Compilation of recent landmark judicial precedents during *pendemic*

Under Income Tax Act ,1961

From Hon'ble Supreme court , High Court & ITAT

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A. Supreme court rulings

i) SHREE CHOUDHARY TRANSPORT COMPANY CIVIL APPEAL No. 7865 OF 2009 Dated: 29th July, 2020.

Questions for determination

12. Having regard to the submissions made by the learned counsel for the parties and the observations occurring in the orders impugned, the principal questions arising for determination in this appeal could be stated as follows:- 1. As to whether Section 194C of the Act does not apply to the present case? 2. As to whether disallowance under Section 40(a)(ia) of the Act is confined/limited to the amount "payable" and not to the amount "already paid"; and whether the decision of this

Court in Palam Gas Service v. Commissioner of Income-Tax: (2017) 394 ITR 300 requires reconsideration? 3. As to whether sub-clause (ia) of Section 40(a) of the Act, as inserted by the Finance (No. 2) Act, 2004 with effect from 01.04.2005, is applicable only from the financial year 2005-2006 and, hence, is not applicable to the present case relating to the financial year 2004-2005; and, at any rate, whole of the rigour of this provision cannot be applied to the present case? 4. As to whether the payments in question have rightly been disallowed from deduction while computing the total income of the assessee-appellant?

Ist Question

15.2. The suggestions on behalf of the appellant that the said truck operators/owners were not bound to supply the trucks as per the need of the appellant nor the freight payable to them was pre-determined, in our view, carry no meaning at all. Needless to observe that if a particular truck was not engaged, there existed no contract but, when any truck got engaged for the purpose of execution of the work undertaken by the appellant and freight charges were payable to its operator/owner upon execution of the work, i.e., transportation of the goods, all the

essentials of making of a contract existed; and, as aforesaid, the said truck operator/owner became a sub-contractor for the purpose of the work in question. The AO, CIT(A) and the ITAT have concurrently decided this issue against the appellant with reference to the facts of the case, particularly after appreciating the nature of contract of the appellant with the consignor company as also the nature of dealing of the appellant, while holding that the truck operators/owners were engaged by the appellant as sub-contractors. The same findings have been endorsed by the High Court in its short order dismissing the appeal of the appellant. We are unable to find anything of error or infirmity in these findings.

In contradistinction to the said case of Hardarshan Singh, the appellant of the present case was not acting as a facilitator or intermediary between the consignor company and the truck operators/owners because those two parties had no privity of contract between them. The contract of the company, for transportation of its goods, had only been with the appellant and it was the appellant who hired the services of the trucks. The payment made by the appellant to such a truck operator/owner was clearly a payment made to a sub-contractor.

Whether the appellant had specific and identified trucks on its rolls or had been picking them up on freelance basis, the legal

effect on the status of parties had been the same that once a particular truck was engaged by the appellant on hire charges for carrying out the part of work undertaken by it (i.e., transportation of the goods of the company), the operator/owner of that truck became the sub-contractor and all the requirements of Section 194C came into operation.

15.5. Thus, we have no hesitation in affirming the concurrent findings in regard to the applicability of Section 194C to the present case. Question No.1 is, therefore, answered in the negative; against the assessee-appellant and in favour of the revenue

IInd Question

16.7. We find the above-extracted observations and reasonings, which have already been approved by this Court in Palam Gas Service (supra), to be precisely in accord with the scheme and purpose of Section 40(a)(ia) of the Act; and are in complete answer to the contentions urged by the learned counsel for the appellant. It is ex facie evident that the term "payable" has been used in Section 40(a)(ia) of the Act only to indicate the type or nature of the payments by the assessees to the payees referred therein. In other words, the expression "payable" is descriptive

of the payments which attract the liability for deducting tax at source and it has not been used in the provision in question to specify any particular class of default on the basis as to whether payment has been made or not. The semantical suggestion by the learned counsel for the appellant, that this expression "payable" be read in contradistinction to the expression "paid", sans merit and could only be rejected. In a nutshell, while respectfully following Palam Gas Service (supra), we could only iterate our approval to the interpretation by the Punjab and Haryana High Court in P.M.S. Diesels (supra) 16.9. We are in respectful agreement with the observations in Palam Gas Service that the enunciations in P.M.S. Diesels had been of correct interpretation of the provisions contained in Section 40(a)(ia) of the Act. The decision in Palam Gas Service covers the entire matter and the said decision, in our view, does not require any reconsideration. That being the position, the contention urged on behalf of the appellant that disallowance under Section 40(a)(ia) does not relate to the amount already paid stands rejected.

16.12. In view of the above, Question No.2 is also answered in the negative; against the assessee-appellant and in favour of the revenue

IIIrd Question

7.5. In the case of Commissioner of Income-Tax, West Bengal v. Isthmian Steamship Lines: (1951) 20 ITR 572, a 3-Judge Bench of this Court exposited on the fundamental principle that 'in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied.' This decision and various other decisions were considered by the Constitution Bench of this Court in the case of Karimtharuvi Tea Estate Ltd. v. State of Kerala: (1966) 60 ITR 262 and the principles were laid down in the following terms (at pp. 264-266 of ITR):- "Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force…..

18. The supplemental submission that in any case, disallowance cannot be applied to the payments already made prior to 10.09.2004, the date on which the Finance (No.2) Act, 2004 received the assent of the President of India, remains equally

baseless. The said date of assent of the President of India to Finance (No.2) Act, 2004 is not the date of applicability of the provision in question, for the specific date having been provided as 01.04.2005. Of course, the said date relates to the assessment year commencing from 01.04.2005 (i.e., assessment year 2005-2006). 18.1. Even if it be assumed, going by the suggestions of the appellant, that the requirements of Section 40(a)(ia) became known on 10.09.2004, the appellant could have taken all the requisite steps to make deductions or, in any case, to make payment of the TDS amount to the revenue during the same financial year or even in the subsequent year, as per the relaxation available in the proviso to Section 40(a)(ia) of the Act but, the appellant simply avoided his obligation and attempted to suggest that it had no liability to deduct the tax at source at all. Such an approach of the appellant, when standing at conflict with law, the consequence of disallowance under Section 40(a)(ia) of the Act remains inevitable.

19. In yet another alternative attempt, learned counsel for the appellant has argued that by way of Finance (No.2) Act, 2014, disallowance under Section 40(a)(ia) has been limited to 30% of the sum payable and the said amendment deserves to be held retrospective in operation. This line of argument has been

grafted with reference to the decision in Calcutta Export Company (supra) wherein, another amendment of Section 40(a)(ia) by the Finance Act of 2010 was held by this Court to be retrospective in operation. The submission so made is not only baseless but is bereft of any logic. Neither the amendment made by the Finance (No.2) Act, 2014 could be stretched anterior the date of its substitution so as to reach the assessment year 2005-2006 nor the said decision in Calcutta Export Company has any correlation with the case at hand or with the amendment made by the Finance (No.2) Act of 2014. Obviously, the appellant could not have derived the benefits that were otherwise available by the curative amendments of 2008 and 2010. Having defaulted at every stage, the attempt on the part of assessee-appellant to seek some succor in the amendment of Section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014 could only be rejected as entirely baseless, rather preposterous. 19.7. Hence, Question No.3 is also answered in the negative, i.e., against the assessee-appellant and in favour of the revenue.

IV the Question

21. The suggestion on behalf of the appellant about the likely prejudice because of disallowance deserves to be rejected for three major reasons. In the first place, it is clear from the provisions dealing with disallowance of deductions in part D of Chapter IV of the Act, particularly those contained in Sections 40(a)(ia) and 40A(3)17 of the Act, that the said provisions are intended to enforce due compliance of the requirement of other provisions of the Act and to ensure proper collection of tax as also transparency in dealings of the parties. The necessity of disallowance comes into operation only when default of the nature specified in the provisions takes place. Looking to the object of these provisions, the suggestions about prejudice or hardship carry no meaning at all. Secondly, as noticed, by way of the proviso as originally inserted and its amendments in the years 2008 and 2010, requisite relief to a bonafide tax payer who had collected TDS but could not deposit within time before submission of the return was also provided; and as regards the amendment of 2010, this Court ruled it to be retrospective in operation. The proviso so amended, obviously, safeguarded the interest of a bonafide assessee who had made the deduction as required and had paid the same to the revenue. The appellant having failed to avail the benefit of such relaxation too, cannot now raise a grievance of alleged hardship. Thirdly, as noticed,

the appellant had shown total payments in Truck Freight Account at Rs. 1,37,71,206/- and total receipts from the company at Rs. 1,43,90,632/-. What has been disallowed is that amount of Rs. 57,11,625/- on which the appellant failed to deduct the tax at source and not the entire amount received from the company or paid to the truck operators/owners. Viewed from any angle, we do not find any case of prejudice or legal grievance with the appellant. 21.1. Hence, answer to Question No. 4 is clearly in the affirmative i.e., against the appellant and in favour of the revenue that the payments in question have rightly been disallowed from deduction while computing the total income of the assessee-appellant.

ii) <u>Shiv Raj Gupta case order dated 22nd July, 2020. CIVIL APPEAL NO. 12044 OF 2016</u>

Important Principles/Propositions

<u>First take away:</u>

.It can be seen that the substantial question of law that was raised by the High Court did not contain any question as to whether the non-compete fee could be taxed under any provision other than Section 28(ii)(a) of the Income Tax Act,

1961. Without giving an opportunity to the parties followed by reasons for framing any other substantial question of law as to the taxability of such amount as a capital receipt in the hands of the assessee, the High Court answered the substantial question of law raised as follows: "63. In view of the aforesaid discussion, we deem it appropriate and proper to treat Rs. 6.60 crores as consideration paid for sale of shares, rather than a payment under Section 28(ii)(a) of the Act. xxx xxx xxx 65. The substantial question of law is accordingly answered in favour of the appellant-Revenue and against the respondent-assessee but holding that Rs.6.60 crores was taxable as capital gains in the hands of the respondent-assessee being a part of the full value sale consideration paid for transfer of shares. The appellant-Revenue will be entitled to costs as per the Delhi High Court Rules." Clearly, without any recorded reasons and without framing any substantial question of law on whether the said amount could be taxed under any other provision of the Income Tax Act, the High Court went ahead and held that the amount of INR 6.6 crores received by the assessee was received as part of the full value of sale consideration paid for transfer of shares – and not for handing over management and control of CDBL and is consequently not taxable under Section 28(ii)(a) of the Income Tax Act. Nor is it exempt as a capital receipt being

noncompete fee, as it is taxable as a capital gain in the hands of the respondent-assessee as part of the full value of sale consideration paid for transfer of shares. This finding would clearly be in the teeth of Section 260-A (4), requiring the judgment to be set aside on this score

Second take away

Coming to the merits, the High Court found: "22. ...No doubt, market price of each share was only Rs.3/- per share and the purchase price under the MOU was Rs.30/-, but the total consideration received was merely about Rs.56 lacs. What was allegedly paid as non-compete fee was ten times more, i.e. Rs.6.60 crores. The figure per se does not appear to be a realistic payment made on account of non-compete fee, dehors and without reference to sale of shares, loss of management and control of CDBL. The assessee had attributed an astronomical sum as payment toward non-compete fee, unconnected with the sale of shares and hence not taxable. Noticeably, the price received for sale of shares, it is accepted was taxable as capital gain. The contention that quoted price of each share was mere Rs. 3 only, viz. price as declared of Rs. 30/- is fallacious and off beam. The argument of the assessee suffers from a basic and fundamental flaw which is conspicuous and evident." This finding flies in the face of settled law. A catena of judgments has

held that commercial expediency has to be adjudged from the point of view of the assessee and that the Income Tax Department cannot enter into the thicket of reasonableness of amounts paid by the assessee.

The reasons given by the learned Assessing Officer and the minority judgment of the Appellate Tribunal are all reasons which transgress the lines drawn by the judgments cited, which state that the revenue has no business to second guess commercial or business expediency of what parties at arms-length decide for each other. For example, stating that there was no rationale behind the payment of INR 6.6 crores and that the assessee was not a probable or perceptible threat or competitor to the SWC group is the perception of the Assessing Officer, which cannot take the place of business reality from the point of view of the assessee, as has been pointed out by us hereinabove.

Third takeaway

Following important decisions reiterated

CIT v. Walchand & Co. (1967) 3 SCR 214; J.K. Woollen Manufacturers v. CIT (1969) 1 SCR 525 CIT v. Panipat Woollen & General Mills Co. Ltd. (1976) 2 SCC 5; Shahzada Nand & Sons v. CIT (1977) 3 SCC 432 ; S.A. Builders Ltd. v.

CIT (2007) 1 SCC 781; Hero Cycles (P) Ltd. v. CIT (2015) 16 SCC 359

Fourth takeaway

The High Court's next finding based on the judgment in Vodafone (supra) is as follows: "56. In view of the aforesaid discussion and our findings on the true and real nature of the transaction camouflaged as 'non-compete fee', we have no hesitation and reservation that the respondentassessee had indulged in abusive tax avoidance."

This finding of high court is overruled

iii) M/S SAMSUNG HEAVY INDUSTRIES CO. LTD. CIVIL APPEAL NO. 12183 OF 2016 22nd July, 2020

Important propositions

First takeaway

A reading of the aforesaid judgments makes it clear that when it comes to "fixed place" permanent establishments under double taxation avoidance treaties, the condition precedent for applicability of Article 5(1) of the double taxation treaty and the ascertainment of a "permanent establishment" is that it should be an establishment "through which the business of an enterprise" is wholly or partly carried on. Further, the profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a permanent

establishment. What is equally clear is that the maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article 5. Also, it is only so much of the profits of the enterprise that may be taxed in the other State as is attributable to that permanent establishment.

Second take away

A reading of the Board Resolution would show that the Project Office was established to coordinate and execute "delivery documents in connection with construction of offshore platform modification of existing facilities for ONGC". Unfortunately, the ITAT relied upon only the first paragraph of the Board Resolution, and then jumped to the conclusion that the Mumbai office was for coordination and execution of the project itself. The finding, therefore, that the Mumbai office was not a mere liaison office, but was involved in the core activity of execution of the project itself is therefore clearly perverse. Equally, when it was pointed out that the accounts of the Mumbai office showed that no expenditure relating to the execution of the contract was incurred, the ITAT rejected the argument, stating that as accounts are in the hands of the Assessee, the mere mode of maintaining accounts alone cannot determine the character

of permanent establishment. This is another perverse finding which is set aside. Equally the finding that the onus is on the Assessee and not on the Tax Authorities to first show that the project office at Mumbai is a permanent establishment is again in the teeth of our judgment in E-Funds IT Solution Inc. (supra) Though it was pointed out to the ITAT that there were only two persons working in the Mumbai office, neither of whom was qualified to perform any core activity of the Assessee, the ITAT chose to ignore the same. This being the case, it is clear, therefore, that no permanent establishment has been set up within the meaning of Article 5(1) of the DTAA, as the Mumbai Project Office cannot be said to be a fixed place of business through which the core business of the Assessee was wholly or partly carried on. Also, as correctly argued by Shri Ganesh, the Mumbai Project Office, on the facts of the present case, would fall within Article 5(4)(e) of the DTAA, inasmuch as the office is solely an auxiliary office, meant to act as a liaison office between the Assessee and ONGC. This being the case, it is not necessary to go into any of the other questions that have been argued before us. The appeal against the impugned High Court judgment is therefore dismissed, but for the reasons stated by us.

Third takeaway

Important decisions referred

M/s DIT (International Taxation), Mumbai v. M/s Morgan Stanley & Co. Inc., (2007) 7 SCC 1 Asst. Director of Income Tax, New Delhi v. EFunds IT Solution Inc. (2018) 13 SCC 294. Ishikawajma-Harima Heavy Industries Ltd. v. Director of Income Tax, Mumbai, (2007) 3 SCC 481
Commissioner of Income Tax and Another v. Hyundai Heavy Industries Co. Ltd., (2007) 7 SCC 422,

iv) SHAILENDRA SWARUP CRIMINAL APPEAL NO.2463 OF 2014 JULY 27, 2020.

From the submissions made by the parties and materials on records following points arise for determination in this appeal: (1) Whether the plea taken by the appellant in its reply dated 29.10.2003 that he was only a part-time, non-executive Director and was never in charge of nor even responsible for the conduct of business of the Company at the relevant time was an afterthought, since, in the reply given by the Company Secretary dated 26.03.2001 no such plea was taken? Tribunal to prove that he was only a parttime, non-executive Director not responsible for the conduct of business of the Company at the time of commission of the offence? (3) Whether the Adjudicating Authority, Appellate Tribunal and the High Court erred in holding contravention of provisions of Section 8(3), 8(4) and Section 68 of FERA, 1973 by the appellant without their being any material that the appellant was responsible for the conduct of business of the Company at the time of commission of the offence and without recording any specific findings to that effect?

