Section 14A(1) of the Act is proof of the fact that the expenditure sought to be disallowed/deducted had actually been incurred in earning the dividend income. Insofar as the appellant-assessee is concerned, the issues stand concluded in its favour in respect of the Assessment Years 1998-1999, 1999-2000 and 2001-2002. Earlier to the introduction of sub-sections (2) and (3) of Section 14A of the Act, such a determination was required to be made by the Assessing Officer in his best judgment. In all the aforesaid assessment years referred to above it was held that the Revenue had failed to establish

any nexus between the expenditure disallowed and the earning of the dividend income in question. In the appeals arising out of the assessments made for some of the assessment years the aforesaid question was specifically looked into from the standpoint of the requirements of the provisions of sub-sections (2) and (3) of Section 14A of the Act which had by then been brought into force. It is on such consideration that findings have been recorded that the expenditure in question bore no relation to the earning of the dividend income and hence the assessee was entitled to the benefit of full exemption claimed on account of dividend income.

37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.

38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in Radhasoami Satsang vs. Commissioner of Income-Tax.

> "We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it

would not be at all appropriate to allow the position to be changed in a subsequent year."

39. In the above circumstances, we are of the view that the second question formulated must go in favour of the assessee and it must be held that for the Assessment Year in question i.e. 2002-2003, the assessee is entitled to the full benefit of the claim of dividend income without any deductions.

40. Consequently, the appeal is allowed and the order of the High Court is set aside subject to our conclusions, as above, on the applicability of Section 14A with regard to dividend income on which tax is paid under Section 115-O of the Act."

IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

ITA No.7/2014

1. Guwahati Metropolitan Development Authority,

Medical College Road, Bhangagarh,

Guwahati—781005.

…… Appellant (Assessee).

-Versus-

1. Commissioner of Income Tax,

Guwahati-II, Aayakar Bhawan,

Christianbasti, Guwahati-781005.

...Respondents.

Date of hearing & judgment: 22.11.2016.

The Appeals were admitted on the following substantial questions of law:-

i) Whether on facts and in the circumstances, the Tribunal was justified in holding that there was justifiable material/ reasons to issue notice under Section 148 of the Income Tax Act, 1961 for reopening of the assessment for the Years 2004-2005?

ii) Whether the Tribunal was justified on facts and in the circumstances of the case to hold that "Gotanagar Truck Terminus" is not a "plant" but a "building" for the purpose of claiming depreciation under Section 32 read with Section 43 of the Income Tax Act, 1961 and, therefore, the assessee was entitled to claim depreciation at the rate of 10 per cent applicable to "buildings" and not at the rate of 25 per cent, as prescribed for "plant"?

11. We have carefully considered the submissions made by the learned counsel for the parties. The first issue that needs to be considered here is whether initiation of reassessment proceeding under Section 147 of the IT Act was justified on the materials. This Section allows the assessing officer to reassess income only if, he has reason to believe that income for concerned

assessment year has escaped assessment. The material basis for the reason to believe will justify the action of the Assessing Officer to act against a particular assessee. Therefore it is relevant to determine whether relevant materials existed on which reasonable person could have formulated the requisite belief to conclude prima facie that, income for the concerned assessment year, has escaped assessment.

12. When the assessing officer takes action under Section 147 of the IT Act and issues notice for reassessment under Section 148, he has to record his reasons and such reasons is subject to judicial scrutiny.

11. We have carefully considered the submissions made by the learned counsel for the parties. The first issue that needs to be considered here is whether initiation of reassessment proceeding under Section 147 of the IT Act was justified on the materials. This Section allows the assessing officer to reassess income only if, he has reason to believe that income for concerned assessment year has escaped assessment. The material basis for the reason to believe will justify the action of the Assessing Officer to act against a particular assessee. Therefore it is relevant to determine whether relevant materials existed on which reasonable person could have formulated the requisite belief to conclude prima facie that, income for the concerned assessment year, has escaped assessment.

12. When the assessing officer takes action under Section 147 of the IT Act

and issues notice for reassessment under Section 148, he has to record his reasons and such reasons is subject to judicial scrutiny.

19. In the present case, when we examine the order recorded by the assessing officer to start the reassessment proceeding under Section 147 of the IT Act, we find that the reason to believe to conclude that tax has escaped assessment is not at all reflected, in the order passed by the assessing officer. The Assessing Officer has not said that income from collection of parking fee from the trucks is attributable to building and not to the parking facility provided for the trucks. Even if the order recorded by the assessing officer on 10.04.2007 is liberally construed, we do not find the requisite material or the nexus on the basis of which, the reasonable belief is reached, for ordering the reassessment proceeding. Therefore in our understanding, the action initiated against the assessee under Section 147/148 appears to be without any jurisdiction and it is declared so accordingly.

20. As the learned counsel for the Revenue has raised the question on whether the jurisdictional issue can be questioned before the High Court in a proceeding under Section 260A of the IT Act, we may note here that the assessee, even before the First Appellate authority, had questioned the legality of re-assessment under Section 147 of the IT Act and this issue was specially dealt in para 5.1 and 5.4 by the CIT (Appeals) when he rejected the assessee's appeal, through his order dated 09.11.2010 (Annexure-C). Also before the Tribunal, the jurisdictional question to act under Section 147 of the IT Act was again raised by the assessee and the Tribunal too rejected the contention. Moreover, the

substantial question of law formulated by the High Court when the appeals were admitted on 24.06.2014 touches on the jurisdictional question for reopening of assessment under Section 147/148 of the IT Act, this being an important question of law going to the very foundation of the reassessment proceeding. Therefore in our considered understanding, this question cannot be left out of consideration in the proceeding under Section 260A of the IT Act. Moreover, the relevant facts pertaining to the jurisdictional question are already on record and therefore no impediment is noticed to answer the question of law posed before us. The jurisdictional question of law arises from the fact found by the Income Tax authority i.e. earning from parking fee collected from truck terminus and since tax liability of the assessee is dependent on this very issue, the contention raised by the learned counsel for the Revenue that this question cannot be examined by us in this proceeding under Section 260A of the IT Act is rejected. The ratio in National Thermal Power Co. Ltd. Vs. Commissioner of Income-Tax reported in (1998) 229 ITR 383 supports our decision.

21. That apart, the High Court can not only answer the substantial question of law already formulated at the time of admission of the appeals but can also determine other substantial questions, which arise out of the proceeding and therefore, the legality of the reassessment proceeding and the validity of the reassessment order under Section 147 of the IT Act are issues, which the High Court can definitely answer in a proceeding under Section 260A of the IT Act.

22. Following the above analysis and conclusion, the substantial questions of law are answered in favour of the assessee and we further declare that the

Gotanagar Truck Terminus is a plant and not building, for the purpose of claiming depreciation under Section 32 read with Section 43 of the IT Act. Consequently the assessee is held entitled to depreciation at the rate of 25% as prescribed for plant and not at 10%, as applicable for building.

23. With the above answer to the substantial questions in favour of the assessee, we quash the reassessment proceeding and also the order(s) passed by the Assessment Officer, the CIT(Appeals) and by the Income Tax Appellate Tribunal which are assailed in these proceedings. It is ordered accordingly.

24. With the above order, both appeals stand allowed in the manner Indicated