13. We may also notice the provisions of Section 51 of FERA, 1973, which is to the following effect:- “Section 51. Power to adjudicate.—For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.” 14. The provisions of Section 51 as noted above oblige the adjudicating officer to hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter.

First take away*: The representation dated 29.10.2003 was the first representation submitted by the appellant before the adjudicating officer during course of personal hearing. What is said by a person who is called for personal hearing even though given in the form of written representation dated 29.10.2003 required to be considered by the adjudicating officer otherwise the personal hearing shall become an empty formality and meaningless, specially when what was said by the appellant in his representation dated 29.10.2003 in no manner contradicted the reply 26.03.2001 sent by the Company Secretary. We, thus, are of the considered opinion that written representation dated 29.10.2003 submitted by appellant required due consideration and the High Court erred in discarding it as an afterthought.*

Second takeaway: 21. The High Court, thus, discarded the plea of the appellant that he was part-time, non-executive Director as afterthought and did not consider the same on the ground that the affidavit dated 04.07.2003 relied by the appellant was not filed which, as noted above, is not correct. There was nothing on record brought on behalf of the Department that the above plea of the appellant was incorrect and it was the appellant who was responsible for the conduct of business of the Company at the relevant time. 22. We, thus, are of the view that the material was brought by the appellant on the record that he was a part-time, non-executive Director not in charge of the affairs of the Company at the relevant time, which was erroneously refused to be considered.

Third takeaway: *There is no consideration of pleas of the appellant as has been extracted by the adjudicating officer himself as noted above specially in paragraph 10(1), 10(2) and 10(3) of the reply. The adjudicating officer has not even held that the pleas taken by the appellant were untenable. The adjudicating officer, thus, has imposed the penalty without returning a finding that it was the appellant who was liable for contravention of the provisions of Section 8(3), 8(4) and Section 68 of the FERA, 1973. The order of the adjudicating officer, thus, is unsustainable on the above ground also.*

Fourth takeaway:

7. Section 68 of FERA, 1973 deals with "Offences by companies". Section 68(1) provides that "……….every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention……..." Section 68(1) creates a legal fiction, i.e., "shall be deemed to be guilty". The legal fiction triggers on fulfilment of conditions as contained in the section. The words "every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business" has to be given some meaning and purpose. The provision cannot be read to mean that whosoever was a Director of a company at the relevant time when contravention took place, shall be deemed to be guilty of the contravention. Had the legislature intended that all the Directors irrespective of their role and responsibilities shall be deemed to be guilty of contravention, the section could have been worded in different manner. When a person is proceeded with for committing an offence and is to be punished, necessary ingredients of the offence as required by Section 68 should be present. 38. We may notice that Section 141 of the Negotiable Instruments Act, which

was inserted in Negotiable Instruments Act by amendment in the year 1988 contains the same conditions for a person to be proceeded with and punished for offence as contained in Section 68 of FERA, 1973. Section 141(1) of Negotiable Instruments Act uses the same expression "every person, who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence". Section 68 of FERA, 1973 as well as Section 141 of the Negotiable Instruments Act deals with the offences by the companies in the same manner. The ratio of the judgments of this Court on Section 141 of Negotiable Instruments Act as noted above are also clearly relevant while interpreting Section 68 of FERA Act. We, thus, hold that for proceeding against a Director of a company for contravention of provisions of FERA, 1973, the necessary ingredient for proceeding shall be that at the time offence was committed, the Director was in charge of and was responsible to the company for the conduct of the business of the company. The liability to be proceeded with for offence under Section 68 of FERA, 1973 depends on the role one plays in the affairs of the company and not on mere designation or status. This Court in S.M.S. Pharmaceuticals Ltd. (supra) while elaborating the ambit and scope of Section 141 of Negotiable

Instruments Act has already laid down above in paragraph 10 of the judgment as extracted above.

Fifth take away:

Even though, FERA, 1973 does not contemplate filing of a written complaint but in proceedings as contemplated by Section 51, the person, who has to be proceeded with has to be informed of the contravention for which penalty proceedings are initiated. The expression "after giving that person a reasonable opportunity for making a representation in the matter" as occurring in Section 51 itself contemplate due communication of the allegations of contravention and unless allegations contains complete ingredients of offence within the meaning of Section 68, it cannot be said that a reasonable opportunity for making a representation in the matter has been given to the person, who is to be proceeded with.

v) ARJUN PANDITRAO KHOTKAR …Appellant CIVIL APPEAL NOS. 20825-20826 OF 2017 JULY 14, 2020

Electronic e evidence judgment

First takeaway

Coming back to Section 65B of the Indian Evidence Act, subsection (1) needs to be analysed. The sub-section begins

with a nonobstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "…without further proof or production of the original…" make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed document" now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

Second takeaway

The non-obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose. However,

Section 65B(1) clearly differentiates between the "original" document - which would be the original "electronic record" contained in the "computer" in which the original information is first stored - and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates between the original information contained in the "computer" itself and copies made therefrom – the former being primary evidence, and the latter being secondary evidence.

uite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under

Section 65B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "…if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act…". This may more appropriately be read without the words "under Section 62 of the Evidence Act,…". With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

Third takeaway

However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the Respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate***. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the Court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC.***

Once such application is made to the Court, and the Court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate.

Fourth takeaway:

Two Latin maxims become important at this stage. The first is lex non cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.

Fifth takeaway:

On an application of the aforesaid maxims to the present case, it is clear that though Section 65B(4) is mandatory, yet, on the facts of this case, the Respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third-party over whom the Respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

Sixth takeaway

We may hasten to add that Section 65B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. (supra), this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. ***We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned***. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. ***When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.*** t is pertinent to recollect that the stage of admitting

documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. Section 207 of the CrPC, which reads as follows, is mandatory6 ***. Therefore, the electronic evidence, i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement.***

Seventh takeaway

Subject to the caveat laid down in paragraphs 50 and 54 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in

electronic record form can then be admitted, and relied upon in evidence.

vi) S.KASI CRIMINAL APPEAL NO. 452 OF 2020 JUNE 19,2020

First take away on Judicial discipline & comity of courts

We may further notice that learned Single Judge in the impugned judgment had not only breached the judicial discipline but has also referred to an observation made by learned Single Judge in Settu versus The State as uncharitable. ***All Courts including the High Courts and the Supreme Court have to follow a principle of Comity of Courts****. A Bench whether coordinate or Larger, has to refrain from making any uncharitable observation on a decision even though delivered by a Bench of a lesser coram. A Bench sitting in a Larger coram may be right in overturning a judgment on a question of law, which jurisdiction a Judge sitting in a coordinate Bench does not have.* ***In any case, a Judge sitting in a coordinate Bench or a Larger Bench has no business to make any adverse comment or uncharitable remark on any other judgment. We strongly disapprove the course adopted by the learned Single Judge in the impugned judgment.***

Second takeaway on default bail

There is one more reason due to which the impugned judgment of the learned Single Judge deserves to be set aside. A learned Single Judge of Madras High Court in Crl.OP(MD)No. 5291 of 2020, Settu versus the State, had already considered the judgment of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 and its effect on Section 167(2) Cr.P.C. The above was also a case of a bail where the accused was praying for grant of default bail due to non-submission of charge sheet. The prosecution had raised objection and had relied on the order of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 claiming that period for filing charge sheet stood extended until further orders. The submission of prosecution was rejected by learned Single Judge. The learned Single Judge had made following observations in paragraphs 14 and 15:-…..

28. The Prayer of the accused in the said case for grant of default bail was allowed. The claim of the prosecution that by order of this Court dated 23.03.2020, the period for filing charge sheet under Section 167 Cr.P.C. stands extended was specifically rejected. 29. The view taken by learned Single Judge of Madras High Court in Settu versus The State (supra) that the order of this Court dated 23.03.2020 passed in Suo

Moto W.P(C)No.3 of 2020 does not extend the period for filing charge sheet under Section 167(2) Cr.P.C. has been followed by Kerala High Court as well as Rajasthan High Court. Kerala High Court in its judgment dated 20.05.2020 in Bail Application No. 2856 of 2020 – Mohammed Ali Vs. State of Kerala and Anr. after noticing the contention raised on the basis of order of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 rejected the said contention and followed the judgment of the learned Single Judge of Madras High Court in Settu versus The State (supra). Kerala High Court in paragraph 13 of the judgment observes: - "13. I respectfully concur with the exposition of law laid down by the learned Single Judge of the Madras High Court in Crl.O.P.(MD) No.5291 of 2020 as well by the learned Single Judge of Uttarakhand High Court when their lordships held that the investigating agency cannot benefit from the directions issued by the Supreme Court in the Suo moto Writ Petition." 30. Rajasthan High Court had occasion to consider Section 167 as well as the order of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 and Rajasthan High Court has also come to the same conclusion that the order of this Court dated 23.03.2020 has no consequence on the right, which accrues to an accused on non-filing of charge sheet within time as prescribed under Section 167 Cr.P.C.

Rajasthan High Court in S.B. Criminal Revision Petition No. 355 of 2020 – Pankaj Vs. State decided on 22.05.2020 has also followed the judgment of learned Single Judge of the Madras High Court in Settu versus The State (supra) and has held that accused was entitled for grant of the default bail. Uttarakhand High Court in First Bail Application No.511 of 2020 – Vivek Sharma Vs. State of Uttarakhand in its judgment dated 12.05.2020 has after considering the judgment of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 has taken the view that the order of this Court does not cover police investigation. We approve the above view taken by learned Single Judge of Madras High court in Settu versus The State (supra) as well as the by the Kerala High Court, Rajasthan High Court and Uttarakhand High Court noticed above.

Learned Single Judge in the impugned judgment has taken a contrary view to the earlier judgment of learned Single Judge in Settu versus The State (supra). It is well settled that a coordinate Bench cannot take a contrary view and in event there was any doubt, a coordinate Bench only can refer the matter for consideration by a Larger Bench. The judicial discipline ordains so. This Court in State of Punjab and another versus Devans Modern Breweries ltd. and another, (2004) 11 SCC 26, in paragraph 339 laid down following:- "339. Judicial

discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1 followed in Union of India Vs. Hansoli Devi, (2002) 7 SCC 273. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority." 32. Learned Single Judge did not follow the judicial discipline while taking a contrary and diagonally opposite view to one which have been taken by another learned Single Judge in Settu versus The State (supra). **The contrary view taken by learned Single Judge in the impugned judgment is not only erroneous but also sends wrong signals to the State and the prosecution emboldening them to act in breach of liberty of a person.**

vii) Ramnath & Company CIVIL APPEAL Nos…2506-2509 OF 2020 Dated: 5th June, 2020.

"Dilip Kumar & Co.

17. The core question referred for authoritative pronouncement to the Constitution Bench in the case of Dilip Kumar & Co. (supra) was as to what interpretative rule should be applied while interpreting a tax exemption provision/notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax? The reference to the Constitution Bench was necessitated essentially for the reason that in a few decisions, one of them by a 3-Judge Bench of this Court in the case of Sun Export Corpn. v. Collector of Customs: (1997) 6 SCC 564, the proposition came to be stated that any ambiguity in a tax provision/notification must be interpreted in favour of the assessee who is claiming benefit thereunder.14

17.1. In Dilip Kumar & Co., the Constitution Bench of this Court examined several of the past decisions including that by another Constitution Bench in CCE v. Hari Chand Shri Gopal: (2011) 1 SCC 236 as also that by a Division Bench of

this Court in the case of UOI v. Wood Papers Ltd.: (1990) 4 SCC 256 wherein, the principles were stated in clear terms that the question as to whether a subject falls in the notification or in the exemption clause has to be strictly construed; and once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the exemption clause liberally. This Court found that in Wood Papers Ltd. (supra), some of the observations in an earlier decision in the case of CCE v. Parle Exports (P) Ltd.: (1989) 1 SCC 345 were also explained with all clarity. This Court noted the enunciations in Wood Paper Ltd. with total approval as could be noticed in the following:- "46. In the judgment of the two learned Judges in Union of India v. Wood Papers Ltd.: (1990) 4 SCC 256 (hereinafter referred to as "Wood Papers Ltd. case", for brevity), a distinction between stage of finding out the eligibility to seek exemption and stage of applying the nature of exemption was made. Relying on the decision in CCE v. Parle Exports (P) Ltd. : (1989) 1 SCC 345, it was held: (Wood Papers Ltd. case, SCC p. 262, para 6) *"6. ... Do not extend or widen the ambit at the stage of applicability. But once that hurdle is crossed, construe it liberally." The reasoning for arriving at such conclusion is found in para 4 of Wood Papers Ltd. case, which reads: (SCC p. 260) "4. ...*

Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective, etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction." (emphasis supplied)

**** *** *** 58. In the above passage, no doubt this Court observed that: (Parle Exports case, SCC p. 357, para 17) "17.*

when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment." This observation may appear to support the view that ambiguity in a notification for exemption must be interpreted to benefit the subject/assessee. A careful reading of the entire para, as extracted hereinabove would, however, suggest that an exception to the general rule of tax has to be construed strictly against those who invoke for their benefit. This was explained in a subsequent decision in Wood Papers Ltd. case. In para 6, it was observed as follows: (SCC p. 262) "6. ... In CCE v. Parle Exports (P) Ltd., this Court while accepting that exemption clause should be construed liberally applied rigorous test for determining if expensive items like Gold Spot base or Limca base or Thums Up base were covered in the expression food products and food preparations used in Item No. 68 of First Schedule of Central Excises and Salt Act and held 'that it should not be in consonance with spirit and the reason of law to give exemption for non-alcoholic beverage basis under the notification in question'. Rationale or ratio is same. Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed construe it liberally. Since the respondent did not fall in the first clause of the notification there was no question of giving the clause a

liberal construction and hold that production of goods by respondent mentioned in the notification were entitled to benefit." 59. The above decision, which is also a decision of a twoJudge Bench of this Court, for the first time took a view that liberal and strict construction of exemption provisions are to be invoked at different stages of interpreting it. The question whether a subject falls in the notification or in the exemption clause, has to be strictly construed. When once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction. The ratio of Parle Exports case deduced as follows: (Wood Papers Ltd. case, SCC p. 262, para 6) "6. ... Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed, construe it liberally." 60. We do not find any strong and compelling reasons to differ, taking a contra view, from this. We respectfully record our concurrence to this view which has been subsequently, elaborated by the Constitution Bench in Hari Chand case." (emphasis in bold supplied)

17.2. The Constitution Bench decision in Hari Chand Shri Gopal (supra) was also taken note of, inter alia, in the following:- *"50. We will now consider another Constitution*

Bench decision in CCE v. Hari Chand Shri Gopal (hereinafter referred as "Hari Chand case", for brevity). We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question viz. whether manufacturer of a specified final product falling under the Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between

*the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas case, to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows: (Hari Chand case, SCC p. 247) "29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. *** *** ***" (emphasis in bold supplied)*

17.3. In view of above and with reference to several other decisions, in Dilip Kumar & Co., the Constitution Bench

summed up the principles as follows:- "66. To sum up, we answer the reference holding as under: 66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. 66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue. 66.3. The ratio in Sun Export case is not correct and all the decisions which took similar view as in Sun Export case stand overruled." (emphasis in bold supplied)

17.4. Obviously, the generalised, rather sweeping, proposition stated in the case of Sun Export Corporation (supra) as also in other cases that in the matters of taxation, when two views are possible, the one favourable to assessee has to be preferred, stands specifically disapproved by the Constitution Bench in Dilip Kumar & Co. (supra). It has been laid down by the Constitution Bench in no uncertain terms that exemption notification has to be interpreted strictly; the burden of proving its applicability is on the

assessee; and in case of any ambiguity, the benefit thereof cannot be claimed by the subject/assessee, rather it would be interpreted in favour of the revenue.

20. The principles laid down by the Constitution Bench, when applied to incentive provisions like those for deduction, would also be that the burden lies on the assessee to prove its applicability to his case; and if there be any ambiguity in the deduction clause, the same is subject to strict interpretation with the result that the benefit of such ambiguity cannot be claimed by the assessee, rather it would be interpreted in favour of the revenue. In view of the Constitution Bench decision in Dilip Kumar & Co. (supra), the generalised observations in Baby Marine Exports (supra) with reference to a few other decisions, that a tax incentive provision must receive liberal interpretation, cannot be considered to be a sound statement of law; rather the applicable principles would be those enunciated in Wood Papers Ltd. (supra), which have been precisely approved by the Constitution Bench. ***Thus, at and until the stage of finding out eligibility to claim deduction, the ambit and scope of the provision for the purpose of its applicability cannot be expanded or widened and remains subject to strict interpretation but, once eligibility is decided in favour of the***

person claiming such deduction, it could be construed liberally in regard to other requirements, which may be formal or directory in nature.

The other guiding rules of interpretation would be the internal aides like definition or interpretation clauses in the statute itself. Yet further, if internal aides do not complete the comprehension, recourse to external aides like those of judicial decisions expounding the meaning of the words used in construing the statutes in pari materi, or effect of usage and practice etc., is not unknown; and in this very sequence, it is an accepted principle that when a word is not defined in the enactment itself, it is permissible to refer to the dictionaries to find out the general sense in which the word is understood in common parlance.

In fact, for the purpose of gathering ordinary meaning of any expression, recourse to its dictionary meaning is rather interlaced in the literal rule of interpretation. This aspect was amply highlighted and expounded by the Constitution Bench of this Court in the case of Commissioner of WealthTax, Andhra Pradesh v. Officer-in-Charge (Court of Wards), Paigah: (1976) 105 ITR 133 as follows (at p.137 of

ITR) : "8 . It is true that in Raja Benoy Kumar Sahas Roy's case: [1957] 32 ITR 466(SC) this court pointed out that meanings of words used in Acts of Parliament are not necessarily to be gathered from dictionaries which are not authorities on what Parliament must have meant. Nevertheless, it was also indicated there that where there is nothing better to rely upon, dictionaries may be used as an aid to resolve an ambiguity. The ordinary dictionary meaning cannot be discarded simply because it is given in a dictionary. To do that would be to destroy the literal rule of interpretation. This is a basic rule relying upon the ordinary dictionary meaning which, in the absence of some overriding or special reasons to justify a departure, must prevail. ……." (emphasis in bold supplied)

viii) **MARICO LTD MARICO LTD SPECIAL LEAVE PETITION (CIVIL) Diary No.7367/2020 Date : 01-06-2020**

"In the present matter, the assessment order was passed on 30.01.2018 as regards the Assessment Year 2014-15.

According to the record, certain queries were raised by the Assessing Officer on 25.09.2017 during the assessment proceedings which were responded to by the Assessee vide

letters dated 10.10.2017 and 21.12.2017. After considering said responses, the assessment order was passed on 30.01.2018. Subsequently, by notice dated 27.03.2019 issued under Section 148 of the Income-Tax Act, the matter was sought to be re-opened. While accepting the challenge to the issuance of notice, the High Court in para 12 of its judgment observed as under:

"12. Thus we find that the reasons in support of the impugned notice is the very issue in respect of which the Assessing Officer has raised the query dated 25 September 2017 during the assessment proceedings and the Petitioner had responded to the same by its letters dated 10 December 2017 and 21 December 2017 justifying its stand. The non-rejection of the explanation in the Assessment Order would amount to the Assessing Officer accepting the view of the assessee, thus taking a view/forming an opinion. Therefore, in these circumstances, the reasons in support of the impugned notice proceed on a mere change of opinion and therefore would be completely without jurisdiction in the present facts. Accordingly, the impugned notice dated 27 March 2019 is quashed and set-aside." In the circumstances, we see no reason to interfere in the matter. This special leave petition is, accordingly, dismissed. Pending application(s), if any, also stand disposed of."

B. High court rulings

B.1 Bombay high court important decisions

i) Gateway Leasing Pvt. Ltd.,] … Petitioner. WRIT PETITION NO. 2518 OF 2019 IN THE IGH COURT OF JUDICATURE AT BOMBAY

Rival contentions and reasons recorded

15.1. Primary contention of Mr. Agarwal is that the reasons given for re-opening assessment do not make out a case for invoking jurisdiction under section 147 of the Act. The so called information allegedly received by the Respondents were in-fact furnished by the Petitioner in the course of the original assessment. It is another matter that Assessing Officer did not refer to all the primary facts placed before him by the Petitioner in the assessment order but that cannot be a ground for re-opening assessment. He therefore submits that at the most it can be construed to be reappreciation of the materials already on record and in the circumstances, it would be a case of change of opinion which is not permissible for re-opening of a concluded assessment. His

further submission is that grounds as furnished by the Respondents for reopening of the assessment and the averments made in the affidavit by the Respondents, justifying the reopening of assessment, are at variance. His contention is that the reasons given for re-opening of the assessment cannot be enlarged and improved upon by way of affidavit filed subsequently. That apart, it is contended that Principal Commissioner of Income Tax-1 had mechanically granted approval to Respondent No.1 to re-open the assessment which has vitiated the impugned notice. 16 On the other hand Mr. Suresh Kumar, learned standing counsel, Revenue, for the Respondents submits that not only the impugned notice was handed over to the Petitioner by the Income Tax Department on 31.03.2019 at about 3.34 p.m. but a copy of the same was served upon the Petitioner before end of the day on 31.03.2019. He further submits that the reasons furnished are good grounds to justify re-opening of the assessment of the Petitioner. Writ petition is premature inasmuch as it has assailed the impugned notice; whereas the Act provides for a host of alternative remedies to the Petitioner which are adequate and efficacious. Therefore, the writ petition should be dismissed. 17 Submissions made by

learned counsel for the parties have been considered. We have also perused the materials on record.

9 From the above, it is seen that according to Respondent No. 2 information was received from the Investigation Wing about search and seizure action carried out in the premises of Shri Naresh Jain on 19.03.2019 which concluded on 21.03.2019. The search action revealed that a syndicate of persons were acting in collusion and had managed transactions in the stock exchange, thereby generating bogus long-term capital gains, bogus short term capital gains and bogus business loss entries for various beneficiaries. The search action unraveled the workings of the syndicate and brought on record the make believe nature of paper work that is manufactured in order to show the arranged transactions as legitimate market transactions. Statements of various persons were recorded in the course of the search action. In his statement Shri Naresh Jain stated that during the assessment year 2012-13, he had used scrips of seven entities to provide bogus entries which included the scrip of M/s. Scan Steels Ltd.. Further, information revealed that the Petitioner had traded in the shares of M/s. Scan Steels Ltd., and was in receipt of Rs. 23,98,014/-. Therefore, Respondent No. 2

stated that he had reasons to believe that this income had escaped assessment within the meaning of section 147 of the Act 20 Thus what is discernible is that the main ground on which assessment is sought to be re-opened is that Petitioner had traded in the shares of Scan Steels Ltd., and was in receipt of Rs. 23,98,014/-, which the Petitioner failed to disclose fully and truly before the Assessing Officer and which Respondent No.2 believed had escaped assessment.

23 From the above, it is seen that what Respondent No. 2 contends is that though Petitioner had disclosed details of the transactions pertaining to purchase and sale of shares of Mittal Securities Ltd., (now Scan Steels Ltd.), Petitioner did not disclose the real colour / true character of such transactions and therefore, he did not make a full and true disclosure of all material facts which was also overlooked by the Assessing Officer.

Principles analyzed

27 At this stage, we may briefly refer to the relevant legal provisions. 28 Section 147 of the Act deals with "income escaping assessment". Section 147 says that if the

Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under section 147 of the Act. 28.1 The first proviso to section 147 is important. As per this proviso, where an assessment under subsection (3) of section 143 or section 147 has been made for the relevant assessment year, no action shall be taken under section 147 after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. 28.2 Section 149 deals with time limit for notice under section 148. As per clause (a) of sub-section (1), no notice under section 148 shall be issued for the elevant assessment year, if four years have

elapsed from the end of the relevant assessment year unless the case falls under clause (b) or clause (c). Clause (b) says that no notice shall be issued if four years have elapsed but not more than six years have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year. Clause (c) deals with a situation where limitation is extended upto sixteen years but the escaped income must relate to any asset located outside India. 29 Insofar the present case is concerned, the assessment year is 2012-13. The assessment year ends on 31.03.2013. In this case impugned notice under section 148 of the Act was issued on 31.03.2019. Therefore, it is a case of re-opening of assessment under section 149 (1) (b) of the Act after expiry of four years but before expiry of six years. 30 In such a case, the first condition for invoking section 147 is that the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment for the relevant assessment year. The second condition is that the Assessing Officer must arrive at the satisfaction that income chargeable to tax has escaped assessment for the said assessment year by reason of the

failure on the part of the assessee to make a return under section 139 or to respond to a notice under section 142(1) or section 148 or due to the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

31 The key or crucial expressions appearing in section 147 are "reason to believe" and "failure to disclose fully and truly all material facts necessary for assessment".

31.1 Before dilating on these two expressions, it would be apposite to refer to section 148 of the Act, which deals with issue of notice where income has escaped assessment. As per sub-section (1), before making the assessment, re-assessment or recomputation under section 147, a notice in the prescribed form is required to be served upon the assessee by the Assessing Officer, calling upon him to file return of income in terms of such notice within the period specified and in such event the return so filed would be construed to be a return filed under section 139. As per sub-section (2) of the said section, the Assessing Officer shall before issuing any notice under section 148, record his reasons for doing so.

31.2 In GKN Driveshafts (India) Ltd. (supra), Supreme Court held that when a notice under section 148 of the

Act is issued, the proper course of action for the assessee is to file the return and if he so desires, to seek the reasons for issuing the notice. If sought for, Assessing Officer is bound to furnish the reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to the notice in which event the Assessing Officer would be under an obligation to dispose off the same by passing a speaking order.

32 Reverting back to the two expressions as noticed above, we may mention that these two expressions were examined and interpreted in great detail by the Supreme Court in Income Tax Officer vs. Lakhmani Mewal Das, reported in 103 ITR 437. That was also a case where notice under section 148 of the Act was put to challenge. Though provisions of section 147 of the Act as it existed then have since been reconstructed and have undergone change, the two key expressions continue to retain their relevance in so far section 147 of the Act is concerned. It may further be noticed that in Lakhmani Mewal Das (supra), Supreme Court was considering validity of notice under Section 148 in respect of an assessment beyond the period of four years but within a period of eight years from the end of the relevant year. Supreme

Court observed that in such a case, two conditions would have to be satisfied before an Income Tax Officer acquires jurisdiction to issue notice. These two conditions are - 1. He must have reason to believe that income chargeable to tax has escaped assessment; and 2. He must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee to make a return under section 139 for the asessment year under consideration or to disclose fully and truly all material facts necessary for his assessment for that year.

32.1 Both the two conditions must co-exist in order to confer jurisdiction on the Income Tax Officer. Supreme Court observed that duty is cast upon the assessee to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income Tax Officer the books of accounts or other evidence from which material evidence with due diligence could have been discovered by the Income Tax Officer will not necessarily amount to disclosure contemplated by law but the duty of the assessee in any case does not extend beyond making a true and full

disclosure of primary facts. Once he has done that, his duty ends. It is for the Income Tax Officer to draw the correct inference from the primary facts. If the Income Tax Officer draws an inference, which appears subsequently to be erroneous, it would amount to change of opinion and mere change of opinion with regard to that inference would not justify initiation of action for re-opening assessment.

32.2 The grounds or reasons which led to formation of the belief that income chargeable to tax has escaped assessment must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exists reasonable grounds for the Income Tax Officer to form the above belief that would be sufficient to clothe him with jurisdiction to issue notice. However, sufficiency of the grounds is not justiceable. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or

a relevant bearing on the formation of the belief and are not extraneous or irrelevant. To this limited extent, initiation of proceedings in respect of income escaping assessment is open to challenge in a court of law. 32.3 Dilating further, Supreme Court held that reasons for formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. But it has to be borne in mind that it is not any and every material howsoever vague and indefinite or distant, remote and far-fetched which would warrant formation of the belief relating to escapement of income. Moreover, powers of the Income Tax Officer to reopen assessment, though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". Reopening of assessment after the lapse of many years is a serious matter. 33 It may be mentioned here that the proposition of law enunciated in Lakhmani

Mewal Das (supra) has withstood the test of time and is being consistently applied while examining challenge to a notice issued under section 148 of the Act. 34 In Prashant S. Joshi -vs- ITO, 324 ITR 154, this Court observed that the basic postulate which underlines section 147 is formation of the belief by the Assessing Officer that any income chargeable to tax has escaped assessment for any assessment year. In other words, the Assessing Officer must have reason to believe that income chargeable to tax for a particular assessment year has escaped assessment for the relevant assessment year before he proceeds to issue notice under section 148. The reasons which are recorded by the Assessing Officer for re-opening a assessment are the only reasons which can be considered when the formation of the belief is impugned. Recording of reasons distinguishes an objective from a subjective exercise of power and is a check against arbitrary exercise of power. The reasons which are recorded cannot be supplemented subsequently by affidavits. The question as to whether there was reason to believe within the meaning of section 147 that income has escaped assessment must be determined with reference to the reasons recorded by the Assessing Officer. Even in a

case where only an intimation is issued under section 143(1), the touchstone to be applied is as to whether there was reason to believe that income had escaped assessment.

Held

36 First of all it would be evident from the materials on record that Petitioner had disclosed the above information to the Assessing Officer in the course of the assessment proceedings. All related details and information sought for by the Assessing Officer were furnished by the petitioner. Several hearings took place in this regard where-after the Assessing Officer had concluded the assessment proceedings by passing assessment order under section 143 (3) of the Act. Thus it would appear that Petitioner had disclosed the primary facts at its disposal to the Assessing Officer for the purpose of assessment. He had also explained whatever queries were put by the Assessing Officer with regard to the primary facts during the hearings. 37 In such circumstances, it cannot be said that Petitioner did not disclose fully and truly all material facts necessary for the assessment. Consequently, Respondent No. 2 could

not have arrived at the satisfaction that he had reasons to believe that income chargeable to tax had escaped assessment. In the absence of the same, Respondent No. 2 could not have assumed jurisdiction and issued the impugned notice under section 148 of the Act. 38 That apart, Respondents have tried to traverse beyond the disclosed reasons in their affidavit which is not permissible. The same cannot be taken into consideration, while examining validity of notice under section 148. As has been held in Prashant S. Joshi (supra), the reasons which are recorded by the Assessing Officer for re-opening an assessment are the only reasons which can be considered when the formation of the belief is impugned; such reasons cannot be supplemented subsequently by affidavit (s). 39 Therefore, in the light of the discussions made above, we are of the view that the attempt made by Respondent No.2 to reopen the concluded assessment is not at all justified and consequently the impugned notice cannot be sustained. 40 Accordingly, we allow the Writ Petition by setting aside the impugned notice dated 31.03.2019 issued under section 148 of the Act and also the impugned order dated 26.08.2019. However, there shall be no order as to costs

ii) M/s. J. S. & M. F. Builders WRIT PETITION NO.2796 OF 2019 Pronounced on : JUNE 12, 2020

26. In Prashant S. Joshi (supra), this Court observed that the basic postulate which underlines Section 147 is formation of the belief by the Assesing Officer that any income chargeable to tax has escaped assessment for any assessment year. In other words, the Assessing Officer must have reason to believe that income chargeable to tax for a particular assessment year has escaped assessment for the relevant assessment year before he procceeds to issue notice under Section 148. The reasons which are recorded by the Assessing Officer for re-opening an assessment are the only reasons which can be considered when the formation of the belief is impugned. Recording of reasons distinguishes an objective from a subjective exercise of power and is a check against arbitrary exercise of power. The reasons which are recorded cannot be supplemented subsequently by affidavits. The question as to whether there was reason to believe within the meaning of Section 147 that income has escaped

assessment must be determined with reference to the reasons recorded by the Assessing Officer. Even in a case where only an intimation is issued under Section 143(1), the touchstone to be applied is as to whether there was reason to believe that income had escaped asessment.

27. Earlier, Supreme Court in Lakhmani Meval Das (supra) when the contours of Section 147 was different though the essence of the section was the same explained the expression 'reason to believe'. The grounds or reasons which lead to the formation of belief that income chargeable to tax has escaped assessment must have a material bearing on the question of escapement of income from assessment. Once there exists reasonable grounds for the Income Tax Officer to form such belief, that would be sufficient to clothe him with jurisdiction. Sufficiency of the grounds, however, is not justiciable. The expression 'reason to believe' does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith and cannot be a mere pretence. It is open to a court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant. Elaborating

further, Supreme Court held that rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of income from assessment in that particular year. Sounding a note of caution, Supreme Court observed that the powers of the Income Tax Officer to re-open assessment though wide, are not plenary; the words of the statute are 'reason to believe' and not 'reason to suspect'.

28. Having noticed the above, we may now advert to the reasons given by the Assessing Officer for re-assessment. We take up the reasons given for the assessment year 1992-93 as the reasons given for the other assessment years are identical. 28.1. Firstly, Assessing Officer after recording the sequence of events from acquiring the property vide the deed of conveyance dated 23.04.1980 noted that assessee had converted part of the property into stock-in-trade on 01.10.1987 with a view to construct flats. On the date of conversion into stock-in-trade the value thereof was determined at Rs.66,29,365.00. Upto assessment year 1991-92 there was no construction. After the building was constructed, the constructed flats were sold to various

customers. On sale of flats, assessee reduced proportionate market value of the land as on 31.03.1989, in the same ratio as the area of the flat sold bore to the total constructed area. However, assessee valued the closing stock at market price prevailing as on 01.10.1987. According to the Assessing Officer the closing stock should have been valued at market price on close of each accounting year. This resulted into under-valuation of closing stock and consequent reduction of profit.

28.2. Secondly, land as an asset is separate and distinct from the building. Building was shown as a work in progress in the profit and loss account prepared by the asessee and filed with the return. Even after construction of building and sale of flat, the stock i.e., the land was still under the ownership of the assessee. Ownership of land was not transferred. As the land continued under the ownership of the assessee, its value could not be reduced on the plea that flat was sold. The whole of the land under ownership of the assessee constituted its stock-in-trade and it should have been valued at the market price as on the date of closing of the accounts for the year under consideration. Therefore, the Assessing

Officer alleged that the assessee had suppressed the market price of the closing stock, thus reducing the profit.

28.3. Third ground given was regarding computation of 'capital gains' furnished with the return of income. Assessing Officer noted that the total capital gains as on 01.10.1987 was arrived at by deducting the cost of the land as on 01.10.1987 i.e., Rs.10,41,774.00 from the fair market value of the land i.e., Rs.66,29,365.00 which came to Rs.55,87,591.00. According to the Assessing Officer, assessee made deduction of the cost incurred for the entire land whereas only a fraction of the said land was converted into stock-in-trade where construction was made. Assessing Offier worked out that cost of the converted piece of land was only Rs.13,260.00. This figure he arrived at by deducting Rs.2,86,740.00 which was the value of the tenanted property from the cost of the property i.e. Rs.3,00,000.00. Thus, he alleged that there was inflation of cost by Rs.10,28,514.00 (Rs.10,41,774.00 - Rs.13,260.00).

28.4. The last ground given by the Assessing Officer was regarding offering of long term capital gain by the assessee. Assessing Officer noted that for the purpose of computation

of long term capital gain, assessee estimated the fair market value of the land converted to stock as on 01.10.1987 at Rs.66,29,365.00 which was reduced by the cost incurred as on 01.10.1987 i.e., Rs.10,74,774.00 (sic). However, Assessing Officer also noted that the method of computation of cost was not clear in view of the fact that the whole of the land with tenanted structures was purchased for Rs.3,00,000.00. Assessing Officer further noted the methodology adopted by the assessee for computation of long term capital gain. According to him, Assessee had worked out the difference between the fair market value of the land converted to stock and the cost and thereafter divided it by the total permissible built-up area. The quotient was identified by the assessee as capital gains per square feet. Assessee thereafter multiplied the built-up area of individual flats sold with such quotient and claimed it to be the 'capital gains' for the year under consideration. By adopting such computation assessee was claiming sale of land in different years in the same ratio as the area of flat sold bore to the total permissible FSI area. But this calculation was not accepted by the Assessing Officer primarily on the ground that land as a stock was different from the flats. Selling of the flats did not amount to selling of

proportionate quantity of land. Under Section 45(2) of the Act, 'capital gains' for land should be considered in the year when land was sold or otherwise transferred by the assessee. Though flats were sold, ownership of the land continued to remain with the assessee. 'Capital gains' would be chargeable to tax only in the year when the land was sold or transferred to the co-operative society formed by the flat purchasers and not in the year when individual flats were sold. 29. Regarding ground Nos.1 and 2, contention of the petitioner is that respondent No.1 proceeded on the erroneous presumption that stock-in-trade had to be valued at the present market value. There is merit in the contention of the assessee if we analyse the decision of the Supreme Court in Chainrup Sampatram (supra). In that case, Supreme Court held that it would be wrong to assume that the valuation of the closing stock at market rate has for its object the ringing into charge any appreciation in the value of such stock. The true purpose of crediting the value of unsold stock is to balance the cost of those goods entered on the other side of the account so that the cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions on which there had been actual sales in the course of the year showing the

profit or loss actually realised on the year's trading. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into the account as no prudent trader would care to show increased profit before its actual realisation. This is the theory underlying the rule that the closing stock has to be valued at cost or market price whichever is lower and it is now generally accepted as an established rule of commercial practice and accountancy. In such circumstances, taking the view that profits for income tax purposes are to be computed in conformity with the ordinary principles of commercial accounting unless such principles have been superseded or modified by legislative enactments, Supreme Court held that it would be a misconception to think that any profit arises out of valuation of the closing stock

. 30. In so far the third ground is concerned i.e., computation of 'capital gains', stand of the assessee is that it had rightly deducted the cost incurred in acquiring the property from the fair market value of the land converted into stock-in-trade. The cost incurred included not only the sale price of the land i.e., Rs.3,00,000.00 but also expenditure incurred by

way of stamp duty and registration charges amounting to Rs.44,087.00. That apart, assessee had incurred a further sum of Rs.9,92,427.00 in getting the entire property vacated. Contention of the Assessing Officer that there was inflation of cost is not correct. 30.1. At this stage we may refer to some of the legal provisions having a bearing on this ground as well as on the fourth ground. 30.2. Section 45 deals with 'capital gains'. As per sub-section (1), any profits or gains arising from the transfer of a capital asset affected in the previous year shall, save as otherwise provided in Sections 54 to 54H, be chargeable to income tax under the head 'capital gains' and shall be deemed to be the income of the assessee for the previous year in which the transfer took place. Thus, any profits or gains arising from the transfer of a capital asset shall be deemed to be the income of the assessee for the previous year in which the transfer took place and shall be chargeable to income tax under the head 'capital gains'. The two key expressions in this provision are 'transfer' and 'capital asset' but before we deliberate upon these two expressions, it would be useful to refer to sub-section (2) of Section 45 and Section 48. 30.3. Sub-section (2) of Section 45 starts with a non-obstante clause. It says that notwithstanding anything contained in sub-section (1),

the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income tax as his income of the previous year in which such stockin-trade is sold or is otherwise transferred by him and for the purposes of Section 48 the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset. Therefore, sub-section (2) which had overriding effect over sub-section (1) says that the profits or gains arising from the transfer of a capital asset by way of conversion by the owner into stock-in-trade of the business carried on by the owner shall be chargeable to income tax as his income of the previous year in which such stock-in-trade is sold or is otherwise transferred by him; further, for the purposes of Section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration as a result of the transfer of the capital asset.

30.4. This brings us to Section 48 of the Act which deals with mode of computation of capital gains. The main provision of Section 48 says that the income chargeable under the head

'capital gains' shall be computed by deducting from the full value of the consideration received or accrued as a result of transfer of the capital asset the following amounts i.e.,- (1) expenditure incurred wholly and exclusively in connection with such transfer; (2) the cost of acquisition of the asset and the cost of any improvement thereto. 30.5. Thus, for computing the income under the head 'capital gains', the full value of consideration received as a result of transfer of the capital asset shall be deducted by the expenditure incurred in connection with such transfer, cost of acquisition of the asset and the cost incurred in improvement of the asset. The expression 'the full value of the consideration' would mean the fair market value of the asset on the date of such conversion. The meaning of the expressions 'cost of improvement' and 'cost of acquisition' are explained in Sections 55(1) and 55(2) of the Act respectively. 30.6. The expression 'capital asset' occuring in sub-section (1) of Section 45 is defined in sub-section (14) of Section 2. 'Capital asset' means property of any kind held by an assessee whether or not connected with his business or profession as well as any securities held by a foreign institutional investor but does not include any stock-in-trade, consumable stores or raw materials, personal effects, etc.

30.7. Again, the word 'transfer' occuring in sub-section (1) of Section 45 has been defined in Section 2(47) of the Act. As per this definition, 'transfer' in relation to a capital asset includes sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or compulsory acquisition of the asset or in case of conversion of the asset by the owner into stock-in-trade of the business carried on by him, such conversion or any transaction involving the allowing of possession of any immovable property to be taken or retained in part performance of a contract or any transaction whether by way of becoming a member of or acquiring shares in a co-operative society etc. which has the effect of transferring or enabling the enjoyment of any immovable property.

30.8. In the case of Miss Piroja C. Patel (supra), the question before this Court was whether the Tribunal was justified in holding that the amount in question being compensation paid by the assessee to the hutment dwellers for vacating the land was an allowable expenditure within the meaning of Section 48 read with Section 55 of the Act. This Court held that on eviction of the hutment dwellers from the land in question, the value of the land increases and

therefore, the expenditure incurred for having the land vacated would certainly amount to cost of improvement.

30.9. Thus in so far the third ground is concerned, we do not find any rationale in the view taken by the Assessing Officer. The cost incurred on stamp duty etc. together with the cost incurred in carrying out eviction of the hutment dwellers would certainly add to the value of the asset and thus amount to cost of improvement which is an allowable deduction from the full value of consideration received as a result of the transfer of the capital asset for computing the income under the head 'capital gains'.

31. In so far the fourth ground is concerned, the Assessing Officer has taken the view that long term capital gains arising out of sale or transfer of land would be assessed to tax only in the year in which the land is sold or otherwise transferred by the assessee. Opining that land as a stock is a different item of asset than flats, Assessing Officer held that ownership of land continued to remain with the assessee notwithstanding sale of flat. Therefore, he was of the view that 'capital gains' would be chargeable to tax only in the year when the land is sold or otherwise transferred to the co-

operative society formed by owners of the flats and not in the year when individual flats are sold.

31.1. Assessee has responded to this as can be seen from the grounds urged in the writ petition by contending that if what the Assessing Officer says is correct then there could not be any escapement of income chargeable to tax for the assessment years under consideration; rather excess income has been offered to tax. According to the Assessing Officer, assessee had erred in offering to tax 'capital gains' in the year when the individual flats were sold whereas such 'capital gains' could be assessed to tax only when the land is trasferred to the co-operative society formed by the flat purchasers. If the assessee had offered to tax as 'capital gains' in the assessment years under consideration which should have been offered to tax in the subsequent years, it is beyond comprehension as to how a belief can be formed that income chargeable to tax for the assessment year under consideration had escaped assessment. That apart, the flat purchasers by purchasing the flats had certainly acquired a right or interest in the proportionate share of the land but its realisation is deferred till formation of the co-operative society by the owners of the

flats and eventual transfer of the entire property to the co-operative society. In Prashant S. Joshi (supra), this Court while examining a challenge to the notices issued under Section 148 of the Act was considering the reasons for issuing such notices. Petitioner in that case was a partner in a particular firm who subsequently retired from the partnership. On his retirement, he received certain amount during the relevant assessment year in full and final settlement of his dues. In the return of income while the assessee disclosed receipt of the said amount, he however did not offer the same to tax on the ground that it was a capital receipt. In the appellate proceeding arising out of the assessment of the partnership firm, the first appellate authority allowed the claim of the partnership firm that the payment of the said amount to the retiring partners should be treated as revenue expenditure. Since the assessee had claimed this to be exempt from income tax by treating it as capital receipt, Assessing Officer stated that there was reason to believe that such receipt had escaped assessment within the meaning of Section 147 of the Act. It was in that context that this Court referred to the judgment of the Supreme Court in Additional CIT Vs. Mohanbhai Pamabhai, 165 ITR 166 wherein the Supreme Court relied

upon its earlier judgments in Sunil Siddharthbhai Vs. CIT, 156 ITR 509 and Addanki Narayanappa Vs. Bhaskara Krishnappa, AIR 1966 SC 1300. Supreme Court held that what is envisaged on the retirement of a partner is merely his right to realise his interest and to receive its value. What is realised is the interest which the partner enjoys in the assets during the subsistence of the partnership by virtue of his status as a partner and in terms of the partnership agreement. Therefore, what the partner gets upon dissolution of the partnership or upon retirement from the partnership is the realisation of a pre-existing right or interest. Supreme Court held that there was nothing strange in the law that a right or interest should exist in praesenti but its realisation or exercise should be postponed. Applying the above principle, it can certainly be said that upon purchase of the flat, the purchaser certainly acquires a right or interest in the proportionate share of the land but its realisation is deferred till formation of the co-operative society by the flat owners and transfer of the entire property to the co-operative society.

32. Thus on an overall consideration of the entire matter, it is quite evident that there was no basis or justification for

respondent No.1 to form a belief that any income of the assesee chargeable to tax for the assessment years under consideration had escaped assessment within the meaning of Section 147 of the Act. The reasons rendered could not have led to formation of any belief that income had escaped assessment within the meaning of the aforesaid provision. Therefore, in the facts and circumstances of the case, the impugned notices issued under Section 148 of the Act cannot be sustained. Accordingly, the impugned notices dated 25.02.2000 are hereby set aside and quashed.

iii) Aberdeen Asia Pacific Including Japan Equity Fund ... Petitioner JUNE 12, 2020

39. However, in the reasons recorded by respondent No.1 it was precisely on the ground of change of status that the claim of the assessee i.e., the petitioner was found to be not acceptable which led to formation of the belief that income of the petitioner chargeable to tax had escaped assessment for the assessment year 2011- 12. Therefore, the very foundation for formation of such belief is erroneous, which

has been contradicted by this Court. In other words, after the judgment of this Court in AICFL, the very basis for re-opening the assessment no longer survived. This position is buttressed in the draft assessment order dated 06.05.2019 passed by respondent No.1 for the assessment year 2011-12 under Section 143(3) read with Sections 147 and 144-C(1) of the Act. In the said order passed on reassessment it was clearly held that the old trust fund and the new LLC fund are separate legal entities for the purpose of the Act. Therefore, loss of the old trust fund could not be carried forward by the new LLC fund. As indicated above, this is a complete misreading of the judgment of this Court which has vitiated the reassessment proceeding for the assessment year 2011-12 as well as the assessment proceeding for the subsequent assessment year 2012-13.

iv) Ventura Textiles Ltd

INCOME TAX APPEAL NO.958 OF 2017 Pronounced on : JUNE 12, 2020

The appeal has been preferred by the assessee projecting the following questions as substantial questions of law:- "A. Whether on the facts and in the circumstances of the case

and in law the Tribunal erred in upholding the levy of penalty u/s.271(1)(c) of the Act of Rs.22,08,860/- (Rupees Twenty-Two Lakhs Eight Thousand Eight Hundred and Sixty only) on account of disallowance of Rs.62,47,460/- (Rupees Sixty Two Lakhs Forty Seven Thousand Four Hundred and Sixty only) which was allowable as a deduction under the provisions of Section 37 of theAct? B. Whether on the facts and in the circumstances of the case and in law the Tribunal erred in not applying the ratio laid down by the Apex Court in the case of CIT Vs. Reliance Petroproducts Private Limited reported in 322 ITR 158(SC), which was squarely applicable to the facts of the present case? C. Whether on the facts and in the circumstances of the case and in law the Tribunal grossly erred in upholding the levy of penalty under Section 271(1)(c) of the Act without appreciating / considering that: (i) the appellant had not been found to have concealed particulars or furnished inaccurate particulars of its claims; (ii) the aforesaid claim could be allowed under Section 37 of the Act as incurred wholly and exclusively for the purposes of business; (iii) no income has been concealed / avoided as inter alia the settlement with JCT took place in assessment year 2003- 2004, when the claim was made by the appellant under the provisions of

Section 37 of the Act. D. Whether on the facts and in the circumstances of the case the Tribunal ought to have held that the order passed under Section 271(1) (c) is bad in view of the fact that both at the time of initiation as well as at the time of imposition of the penalty the Assessing Officer was not clear as to which limb of Section 271(1)(c) was attracted?"

13.2. On a query by the Court as to whether in a case where the Assessing Officer directs initiation of penalty proceedings in the assessment order for furnishing inaccurate particulars of income but in the show cause notice it is not indicated whether penalty is sought to be imposed for furnishing inaccurate particulars of income by not striking off the inapplicable portion in the printed notice, would it till vitiate the penalty proceeding and the consequential order of penalty, Ms Sathe, learned counsel for the appellant answers in the affirmative. She contends that penalty proceeding is initiated by the show cause notice. Therefore in the show cause notice it must be clearly mentioned as to why the penalty is sought to be imposed; the charge against the assessee must be already indicated. Failure to do so would reflect non-application of mind, thus vitiating the penalty proceedings and the consequential order of penalty. 13.3. In

addition to the above, learned counsel for the appellant submits that assessee had made a bona-fide claim of deduction and had furnished all the necessary particulars. In the assessment proceedings, the Assessing Officer may not have agreed to such a claim and may have disallowed the same. Mere disallowance of a claim made bonafidely would not amount to concealment of particulars of income or furnishing inaccurate particulars of such income to warrant imposition of penalty under Section 271(1)(c) of the Act. To support such a contention, she has placed reliance on CIT Vs. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC) and on a few other cases. 13.4. Summing up, learned counsel for the appellant submits that the questions proposed are substantial questions of law which arise from the impugned order of the Tribunal. Those may be answered in favour of the assessee and against the Revenue. 14. Per contra, Mr. Sharma, learned standing counsel, Revenue supports the impugned order passed by the Tribunal. He submits that assessee had made improper and unsubstantiated claim of bad debt, thereby reducing the total income and consequential quantum of tax which came to light only during scrutiny assessment and rightly disallowed by the Assessing Officer. Had the case not been selected for

scrutiny, such inadmissible claim would have escaped assessment. CIT (A) rightly held that the assessee had wilfully submitted inaccurate particulars of income which had resulted into concealment, which was affirmed by the Tribunal. Therefore, Assessing Officer was justified in imposing the penalty which has been confirmed by both the lower appellate authorities by applying the correct principles. In such circumstances, learned standing counsel submits that there is no merit in the appeal, which should accordingly be dismissed. 15. Submissions made by learned counsel for the parties have been duly considered. Also perused the materials on record including the judgments cited at the Bar.

17. The two key expressions in Section 271(1)(c) of the Act are “concealment of particulars of his income” and “furnishing inaccurate particulars of such income”. These two expressions comprise of the two limbs for imposition of penalty under Section 271(1)(c) of the Act. Gujarat High Court in the case of Manu Engineering Vs. CIT, 122 ITR 306 and Delhi High Court in Virgo Marketing P. Ltd. Vs. CIT, 171 Taxmann 156 held that levy of penalty has to be clear as to the limb for which penalty is levied. If the Assessing Officer proposes to invoke the first limb, then the

notice has to be appropriately marked. Similarly, if the Assessing Officer wants to invoke the second limb then the notice has also to be appropriately marked. If there is no striking off of the inapplicable portion in the notice which is in printed format, it would lead to an inference as to nonapplication of mind. In such a case, penalty would not be sustainable. 18. Supreme Court in Ashok Pai Vs. CIT, 292 ITR 11 observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act carry different connotations. 19. Having discussed the above, let us address the submissions advanced by learned counsel for the parties.

20.2. Therefore, from the above it can be culled out that if an issue is not urged before the Tribunal, the same cannot be raised before the High Court in an appeal under Section 260-A of the Act. However, in Jhabua Power Limited (supra), Supreme Court had remanded the questions raised before it for the first time back to the Tribunal for deciding the questions in accordance with law. Again, in Ashish Estates & Properties (P) Ltd. (supra), this Court has taken the view that an appeal under Section 260-A of the Act can

be entertained by the High Court on the issue of jurisdiction even if the same was not raised before the Tribunal.

21. Let us now advert to the fourth question i.e. Question number D framed / proposed by the appellant. Through this question, appellant is contending that the Tribunal ought to have held that the order of penalty passed under Section 271(1) (c) of the Act was bad in law in view of the fact that at the time of initiation of penalty proceedings as well as at the time of imposition of penalty, Assessing Officer was not clear as to which limb of Section 271 (1)(c) of the Act was attracted. At the time of hearing, learned counsel for the appellant had argued that in the show-cause notice the inapplicable portion was not struck off; thus it was not indicated in the notice whether the penalty was sought to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income, which has vitiated the impugned order of penalty. However, she fairly submits that this point was not urged before the lower authorities including the Tribunal. We have already noted and analyzed the two limbs of Section 271(1)(c) of the Act and also the fact that the two limbs i.e. concealment of particulars of income and furnishing inaccurate particulars of income carry different connotations. We have also noticed

that the Assessing Officer must indicate in the notice for which of the two limbs he proposes to impose the penalty and for this the notice has to be appropriately marked. If in the printed format of the notice the inapplicable portion is not struck off thus not indicating for which limb the penalty is proposed to be imposed, it would lead to an inference as to non-application of mind, thus vitiating imposition of penalty.
21.1. Therefore, the question relating to non-striking off of the inapplicable portion in the show-cause notice which is in printed format, thereby not indicating therein as under which limb of Section 271(1)(c) of the Act penalty was proposed to be imposed i.e. whether for concealing the particulars of income or for furnishing inaccurate particulars of such income would go to the root of the lis. Therefore, it would be a jurisdictional issue. Being a jurisdictional issue, it can be raised before the High Court for the first time and adjudicated upon even if it was not raised before the Tribunal.

22. Coming to the facts of the present case, we have already noticed that in the assessment order dated 28.02.2006, Assessing Officer had ordered that since the ssessee had furnished inaccurate particulars of income, penalty

proceedings under Section 271(1)(c) were also initiated separately. Therefore, it was apparent that penalty proceedings were initiated for furnishing inaccurate particulars of income. 23. The statutory show-cause notice under Section 274 read with Section 271 of the Act proposing to impose penalty was issued on the same day when the assessment order was passed i.e., on 28.02.2006. The said notice was in printed form. Though at the bottom of the notice it was mentioned 'delete inappropriate words and paragraphs', unfortunately, the Assessing Officer omitted to strike off the inapplicable portion in the notice i.e., whether the penalty was sought to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of such income. Such omission certainly reflects a mechanical approach and non-application of mind on the part of the Assessing Officer. 24. However, the moot question is whether the assessee had notice as to why penalty was sought to be imposed on it? 25. This brings us to the basic question as to what is a notice or what do we mean by notice. Concise Oxford English Dictionary, Indian Edition, explains notice to mean the fact of observing or paying attention to something; advanced notification or warning; a displayed sheet or placard giving news or information. It

means to become aware of. In other words, to put someone on notice would mean warn someone of something about or likely to occur. Black's Law Dictionary, Eighth Edition, defines the expression 'notice' to mean having actual knowledge of a fact; has received information about it; has reason to know it; knows about the related fact. In CST Vs. Subhash & Company, (2003) 3 SCC 454, Supreme Court deliberated upon the concept of notice and observed that the term 'notice' has originated from the Latin word “notifia” which means “being known” or “a knowing”. Thereafter, Supreme Court referred to the definition of the word 'notice' in various general and judicial dictionaries. Without adverting to the large number of definitions, suffice it to say notice would mean information, warning or announcement of something impending; notice in its legal sense may be defined as information concerning a fact communicated to a party by an authorized person or actually derived by him from a proper source; the term “notice” in its full legal sense embraces a knowledge of circumstances that ought to induce suspicion or belief as well as direct information of that fact. 26. Reverting back to the facts of the present case, if the assessment order and the show cause notice, both issued on the same date i.e., on 28.02.2006, are read in conjunction, a

view can reasonably be taken that notwithstanding the defective notice, assessee was fully aware of the reason as to why the Assessing Officer sought to impose penalty. It was quite clear that for breach of the second limb of Section 271 (1)(c) of the Act i.e., for furnishing inaccurate particulars of income that the penalty proceedings were initiated. The purpose of a notice is to make the noticee aware of the ground(s) of notice. In the present case, it would be too technical and pedantic to take the view that because in the printed notice the inapplicable portion was not struck off, the order of penalty should be set aside even though in the assessment order it was clearly mentioned that penalty proceedings under Section 271(1)(c) of the Act had been initiated separately for furnishing inaccurate particulars of income. Therefore, this contention urged by the appellant / assessee does not appeal to us and on this ground we are not inclined to interfere with the imposition of penalty. 27. Having held so, let us now examine whether in the return of income the assessee had furnished inaccurate particulars of income. As already discussed above, for imposition of penalty under Section 271(1)(c) of the Act, either concealment of particulars of income or furnishing inaccurate particulars of such income are the sine qua non. In

the instant case, as we have seen, penalty proceedings under Section 271(1)(c) of the Act were initiated on the ground that assessee had furnished inaccurate particulars of income.

29. We have already noticed that in the statutory show cause notice, Assessing Officer did not indicate as to whether penalty was sought to be imposed for concealment of income or for furnishing inaccurate particulars of income though in the assessment order it was mentioned that penalty proceedings were initiated for furnishing inaccurate particulars of income. 30. Be that as it may, in the order of penalty, Assessing Officer held that assessee had concealed its income as well as furnished inaccurate particulars of income

. 31. Concealment of particulars of income was not the charge against the appellant, the charge being furnishing inaccurate particulars of income. As discussed above, it is trite that penalty cannot be imposed for alleged breach of one limb of Section 271(1)(c) of the Act while penalty proceedings were initiated for breach of the other limb of Section 271(1)(c). This has certainly vitiated the order of penalty. In appeal, CIT (A) took a curious view that submission of inaccurate particulars of income resulted into

concealment, thus upholding the order of penalty. This obfuscated view of the CIT (A) was affirmed by the Tribunal.

32. On the ground that while the charge against the assessee was of furnishing inaccurate particulars of income whereas the penalty was imposed additionally for concealment of income, the order of penalty as upheld by the lower appellate authorities could be justifiably interfered with, still we would like to examine whether there was furnishing of inaccurate particulars of income by the assessee in the first *place because that was the core charge against the assessee.*

In CIT Vs. DCM Ltd., 359 ITR 101, Delhi High Court applied the said decision of the Supreme Court and further observed that law does not debar an assessee from making a claim which he believes is plausible and when he knows that it is going to be examined by the Assessing Officer. In such a case a liberal view is required to be taken as necessarily the claim is bound to be carefully scrutinized both on facts and in law. Threat of penalty cannot become a gag and / or haunt an assessee for making a claim which may be erroneous or wrong.

5. Reverting back to the present case it is quite evident that assessee had declared the full facts; the full factual matrix or facts were before the Assessing Officer while passing the asessment order. It is another matter that the claim based on such facts was found to be inadmissible. This is not the same thing as furnishing inaccurate particulars of income as contemplated under Section 271(1) (c) of the Act. 36. Thus, on a careful examination of the entire matter, while we answer question number D against the appellant / assessee, question numbers A, B and C are answered in favour of the appellant / assessee. Therefore, on an overall consideration, the appeal would stand allowed and the order of penalty as affirmed by the two lower appellate authorities would consequently stand interfered with.

v) Alag Securities Pvt. Ltd. (Formerly known as Mahasagar Securities and Richmond Securities Pvt. Ltd.)

Pronounced on : JUNE 12, 2020 INCOME TAX APPEAL NO.1512 OF 2017

19. As **noticed above, Tribunal observed that this issue was present in all the appeals of the group of entities**

controlled by Mr. Mukesh Choksi. Be it stated that assessee was also part of the said group of entities. Therefore, maintaining uniformity Tribunal held that CIT (A) made no mistake in arriving at the impugned decision which was in conformity with the position taken by the Tribunal in all the cases pertaining to the said group of entities. Thus, order of the CIT (A) was affirmed and appeal of the Revenue was dismissed.

20. We are in agreement with the view taken by the Tribunal. In a case of this nature Section 68 of the Act would not be attracted. Section 68 would come into play when any sum is found credited in the books of the assessee and the assessee offers no explanation about the nature and source thereof or the explanation offered by the assessee is not in the opinion of the Assessing Officer satisfactory. In such a situation the sum so credited may be charged to income tax as the income of the assessee of the relevant previous year. But that is not the position here. It has been the consistent stand of the assessee which has been accepted by the First Appellate Authority and affirmed by the Tribunal that the business of the assessee centered around customers / beneficiaries

making deposits in cash amounts and in lieu thereof taking cheques from the assessee for amounts slightly lesser than the quantum of deposits, the difference representing the commission realized by the assessee. The cash amounts deposited by the customers i.e., the beneficiaries had been accounted for in the assessment orders of these beneficiaries. Therefore, question of adding such cash credits to the income of the assessee, more so when the assessee was only concerned with the commission earned on providing accommodation entries does not arise.

21. Coming to the percentage of commission, Tribunal had already held 0.1% commission in similar type of transactions to be a reasonable percentage of commission. Therefore Tribunal accepted the percentage of commission at 0.15% disclosed by the assessee itself. This finding is a plausible one and it cannot be said that the rate of commission was arrived at in an arbitrary manner. The same does not suffer from any error or infirmity to warrant interference, that too, under Section 260-A of the Act. 22. In so far the decision of the Supreme Court in NRA Iron and Steel Pvt. Ltd. (supra) is concerned, the same is not attracted

in the present case in as much as facts of the present case are clearly distinguishable. Unlike the present case, the assessee in NRA Iron and Steel Pvt. Ltd. (supra) claimed the cash credits as its income. However, it was found that the creditors had meagre or nil income which did not justify investment of such huge sums of money in the assessee. The field enquiry conducted by the Assessing Officer revealed that in several cases the investor companies were non-existent. Thus, it was held that the assessee had failed to discharge the onus which lay on it to establish the identity of the investor companies and the credit worthiness of the investor companies. In such circumstances, the entire transaction was found to be bogus. But as already discussed in the preceding paragraphs, assessee never claimed the cash credits as its income. It admitted its business was to provide accommodation entries. In return for the cash credits it used to issue cheques to the customers / beneficiaries for slightly lesser amounts, the balance being its commission. Moreover, the cash credits had been accounted for in the respective assessment of the beneficiaries. Therefore, the decision in NRA Iron and Steel Pvt. Ltd. (supra) is clearly distinguishable and not attracted to the facts of the present case. 23. On a thorough

consideration of all relevant aspects, we have no hesitation to hold that the impugned order of the Tribunal does not suffer from any error or infirmity to warrant interference and no substantial question of law arises therefrom. There is no merit in the appeal. Appeal is accordingly dismissed. However, there shall be no order as to costs.

vi) <u>Vodafone Idea Limited WP-LD-VC NO. 81 OF 2020 DATE : 26th JUNE, 2020 (IN CHAMBER THROUGH VIDEO CONFERENCE)</u>

8. Mr. Walve learned counsel for the respondents on the other hand, strongly pressed in service Section 241A of the Income Tax Act 1961 and would submit that since huge outstanding demand has been pending against the petitioner, the Assessing Officer has initiated proceedings under Section 241A of the Act against the petitioner to withheld the refund after following prescribed procedure laid down in the Act. He submits that the petitioner has claimed refund in several years and total value is more than the outstanding demand excluding the stay against the demands raised by the respondents. The learned counsel for the respondents submits that action of the respondents to withhold the refund

under Section 241A is justified in view of the liberty granted by the Hon'ble Supreme Court in the order dated 29th April, 2020.

19. Learned counsel placed reliance on the judgment of Delhi High Court in the case of Maruti Suzuki India Ltd. V/ s. Deputy Commissioner of Income Tax [2012] 347 ITR 43 (Delhi) and more particularly, paragraph Nos. 17 and 25 in support of his submission that the respondents were justified in withholding the refund due to the petitioner for the assessment year 2014-15 by invoking section 241-A of the Act. 20. Mr. Mistri learned senior counsel for the petitioner in rejoinder distinguished the judgment of Delhi High Court in case of Maruti Suzuki India Ltd. V/s. Deputy Commissioner of Income Tax (Supra). He submits that in the facts of that case, Delhi High Court has held that the conduct and action of respondent-Revenue in recovering the disputed tax in respect of additions to the extent of Rs.96 Crores on the issues which were already covered against them by the earlier orders of the ITAT or CIT(Appeals) was unjustified and contrary to law. Learned senior counsel submits that the respondents cannot withhold the amount of refund admittedly due by seeking adjustment of the tax liability which may arise according to the respondents in future. He submits that

the entire action on the part of the respondents is in gross violation of judgment and order of the Hon'ble Supreme Court dated 29th April, 2020 directing the respondents to refund the amount of Rs. 733 Crores and also contrary to the order passed by the respondent No.1 himself holding that the petitioner was entitled to net refundable amount of Rs. 833,04,88,000/-.

21. A perusal of the record clearly indicates that insofar as assessment year 2014-15 is concerned, the Hon'ble Supreme Court by judgment and order dated 29th April, 2020 had already directed the respondents to refund a sum of Rs.733 Crores to the petitioner however subject to any proceedings that the Revenue may deem appropriate to initiate in accordance with law. The respondent No.1 had already issued two notices dated 8th May, 2020 and 13th May, 2020 respectively inter alia seeking adjustment of the refund in sum of Rs.953,75,27,138/- against the refund payable to the petitioner for the assessment year 2014-15. 22. A perusal of the order dated 28th May, 2020 passed by the respondent No.1 clearly indicates that said order was the common order passed in the application filed by the petitioner under Section 154 of the Act and also under Section 245 of the Act.

Adjustment of the alleged tax dues which was required to be made according to the respondents against the refund amount due to the petitioner in the assessment year 2014-15 was already made by the respondent No.1 in the said order. The said order, insofar as respondents are concerned, has attained finality. The question as to whether the respondent No.1 could have adjusted the sum of Rs.176,3900637/- or not is an issue raised in this Writ Petition. The said issue would be decided by this Court at the stage of final hearing of the Writ Petition. 23. However, insofar as the net refundable amount of Rs. 833,04,88,000/- is concerned, in our view, the respondents ready having invoked their powers under Section 245 of the Act which action has ended with passing of the order dated 28th May, 2020, the respondents cannot withheld the admitted refundable amount of Rs. 833,04,88,000/- on the ground that the respondents may have a future demand against the petitioner arising out of the pending assessment orders. In our view, there is no such power vested in the respondents to adjust the admitted refund amount against the tax dues which are not even adjudicated upon by the respondents and may arise in future as contemplated/visualized by the respondents. 24. Insofar as the provisions of Section 241A of the Act pressed in service

by the respondents and that also only in the affidavit-in-reply for the first time is concerned, it would be appropriate to quote the said Section to appreciate the submission made by the respondents. Section 241A of the Income Tax, 1961 reads thus:- 241A. For every assessment year commencing on or after the 1st day of April, 2017, where refund of any amount becomes due to the assessee under the provisions of sub-section(1) of section 143 and the Assessing Officer is of the opinion, having regard to the fact that a notice has been issued under sub-section(2) of section 143 in respect of such return, that the grant of the refund is likely to adversely affect the revenue, he may, for reasons to be recorded in writing and with the previous approval of the Principal Commissioner or Commissioner, as the case may be, withhold the refund up to the date on which the assessment is made.

25. Respondents cannot be allowed to invoke section 241-A for the first time in the affidavit in reply to the writ petition filed by the petitioner. Be that as it may, a plain reading of the said provision makes it clear that the power to withhold the refund granted to the Assessing Officer is subject to the previous approval of the Principal Commissioner or Commissioner, as the case may be and that also would be

for every assessment year after 1st April, 2017 where refund of any amount becomes due to the assessee under the provisions of sub-section(1) of section 143 and not for the earlier assessment year. The assessment year in question in this case is 2014-15. In our view , the Section 241A pressed in service even in the affidavit-in-reply or otherwise is not attracted to the refund of assessment year 2014-15 or any assessment year prior to 2017-18. 26. It is not in dispute that as on today, there is no determination of any further tax liability for any other assessment year which liability can be adjusted against the admitted refundable amount determined by the respondent No.1 assuming Section 241A is applicable or otherwise. Even otherwise no approval is granted by the Principal Commissioner or Commissioner as the case may be to withhold the refund up to the date on which the assessment is made. In this case, the assessment order under Section 143(1) for the assessment year 2014-2015 has already attained finality resulting in refund of amount in view of the judgment delivered by Hon'ble Supreme Court on 29th April, 2020 and the order dated 28th May, 2020 passed by the respondent no.1.

We accordingly pass the following order:- ORDER (a) The respondents are directed to refund a sum of

Rs.833,04,88,000/- to the petitioner within two weeks from the date of uploading of this order without fail.

B.2 Delhi high court important decisions

I) SAVITA KAPILA, LEGAL HEIR OF LATE SHRI MOHINDER PAUL KAPILA

W.P.(C) 3258/2020

Date of Decision: 16th July, 2020

A) AN ALTERNATIVE STATUTORY REMEDY DOES NOT OPERATE AS A BAR TO MAINTAINABILITY OF A WRIT PETITION WHERE THE ORDER OR NOTICE OR PROCEEDINGS ARE WHOLLY WITHOUT JURISDICTION. IF THE ASSESSING OFFICER HAD NO JURISDICTION TO INITIATE ASSESSMENT PROCEEDING, THE MERE FACT THAT SUBSEQUENT ORDERS HAVE BEEN PASSED WOULD NOT RENDER THE CHALLENGE TO JURISDICTION INFRUCTUOUS.

23. It is well settled law that an alternative statutory remedy does not operate as a bar to maintainability of a

writ petition in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or notice or proceedings are wholly without jurisdiction or the vires of an Act is challenged. [See Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, (1998)8 SCC 1]. 24. Further, the fact that an assessment order has been passed and it is open to challenge by way of an appeal, does not denude the petitioner of its right to challenge the notice for assessment if it is without jurisdiction. If the assumption of jurisdiction is wrong, the assessment order passed subsequently would have no legs to stand. If the notice goes, so does the order of assessment. It is trite law that if the Assessing Officer had no jurisdiction to initiate assessment proceeding, the mere fact that subsequent orders have been passed would not render the challenge to jurisdiction infructuous.

B) THE SINE QUA NON FOR ACQUIRING JURISDICTION TO REOPEN AN ASSESSMENT IS THAT NOTICE UNDER SECTION 148 SHOULD BE

ISSUED TO A CORRECT PERSON AND NOT TO A DEAD PERSON. CONSEQUENTLY, THE JURISDICTIONAL REQUIREMENT UNDER SECTION 148 OF THE ACT, 1961 OF SERVICE OF NOTICE WAS NOT FULFILLED IN THE PRESENT INSTANCE.

26. In the opinion of this Court the issuance of a notice under Section 148 of the Act is the foundation for reopening of an assessment. Consequently the sine qua non for acquiring jurisdiction to reopen an assessment is that such notice should be issued in the name of the correct person. This requirement of issuing notice to a correct person and not to a dead person is not merely a procedural requirement but is a condition precedent to the impugned notice being valid in law. [See Sumit Balkrishna Gupta Vs. Asstt. Commissioner of Income Tax, Circle 16(2), Mumbai & Ors., (2019) 2 TMI 1209 – Bombay High Court]. 27. In Chandreshbhai Jayantibhai Patel Vs. The Income Tax Officer, 2019 (1) TMI 353 – Gujarat High Court has also held, “the question that therefore arises for consideration is whether the notice under Section 148 of the Act issued against the deceased assessee can be said to be in conformity with or according

to the intent and purposes of the Act. In this regard, it may be noted that a notice under Section 148 of the Act is a jurisdictional notice, and existence of a valid notice under Section 148 is a condition precedent for exercise of jurisdiction by the Assessing Officer to assess or reassess under Section 147 of the Act. The want of valid notice affects the jurisdiction of the Assessing Officer to proceed with the assessment and thus, affects the validity of the proceedings for assessment or reassessment. A notice issued under Section 148 of the Act against a dead person is invalid, unless the legal representative submits to the jurisdiction of the Assessing Officer without raising any objection." Consequently, in view of the above, a reopening notice under Section 148 of the Act, 1961 issued in the name of a deceased assessee is null and void.

C) ALSO, NO NOTICE UNDER SECTION 148 OF THE ACT, 1961 WAS EVER ISSUED UPON THE PETITIONER DURING THE PERIOD OF LIMITATION. CONSEQUENTLY, THE PROCEEDINGS AGAINST THE PETITIONER ARE

BARRED BY LIMITATION AS PER SECTION 149(1)(b) OF THE ACT, 1961.

28. Also, no notice under Section 148 of the Act, 1961 was ever issued to the petitioner during the period of limitation and simply proceedings were transferred to the PAN of the petitioner, who happens to be one of the four legal heirs of the deceased assessee vide letter dated 27th December, 2019. Therefore, the assumption of jurisdiction qua the Petitioner for the relevant assessment year is beyond the period prescribed and consequently, the proceedings against the petitioner are barred by limitation in accordance with Section 149(1)(b) of the Act, 1961.

D) AS IN THE PRESENT CASE PROCEEDINGS WERE NOT INITIATED / PENDING AGAINST THE ASSESSEE WHEN HE WAS ALIVE AND AFTER HIS DEATH THE LEGAL REPRESENTATIVE DID NOT STEP INTO THE SHOES OF THE DECEASED ASSESSEE, SECTION 159 OF THE ACT, 1961 DOES NOT APPLY TO THE PRESENT CASE.

30. Section 159 of the Act, 1961 applies to a situation where proceedings are initiated / pending against the assessee when he is alive and after his death the legal representative steps into the shoes of the deceased assessee. Since that is not the present factual scenario, Section 159 of the Act, 1961 does not apply to the present case.

E) THERE IS NO STATUTORY REQUIREMENT IMPOSING AN OBLIGATION UPON LEGAL HEIRS TO INTIMATE THE DEATH OF THE ASSESSEE.

32. This Court is of the view that in the absence of a statutory provision it is difficult to cast a duty upon the legal representatives to intimate the factum of death of an assessee to the income tax department. After all, there may be cases where the legal representatives are estranged from the deceased assessee or the deceased assessee may have bequeathed his entire wealth to a charity. Consequently, whether PAN record was updated or not or whether the Department was made aware by the legal representatives or not is irrelevant

F) SECTION 292B OF THE ACT, 1961 HAS BEEN HELD TO BE INAPPLICABLE VIZ-A-VIZ NOTICE ISSUED TO A DEAD PERSON IN RAJENDER KUMAR SEHGAL (SUPRA), CHANDRESHBHAI JAYANTIBHAI PATEL (SUPRA) AND ALAMELU VEERAPPAN (SUPRA).

35. This Court is of the opinion that issuance of notice upon a dead person and non-service of notice does not come under the ambit of mistake, defect or omission. Consequently, Section 292B of the Act, 1961 does not apply to the present case.

G) This Court is also of the view that Section 292BB of the Act, 1961 is applicable to an assessee and not to a legal representative. Further, in the present case one of the legal heirs of the deceased assessee, i.e. the petitioner, had neither cooperated in the assessment proceedings nor filed return or waived the requirement of Section 148 of the Act, 1961 or submitted to jurisdiction of the Assessing Officer. She had merely uploaded the death certificate of the deceased assessee.

H) To conclude, the arguments advanced by the respondent are no longer res integra and have been consistently rejected by different High Courts including this jurisdictional Court. In view of consistent, uniform and settled position of law, to accept the submissions of the respondent would amount to unsettling the „settled law". In fact, in Pr. Commissioner of Income Tax v. Maruti Suzuki India Limited (supra), the Supreme Court speaking through Hon"ble (Dr.) Justice Dhananjaya Y. Chandrachud has succinctly observed as under:- "40. We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."

II) Sanjay Sawhney ***(oral legal ground)***

Delhi high court in case of Sanjay Sawhney ITA 834/2019 (order dated 18.05.2020) while analyzing entire conundrum of rule 27 of ITAT rules ,overruling Delhi ITAT order against assessee, has pleased to hold that even oral application is allowed in rule 27 of ITAT rules , the relevant gist of said Jurisdictional Delhi high court decision is reproduced below for sake of clarity:

Quote

11. The Tribunal has taken a pedantic view on the interpretation of Rule 27 by holding that for availing the remedy under the said provision, an application in writing is necessary. In our opinion, this surmise is fallacious and we cannot countenance the same. We agree with Mr. Krishnan that Rule 27, as it stands today, does not mandate for the application to be made in writing. Revenue has not brought to our notice any particular Form notified for filing such an application. Revenue also does not controvert the contention of the Appellant that the draft Appellate Tribunal Rules 2017 proposing to insert a proviso to Rule 27, providing for an application to be made in writing, have not been notified, as yet. Therefore, the reasoning of the Tribunal for rejecting Appellant's contentions is palpably wrong. If the provision does not specify any defined structure for making an application in a particular manner, the Tribunal ought not to have deprived the Appellant of an opportunity to raise a fundamental question of jurisdiction, taking a hyper technical viewpoint. The Tribunal has plainly refused to consider the additional grounds on an erroneous premise which is contrary to the statutory scheme of the Act, that permits the Respondent to urge all grounds in support of the order appealed, as provided under Rule 27. The appeal deserves to be allowed on this short ground and we would have no hesitation in doing so with a consequential direction to ITAT to reconsider the matter afresh on the additional grounds urged by the Appellant. However, that direction would not take the controversy to a logical conclusion. Mr. Hossain raises a more fundamental issue by arguing that in absence of an appeal by the Petitioner, or cross objections by it, the issue of validity had attained finality, and cannot be raked up by taking recourse to the said Rule putting them in a more disadvantageous position. He persists that irrespective of the format of the application and regardless of the reasons given in the impugned order, the appellant cannot be permitted to urge jurisdictional objections

***before ITAT**. We feel clarity is required on this vital ground, particularly, since Mr. Hossain has attempted to substantiate his submissions by contending that this court has already taken a view that supports his line of arguments. In fact, this prompted the learned counsels for both the parties to cite plethora of case laws dealing with this jurisdictional question.*

19. We are of the view that Mr. Hossain's reading of the aforementioned Judgment is flawed. He is misconstruing the language employed in Section 254 (1) of the Act (corresponding to section 33(4) of the Indian Income-tax Act 1922). The word 'thereon' used in section 254 (1) of the Act, gives power to the Appellate Tribunal to pass such orders thereon as it thinks fit, implies that the tribunal would confine itself to the subject matter of appeal only. Under Rule 11 of the ITAT Rules, an appellant can, by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, and the Tribunal, in deciding the appeal, would not be confined to the grounds set forth in the memorandum of appeal. This, however, does not mean that the Respondent is prevented from supporting the judgment on the grounds decided in his favor, or by assailing the aspect decided against him. Accepting Mr. Hossain's submission would mean that subject matter of the appeal is circumscribed and is confined only to the grounds urged by the Appellant. Firstly, the subject matter of an appeal is not be construed narrowly, as already observed above. Subject matter is "comprehended as to encompass the entire controversy between the parties which is sought to be got adjudicated upon by the Tribunal". Secondly, if jurisdictional objection under Rule 27 is gone into by the Tribunal, albeit raised by resort to Rule 27, it cannot be said that the subject matter is expanded under the guise of the said provision. It cannot be said that Respondent is taking away benefit that could be said to have accrued in favour of the Appellant before the Tribunal. The jurisdictional question is not an independent issue that can be reversed only by way of an appeal or cross objection. We do not find any merit in the submission of Mr. Hossain. 20. Having analyzed the judgments relied upon by the Revenue and not finding same to be of any assistance to the Revenue, we now proceed to examine the legal position that emerges from a plain reading of the provision in question. In fact, we feel the controversy sought to be raked up by the Revenue to deprive the Appellant [Respondent before ITAT] an option to raise jurisdictionalgrounds ofobjection is completely misplaced. If we refer to Rule 27 of ITAT Rules, 1963, a bare reading thereof manifest that a Respondent has a right to support the impugned order, without having filed any cross appeal or cross objection. This understanding emerges from the language of the said provision which begins with the words "The Respondent, though he may not have appealed,". This means that the provision is to enable a Respondent to effectively defend the order appealed before the Appellate forum. The expression "though he may not have appealed" also indicates that the provision is to be resorted to in a situation where a Respondent may otherwise have

a right to file an appeal or cross objections, but has chosen not to avail of this remedy. Thus, a party who has not availed of the option of filing an appeal, in a given situation, if arrayed as a Respondent before the Appellate Tribunal, can rely upon Rule 27, to support the order under appeal. The aforesaid expression also suggests that recourse to Rule 27 would only be available in case the remedy of appeal is otherwise available with the Respondent, and he has elected not to avail the same. In other words, in case a Respondent would not have such a right [of filing a cross appeal or cross objection], then he would not have the option to invoke the said provision. This brings us to the more fundamental question regarding the scope of aforesaid rule at the instance of the Respondent who is invoking the same. The scope and ambit of the aforesaid provision can be gathered from the remaining part of the said rule to the effect "may support the order appealed against on any of the grounds decided against him". A plain reading of the aforesaid expression indicates that a Respondent can support an impugned order on any of the grounds which were decided against him. Now, if weapply the aforesaid provision to the situation before us, we can easily discern that the Appellant-assessee- on the basis of Rule 27, was urging before the ITAT that the initiation of reassessment may be declared as invalid. Therefore, by invoking Rule 27, the assessee sought to support the final order of the CIT(A) in his favour, by assailing that part of the said order, wherein the CIT(A) upheld the initiation of reassessment under Section 153C of the Act. We are, therefore, of the view that invocation of Rule 27 for challenging the decision of the CIT (A) on the legal ground was well within the scope of Rule 27. The Appellant – assessee, as a respondent before the Tribunal was within its right to support the order under appeal before the Tribunal by attacking the grounds decided against him. It should nevertheless be borne in mind that Rule 27 cannot be invoked by a Respondent on an issue which is independently decided against him in the order appealed by the Appellant. In other words, if there is an issue, which is separately decided against a Respondent [in appeal], and the decision on the said issue has no bearing on the final decision of the CIT (A), then invocation of Rule 27 to challenge the correctness of the same cannot be sustained. Rule 27 and the provisions dealing with cross objections operate in separate fields, although there is certain overlap between them. Evidently, if cross objection is not filed, the Respondent would run the risk of being faced with a situation that it cannot succeed in getting anything over and above the order in appeal being confirmed. If the Respondent wants to assail an independent issue that has been decided against him in the order appealed by the Appellant, which has no bearing on the result of order impugned in appeal before the Tribunal, the appropriate remedy would lie in of filing a cross appeal or cross objection. In that event, as explained above, Rule 27 cannot be pressed into service to have the same upset or overturned. 21. Therefore, arguably Rule 27 has a limited sphere of operation, but this cannot be whittled or narrowed down to the extent, the Revenue would like us to hold. We cannot read Rule 27 in a restrictive manner to hold that the said provision can only be invoked to support the order in appeal and while doing so, the subject matter of the appeal before the ITAT should be confined only to the extent of the grounds urged by the Appellant. To read Rule 27 in this

manner would render the said rule redundant as the respondent before the Tribunal would, even otherwise be entitled to oppose the appeal and raise submissions in answer to the grounds raised in the appeal that are pressed at the hearing of the appeal. With this clarity, we do not find any merit in the submissions of the Revenue that the assessee had accepted order of CIT (A), or that the issue of maintainability had attained finality

22. Therefore, the position of law that materialises on a reading of the aforesaid decisions is that the appellant herein, (Respondent before ITAT) could have invoked Rule 27 to assail those grounds that were decided against him if those grounds/issues had a bearing on the final decision of the CIT(A). Revenue was certainly not taken by surprise as the appeal is considered to be continuation of the original proceedings. The ITAT had no discretion to deprive the appellant the benefit of the enabling Rule provision to defend the order of the CIT(A). The question of jurisdiction -which is sought to be urged by the Respondent while supporting the order in appeal, had a bearing on the final order passed by the CIT(A), because if the said issues were to be decided in favour of the appellant herein the assessee, that were decided against him if those grounds/issues had a bearing on the final decision of the CIT(A). Revenue was certainly not taken by surprise as the appeal is considered to be continuation of the original proceedings. The ITAT had no discretion to deprive the appellant the benefit of the enabling Rule provision to defend the order of the CIT(A). The question of jurisdiction -which is sought to be urged by the Respondent while supporting the order in appeal, had a bearing on the final order passed by the CIT(A), because if the said issues were to be decided in favour of the appellant herein the assessee, that would have been an additional reason to delete the additions made by the A.O.

26. The upshot of the above discussion is that Rule 27 embodies a fundamental principal that a Respondent who may not have been aggrieved by the final order of the Lower Authority or the Court, and therefore, has not filed an appeal against the same, is entitled to defend such an order before the Appellate forum on all grounds, including the ground which has been held against him by the Lower Authority, though the final order is in its favour. In the instant case, the Assessee was not an aggrieved party, as he had succeeded before the CIT (A) in the ultimate analysis. Not having filed a cross objection, even when the appeal was preferred by the Revenue, it does not mean that an inference can be drawn that the Respondent– assessee had accepted the findings in part of the final order, that was decided against him. Therefore, when the Revenue filed an appeal before the ITAT, the Appellant herein (Respondent before the Tribunal) was entitled under law to defend the same and support the order in appeal on any of the grounds decided against it. The Respondent – assessee had taken the ground of maintainability before Commissioner (Appeals) and, therefore, in the appeal filed by the Revenue, it

*could rely upon Rule 27 and advance his arguments, even though it had not filed cross objections against the findings which were against him. The ITAT, therefore, committed a mistake by not permitting the assessee to support the final order of CIT (A), by assailing the findings of the CIT(A) on the issues that had been decided against him. The Appellant - assessee, as a Respondent before the ITAT was entitled to agitate the jurisdictional issue relating to the validity of the reassessment proceedings**. We are, therefore, of the considered opinion that the impugned order passed by the ITAT suffers from perversity in so far as it refused to allow the Appellant – assessee (Respondent before the Tribunal) to urge the grounds by way of an oral application under Rule 27. The question of law as framed is answered in favour of the Appellant – assessee and resultantly the impugned order is set aside. The matter is remanded back before the ITAT with a direction to hear the matter afresh by allowing the Appellant-assessee to raise the additional grounds, under Rule 27 of the ITAT Rules, pertaining to issues relating to the assumption of jurisdiction and the validity of the reassessment proceedings under Section 153C of the Act.***

Unquote

III) COONER INSTITUTE OF HEALTH CARE AND RESEARCH CENTRE PVT. LTD Pronounced on:27.07.2020 W.P. (C) 430/2020

6. From a reading of the aforesaid reasons, it is apparent that only ground for withholding refund is that since case of the petitioner has been selected for scrutiny for AY 2018-19, under Section 143(2) of the Act, the assessment is yet not complete and therefore genuineness of the refund claimed by the assessee is yet to be verified. We find that the aforesaid reason is inherently flawed and contrary to the views expressed by this Court in aforesaid two cases i.e. Maple

Logistics (Supra) and Ericsson India Private Limited (Supra).

8. The exercise of withholding of refund under section 241A of the Act, pursuant to notice u/s 143(2) of the Act, without recording justifiable reasons, is not in consonance with the legislative intent and mandate of the aforesaid provision. The reasons cited do not support the finding that refund would adversely affect the Revenue. In view of the aforesaid, we hold that the reasoning given by the Income-Tax Officer is contrary to Section 241A of the Act. Accordingly, we set aside the impugned communication/ order dated 10.01.2020. We, therefore, grant three weeks' time to the respondents to re-consider the aspect whether the amount found due to be refunded, or any part thereof, is liable to be withheld under Section 241A in line with the decisions of this court as noted above. The entire consideration, with the approval of the Principal Commissioner of Income Tax to the withholding of the refund amount, or any part thereof, should be completed within three weeks from today, failing which, we direct that without awaiting any further orders, the respondents shall transmit the amount of refund determined under section 143 (1) of the Act alongwith interest to the petitioner. In the eventuality of the respondents recording any reasons for

withholding a part thereof, or the entire amount due for refund to the petitioner under Section 143(1), the reasons thereof as approved by the Principal Commissioner of Income Tax shall be provided to the petitioner forthwith. It shall be open to the petitioner to take remedial steps in respect of any orders for withholding of refund that may be passed. Needless to state that the reasons recorded for withholding of refund under section 241A would only amount to a tentative view and would not come in the way of the Assessing Officer to frame the assessment under section 143(3) of the Act.

B.3 Madras high court important decisions

i) <u>Shri.K.R.Jayaram 22.07.2020 Tax Case (Appeal) No.440 of 2018</u>

The Tax Case (Appeal) was admitted on 24.06.2019 on the following substantial questions of law:- "(i) Whether the Tribunal was justified in holding that the reopening of assessment was a result of mere change of opinion, even when there is no opinion formed or expressed by the Assessing Officer on this issue in the original assessment? (ii) Whether the Tribunal was right in not considering the

decision of the Hon'ble Supreme Court wherein reopening of assessment on the basis of information possessed by the Assessing Officer either from external sources or from material on record is legally tenable as held in the case of Kalyanji Mavji & Co., vs. CIT [reported in 102 ITR 286] ? and (iii) Whether the Tribunal was right in stating that reopening of assessment is bas in law when Section 147 of the Income Tax Act clearly says that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, the Assessing Officer can assess or re-assess the assessment?"

0.We need not labour much to take a decision in the instant case, in the light of the decision of the Delhi High Court in the case of CIT vs. Kelvinator India Ltd., reported in (2002) 256 ITR 1, which was affirmed by the Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd., reported in (2010) 320 ITR 561. It was pointed out that a schematic interpretation is to be given to the words "reason to believe" failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of mere change of opinion, which cannot be per se reason to reopen. 11.It was pointed out that the Assessing Officer has no power to review; he has power to reassess. The power of

reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, then, in the garb of reopening the assessment, review would take place and the concept of "change of opinion" should be treated as an in-built test to check abuse of power by the Assessing Officer. Thus, it is clear that the words "reason to believe" occurring in Section 147 of the Act as interpreted by the Hon'ble Supreme Court in Kelvinator India Ltd., (supra), does not make a distinction in respect of reopening done within four years or beyond four years.

ason to believe cannot be on a "change of opinion". The assessee is expected to file his return of income along with his books and documents. It is for the Assessing Officer to consider the same in accordance with law and complete the assessment. The assessee is not there to advice the Assessing Officer as to how he should go about in assessing the income of the assessee, as it is the statutory duty of the Assessing Officer. Admittedly, the Sale Deed dated 02.05.2008, is only the document, which is the subject matter of the assessment. This document was very much available with the Assessing Officer when he completed the assessment under Section 143(3), dated 05.12.2011. At that juncture, all that the

Assessing Officer was concerned about is the claim made by the assessee as expenses for the improvement of the land by levelling, sand filling, road laying etc.

In Ashley Services Ltd., (supra), the Court on going through the reasons given for reopening of the assessment, held it to be a review of the assessment order under Section 143(3) and even though the assessment was reopened within four years, when there was no fresh material to disturb the reasoning arrived at, reopening of assessment was unsustainable. Therefore, the Tribunal rightly held that there was no material available with the Assessing Officer other than what was available with him at the first instance, when he completed the assessment under Section 143(3) of the Act, vide order dated 05.12.2011 to come to a conclusion that there were reasons to reopen the assessment.

28. Accordingly, the appeal filed by the Revenue is dismissed and substantial questions of law are answered against the Revenue and in favour of the Assessee.

ii) <u>M/s.SKI Retail Capital Ltd DELIVERED ON : 07 .05.2020 TCA.Nos.66&67/2018</u>

27. The primordial submission of the learned Senior Standing Counsel appearing for the Revenue is that the

reasons recorded by ITO, in the order dated 30.01.2015 as to the treating of the amount of Rs.5,30,99,960/~ as on 31.03.2007 came into being on an independent application of mind to the materials placed and he did not refer to the audit objections which pertain to some other issue and though it is obligatory on the part of ITAT to deal with the merits of the appeal also, did not go in the merits at all and prays for remanding of the matter.

28. The respondent/assessee, in the case on hand, did not burke/suppress any material and whatever materials in their possession, had submitted the same by enclosing in their reply dated 19.04.2014, in response to the notice under Section 148 of the IT Act dated 31.03.2014. The ITO has passed the order of assessment dated 31.03.2015 and had also drawn the attention of the Deputy Director of Revenue Audit as to the said material, especially referring to the amount of Rs.5,39,99,960/~ in Schedule "G" and prayed for dropping of the audit objections in respect of the Assessment Year from 2007~2008. In the light of the materials available, it is obligatory on the part of the Assessing Officer to record reasons for the purpose of believing that the income had escaped assessment and in the

light of the judgment rendered by the Division Bench of Delhi High Court in United Electrical Co. P.Ltd. v. Commissioner of Income Tax and Others [2002 Vol.258 ITR 317], it is open to the Court to examine whether there was some material available for the Assessing Officer to form the requisite belief and further recorded a finding that even the Additional Commissioner had accorded approval for action under Section 147 of IT Act mechanically.

29. The Hon-ble Apex Court, in the decision in Commissioner of Income Tax and Another v. Foramer France [2003 Vol.264 ITR 566], while dismissing the appeal filed by the Revenue and thereby confirming the judgment of the Allahabad High Court, recorded reasons as to the non~failure on the part of the assessee to disclose fully and truly all material facts for assessment and further found that notices were bad as they were only on the basis of a change of opinion and the law that an assessment could not be reopened on a change of opinion was the same before and after amendment by the Direct Tax Laws (Amendment) Act, 19867 of Section 147.

30. In the decision in Commissioner of Income Tax v.A.V.Thomas Exports Ltd. [(2008) 296 ITR 603 (Mad)], which pertains to Assessment Year 1990~1991, the Division Bench of this Court, while dealing with the appeal filed by the Revenue, had observed that the initiation of proceedings was after a period of four years by reason of failure on the part of the assessee and as such, there was no jurisdiction to reopen the assessment under the provision of Section 147 of IT Act.

31. In the considered opinion of the Court, the reasons recorded in the notice dated 31.03.2014 as to the income escaping assessment and the order of assessment dated 31.03.2015 passed under Section 143(3) r/w. Section 147 of the IT Act are unsustainable on facts as well on law.

32. The CIT (Appeals), in the order dated 25.05.2016 in ITA No.55/CIT(A)~15 has also ordered deletion of Rs.2,29,00,539/~ on the ground that the provision of Sec.2(22)(e) of IT Act do not apply and the reasons for arriving such a conclusion is sustainable in law.

33. The findings recorded by the ITAT, in the impugned common order as to the non~application of mind on the part of the Assessing Officer to apply his mind independently for the purpose of reopening of assessment is also sustainable for the reason that the very same official, namely Mr.S.Krishna Kumar, in response to the audit objection dated 31.01.2015, had taken into consideration all the materials placed and requested for dropping of the audit objection and therefore, passing of second order of assessment dated 31.03.2015 by him amounts to change of opinion on the very same set of facts.

34. This Court, on an independent application of mind and on thorough consideration of material aspects and legal position, is of the considered view that there is no error or infirmity in the reasons assigned by the ITAT in dismissing the appeal filed by the Revenue and allowing of the cross objection filed by the assessee.

35. Therefore, the Substantial Question of Law is answered in negative and against the appellant/Revenue.

iii)

B.4 Other high court important decisions

i) Allahabad high court

M/s Kesharwani Sheetalaya Sahsaon Allahabad in INCOME TAX APPEAL No. 17 of 2007 Order Date : 24.04.2020 has held as under:

"14. The conditions for the applicability of Section 68 would therefore be as follows—

(i) the existence of books of accounts made by the assessee itself;

(ii) a credit entry in the books of account; and

*(iii) the absence of a satisfactory explanation by the assessee about the nature and source of the amount credited. 15. The requirement under the Section is that the assessee is to submit an explanation about the nature and source of the sum which has been credited. The explanation furnished by the assessee is to be satisfactory and the creditworthiness or financial strength of the creditor is to be proved by showing that it had sufficient balance in its accounts to explain the source and the credits in the books of accounts of the assessee. The assessee would be required to explain the source of credit in the books of accounts but not the source of the source i.e. source of the creditor**. It is seen that although the requirement under Section 68 is that the***

Assessing Officer must be satisfied that the explanation offered by the assessee is genuine, but it is also provided that in the absence of a satisfactory explanation, the unexplained cash credit "may" be charged to income tax – therefore, the unsatisfactoriness of the explanation would not automatically result in deeming the amount credited in the books as income of the assessee .. 27.

Section 68 requires the Assessing Officer to satisfy itself of the source of the credit and if during the course of enquiry undertaken, the entries are found to be not genuine then the sum represented by such credit entry is to be added as income of the assessee. The satisfaction of the Assessing Officer thus forms the basis for invocation of the provisions of Section 68. The satisfaction in this regard, however, must not be illusory or imaginary but is required to be based on the facts and the evidence and on the basis of a proper enquiry of the material before the Assessing Officer. The enquiry envisaged under the provision is to be reasonable and just*. 28. Under Section 68, the onus is on the assessee to offer explanation where any sum is found credited in the books of account and where the assessee fails to prove to the satisfaction of the Assessing Officer, the source and nature of the amount of cash credits an inference may be drawn that the credit entries represent income taxable in the hands of the assessee. This does not however absolve the responsibility of the Assessing Officer to prove that the cash credits constitute the income of the assessee. The onus on*

the assessee has to be understood with reference to the facts of each case and if the prima facie inference on the basis of facts is that the assessee's explanation is probable, the onus shifts to the Revenue. It has been consistently held that once the assessee has proved the identity of its creditors, the genuineness of the transactions and the creditworthiness of the creditors vis-avis the transactions which it had with the creditors, the burden stands discharged and the burden then shifts to the Revenue to show that the amount in question actually belong to, or was owned by the assessee himself."

ii) Hon'ble Calcutta high decision in case of Kesoram Industries Ltd (order dated 2/08/2019) reported in **423 ITR 180** relevant extract of which is reproduced below:

"In the present case, four broad aspects were questioned before the Tribunal. By the order impugned dated November 4, 2016, the Tribunal held in favour of the assessee.

The first aspect pertains to an order under Section 143(3) of the Act which was found to be erroneous and prejudicial to the interest of the Revenue. The specific matter pertained to the difference in the addition of fixed assets of about Rs.1.10 crore. The ***notice under Section 263 of the Act was issued to clarify the difference. The assessee clarified the difference by its written submission and a reconciliation statement was also used. However, the Commissioner, instead of considering the reply, recorded that the issue had not been verified by the assessing officer****.*

The Tribunal set aside the decision of the Commissioner on the ground that the show-cause notice indicated a specific purpose but the matter was dealt with on another count after the receipt of the reply*. The Tribunal relied on a view taken by a coordinate bench reported at 54 SOT 172 (Visuvius India Limited v. CIT) and a judgment of the Andhra Pradesh High Court reported at 211 ITR 336 (CIT v. G.K. Kabra). In both cases, it was held that if the object of the notice was one and the matter was treated for a different purpose in the ultimate order, that may not be the appropriate exercise of the jurisdiction.*

In the light of a possible view taken on the facts as they presented themselves in such regard, the order of the tribunal in respect of the first of the four heads does not call for any interference.

The tribunal found that the Commissioner had not even indicated in the show- cause notice that "adequate enquiries were not carried out." *The tribunal found that the assessing officer had conducted an enquiry regarding the addition of fixed assets. The tribunal referred to the notice issued under Section 142(1) of the Act and the reply of the assessee. The tribunal reasoned that the order passed by the assessing officer in such circumstances could neither be held to be erroneous nor prejudicial to the interest of the Revenue.* ***In such regard, the tribunal referred to a judgment of the Allahabad High Court where it was observed that the Commissioner could exercise his jurisdiction under Section 263 of the Act "only in cases where no enquiry is made by the assessing officer."***

On the second aspect pertaining to disallowance under Section 14A of the Act read with Rule 8D (2) (ii) of the Income Tax Rules, 1962, the tribunal found that the assessing officer had netted off the interest paid with the interest income for working out the disallowance under Rule 8D. According to the tribunal, the assessing officer had applied his mind to the issue and it was not something that escaped the attention of the assessing officer for the Commissioner to assume jurisdiction under Section 263 of the Act on the ground that no enquiry in such regard had been conducted by the assessee.

Apropos the third aspect pertaining to trade discount, the tribunal found that the Commissioner had issued the notice for addition of trade discount on the ground that the assessee's claim for trade discount was not in order. The tribunal also found that details of the trade discount had been furnished by the assessee to the assessing officer at the time of assessment under Section 143(3) of the Act and the details of such discount had been included in the paper-book filed before the tribunal. Further, the tribunal found that the Commissioner had changed his stand as indicated in the notice and at the time of passing the order under Section 263 of the Act. For the same reasons, as in respect of the first head pertaining to fixed assets, the tribunal found that the Commissioner had acted without basis.

Finally, as regards the fourth issue pertaining to depreciation, the tribunal found that the Commissioner had raised the issue in the notice under Section 263 of the Act for excess depreciation but concluded in his order that proper enquiries had not been made by the assessing officer. Again, the tribunal found that there was a change in stand with regard to the notice and in the revision order, which was impermissible.

In matters of the present kind where there is a specialized tribunal in place for dealing with matters pertaining to a particular subject, the scope of interference is limited in the present jurisdiction. Once it is seen that a plausible or reasonable view has been taken by the tribunal upon a fair discussion of the matter, this Court in exercise of the authority available in this jurisdiction would not supplant its view in place of the tribunal's unless the error is apparent and palpable.

The tribunal has given adequate reasons, and relied on precedents, as to why the manner in which the jurisdiction exercised by the Commissioner under Section 263 of the Act was found to be erroneous. There does not appear to be any legal error committed by the

tribunal in either taking up the appeal or in deciding the same, particularly since cogent grounds have been indicated for interfering with the order of the Commissioner passed under Section 263 of the Act."

C. ITAT rulings

i) Delhi bench ITAT decision in case of **Wimco Seedlings Ltd Date of pronouncement 22/06/2020**

Held

"27. On perusal of above two statements (one) the reasons supplied it to the assessee and (two) the reasons some before the High Court, it is apparent that both are altogether different. It is not denied that in context and in substance they are same but there should be same ad verbatim. It cannot be the case of the revenue that it gives few extracts of the reasons to the assessee to defend it against the reopening of the assessment and when cornered before the higher authorities, the revenue comes out with the detailed reasons recorded by the assessing officer. In fact in all circumstances the assessing officer is supposed to provide the complete reasons recorded for reopening of the assessment to facilitate the assessee to defend itself against the reopening of the assessment. To keep few arrows in its quiver and only disclosing few arrows out of that is not expected from a revenue officer. It also against the fair play rule of reassessment proceedings. In Haryana Acrylic Manufacturing Co V Commissioner of Income tax 308 ITR 38 [Delhi] the identical issue arose. As per para no 4 following reasons were given to the assessee:-

30. As before us also the reasons recorded by the assessing officer produced before the honourable High Court are quite different and number eight whereas the extract given to the assessee was merely of two paragraphs. In view of this, respectfully following the decision of the honourable Delhi High

Court we are not inclined to uphold the reopening of the assessment and hence they are quashed. The orders of the learned Commissioner of income tax upholding of the reopening of the assessment are reversed. Thus all the three assessment years reopening proceedings are held to be invalid and quashed ."

ii) Delhi ***ITAT bench decision in case of Marubeni India Pvt Ltd (order dated 24.06.2020) wherein it is held that:***

"14. Regarding the lack of opportunity af forded, while making the addition as canvassed by the ld. AR. The ld. CIT (A) held that the calculation of the adjustment and determination o f the ALP has been made based on the working given by the assessee . Thus, at this juncture two issues needs to be addressed, a) Whether in the absence o f show-cause notice as to the quantum proposed, the addition made by the revenue can be held to be legally valid. b) Whether the allocation of expenses be on the basis o f gross sales or on the basis o f gross profit. 15. Having gone through the show-cause notice and the addition made , we find that the assessee has not been afforded an opportunity while making the addition, thus denying the principles of natural justice . It is very unfortunate that in many cases, Assessing Officers make additions under scrutiny assessments in gross violation of the principles of natural justice even without issuing a proper Show Cause Notice or without giving the taxpayer a fair opportunity to explain his point o f view. This approach not only creates ill-will for the department, but also gives rise to un justified demands.

Further, it makes the appeal proceedings also complex and time consuming, because the Commissioner Appeals is required to admit additional evidence or call for Remand Reports etc. "Hearing rule" states that the person or party who is affected by the decision made judicial/quasi judicial should be given a fair opportunity to express his point of view to defend himself. The principle of natural justice is a very old concept and it originated at an early age. The people of Greek and roman were also familiar with this concept. In the days of Kautilya, Arthashastra and Adam were acknowledged the concept of natural justice. According to the Scriptures, in the case of Eve and Adam, when they ate the fruit of knowledge, they were forbidden by the god. Before giving the sentence, eve was given a fair chance to defend himself and the same process was followed in the case of Adam too. Later on, the concept of natural justice was accepted by the English jurist. The word natural justice is derived from the Roman word 'jus-naturale' and 'lexnaturale' which planned the principles of natural justice, natural law and equity. "Natural justice is a sense of what is wrong and what is right." In India, this concept was introduced at an even as earlier as of Ramayana and Mahabharata.

16. The Hon'ble Supreme Court of India in the case of Mohinder Singh Gill vs. Chief Election Commissioner 1978 SCR (3) 272, held that the concept of fairness should be in every action whether it is judicial, quasi-judicial, administrative and or quasi-administrative

work. The rules of natural justice are rooted in all legal systems , and are not any 'new theology. They are mani fested in the twin principles of nemo judex in causa sua and audi alteram partem. It has been ointed out that the aim o f natural justice is to secure justice , or, to put it negatively to prevent miscarriage o f justice . These rights can operate only in areas not covered by any law validly made. The rules of natural justice are not embodied rules. What particular rule o f natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case , the framework o f the law under which the inquiry is held and the constitution o f the tribunal. Whenever, a complaint is made be fore a court that some principle o f natural justice has been contravened, the court has to decide whether the observation o f that rule was necessary for a just decision on the facts of that case. Every Assessing Officer, TPO, CIT(A) or any other functionary implementing statute or law whether implementing judicial functions or an administrative functions is a judicial authority with regard to the role and duties he is supposed to perform. While exercising such judicial authority , observance of principles of natural justice is a sine qua non. 17. Keeping in view the above and the well laid down principles and keeping in view that there is substantial discrepancy between the show-cause issue and the addition made, we have come to a conclusion that this is an unambiguous case of violation of principles of natural justice and

hence the action o f the revenue which was concluded without af fording an opportunity to the assessee is liable to be obliterated."

iii) Exotica Housing & Infrastructure Company Pvt. Ltd v . ITO (Delhi) (Trib) www.itatonline.org

S. 2(22)(e):Deemed dividend- Deeming provision should be construed strictly- Advances given for purely temporary financial accommodation for business purposes does not attract the deeming fiction.

Allowing the appeal of the assessee , the Tribunal held that the section uses the expression "by way of advances or loans" which shows that all payments received from the sister company cannot be treated as deemed dividend but only payments which bear the characteristics of loans and advances. Under the law, all loans and advances are debts, but all debts are not loans and advances. The term 'loans and advances' is not defined & has to be understood in the commercial sense. Advances given for purely temporary financial accommodation for business purposes does not attract the deeming fiction. (ITA.No.5188/Del./2019 dt .24-06-2020) (AY. 2013 -14)

iv) **Dev** Milk Foods Pvt. Ltd v .Dy.CIT (Delhi) (Trib) www.itatonline .org

S. 143(3) : Assessment – Limited scrutiny cannot be taken for complete scrutiny unless the AO forms a reasonable view that there is a possibility of under assessment of income – Approval by the PCIT in a mechanical manner is not valid – S.292BB does not save the infirmity – Order is quashed as a nullity . [S. 292BB]

Allowing the appeal of the assessee the Tribunal held that ,under CBDT Instruction No.5/2016, a case earmarked for 'Limited Scrutiny' cannot be taken for 'Complete Scrutiny' unless the AO forms a "reasonable view" that there is a possibility of under assessment of income. The objective of the instruction is to (i) prevent fishing and roving enquiries; (ii) ensure maximum objectivity; and (iii) enforce checks and balances upon the powers of the AO. On facts, there is not an iota of cogent material shown by the AO for the conversion from limited scrutiny to complete scrutiny. The PCIT has also accorded approval in a mechanical manner. S. 292BB does not save the infirmity. The assessment order has to be quashed as a nullity (ITA No 6767 /Del/ 2019 dt 12-06 -2020 (AY.2015 -16)

v) **Delhi itat in case of Raj Bala, 24/07/2020**
ITA Nos.3396 & 3397/Del/2017

It is the submission of the ld. Counsel for the assessee that since the AO has accepted the income declared in the return filed in response to the notice issued u/s 148, he could not have made other additions without issuing fresh notice u/s 147. According to him, the AO had the jurisdiction to reassess issues other than the issues in respect of which proceedings are initiated, but, he was not so justified when the reasons for the initiation of those proceedings cease to survive. We find merit in the above argument of the ld. Counsel for the assessee…..

since, in the instant case, the AO had initiated proceedings u/s 147 for escapement of income of Rs.9,43,897/- which was the returned income filed prior to issue of notice u/s 148 in the belated return and as well as in the return filed in response to notice u/s 148 and since the AO has accepted the said returned income and proceeded to make various other additions without issuing fresh notice u/s 147/148, therefore, we are of the considered opinion that the AO has exceeded his jurisdiction in

reassessing issues other than the issues in respect of which the proceedings are initiated and reasons for the initiation of those proceedings cease to survive. We, therefore, hold that the various other additions made by the AO are not in accordance with the law being without jurisdiction

vi) **Delhi ITAT Penny stock decision in case of Suresh Kumar Aggarwal ITA No 8703/Del/2019 Date of Order 29.06.2020 [G BENCH]**

28. Now we come to ground number [2] , which challenges the addition of ₹ 5 643084 on account of the sale proceeds received by the assessee on sale of equity shares through stock exchange held to be chargeable to tax by the learned assessing officer u/s 68 of the income tax act. At the cost of repetition, once again the fact shows that assessee has purchased 50,000 shares of Nouveau global ventures Ltd on 12 December 2007 for ₹ 1756121/- through his broker Alankit Assignments Ltd by online trading platform of the Bombay stock exchange. On the purchase value of those shares the assessee paid the securities transaction tax of rupees to 188/-, brokerage of ₹ 3500 and service tax of Rs 433/-. The above payment has been made by the assessee by account payee cheque number 319720 of IDBI Bank on 13 December 2007. The shares were transferred in the Demat account of the assessee. Such Demat account and its holding statement were furnished by the assessee before the assessing officer by letter dated 28th of June 2016. The copy of the contract note of purchase orders executive by the assessee was also submitted before the assessing officer on 11/7/2016. Such shares were sold by the assessee on 12 August 2010 and 16 August 2010 by the same broker on the same online platform. The security transaction tax, service tax, stamp charges and transaction charges were also paid by the assessee. Consequently two tax of ₹ 2 029541/- and 3580061/- was received by the assessee on 16 August 2010 on 18 August 2010 respectively. On these facts after reopening of the assessment the learned assessing officer dealt with the very issue as under:-

"10. The reply of the assessee has been examined and found that the reply is silent on question "why purchases of shares were made on abnormal higher side". Further the reply of the assessee is also not satisfactory on second question i.e." Shares of identified paper/Jama Kharchai companies have been purchased which are controlled by entry operators, most of them on oath admitted to have been engaged in providing entries". The assessee could not provide satisfactory reply and has just stated that "to whom these shares were sold are not known to the assessee.". Later the assessee submitted his reply dated 13.12.2016, relevant portion of the reply is as under:-

"so far as sale of shares at abnormally high prices are concerned, we waste to submit that in the instant case the assessee had purchased the shares on 12.12.2007 at ₹ 35 per share and sold the same at an average selling price of ₹ 1 13 for share (average of all selling prices) in August 2010. Meaning thereby the price of the shares moved approximately 3.23 times of fault after holding the investment for a period of three years approximately.

Further, so far as issue of transactions done with identified paper/jamakharchi companies controlled by entry operator is concerned, we waste to submit that all the transactions of sales had been done through screen-based trading on the recognized stock exchange. The assessee does not have any details about the identity of the persons to move he sold shares. In this regard, we would like to appraise your good self that it is undisputed in case of screen-based trading, all trades executive in OPEC screen, wherein the persons do not get to choose counterpart to the trade. The automated system itself matches orders on apprise/time priority basis and hence is not possible for anybody to have access over the identity of counter party dealing in any transaction. Since the counter party identity not displace, one can never have any choice with whom it wants to deal or not to deal."

10.1 The reply of the assessee has been per used and found that the assessee has stated that he purchased shares at the rate of ₹ 35 per share on 12.12.2007. The assessee has neither explained that this purchase price of shares was not on higher side note the assessee has submitted any documentary evidence that can establish that the purchase price of the share is at average market rate. Hence, the reply of the assessee is not acceptable and rejected.

10.2 Further the assessee has submitted that all the transactions of sale is have been done through screen-based trading on recognized stock exchange and the assessee does not have any details about the identity of the persons to womb he sold shares. The reply of the assessee is silent on „paper/jamakharchi companies" and „entry operators, who have admitted on oath to have engaged in providing entries". In view of this, the reply of the assessee is not satisfactory and is rejected. The assessee has not discharged his owners of proving that he has not purchased the shares through agents OR entry providers. Further on perusal of the computation of income, it is observed that the assessee has shown total sales of shares of „ Nouvea Limited" for s. 56,22,799/- and claimed exempt income of ₹ 3,866,678 u/s 10 (38) of the act, and the same has not been offered for taxation for the year under consideration.

11. In view of the above discussion, it can be concluded that the assessee has not disclosed long-term capital gain (LTCG) made through stock penny amounting to ₹ 5,643,000 zero 84/- for financial year 2010 – 11 corresponding to assessment year 2011 – 12. Accordingly, unaccounted long-

term capital gain (LTC) of ₹ 56,43,000 zero 84 is added to the income of the assessee.
{Addition of Rs 56,43,084}"
29. When the appeal was referred before the learned CIT – A, he also confirmed the addition as under:-

"6. Ground number two relates to the contention of the appellant against the disallowance of his claim made u/s 10 (38) of the IT act. The fact of the case is that the AO found that information was gathered by the Department that the scheme was hatched by various players to obtain/provide accommodation entries of bogus long-term capital gain through manipulation of stock market. Many companies are engaged in the illegal business of (also known as syndicate member). The share broker said the entry operators are involved in this scheme. The basic aim of the scheme was to root the unaccounted income of long-term capital gain beneficiaries

into their account/books in the garb of long- term capital gain. This entry of long-term capital gain is taken by selling the shares on the stock exchange and registering the proceeds arising out of the sale of shares in the books as long-term capital gain. For implementing the scheme, sales of some penny stock companies were used. The same modus operandi adopted for providing accommodation entry of bogus loss. Penny stocks are those stocks which trade at very low price and whose market capitalization is very low. The low price of the penny stock makes manipulation of the sale price very easy.

6.1 On perusal of the information data, it was observed by the AO that the appellant was one of the beneficiaries, who booked bogus long-term capital gain. From the given transaction, it was observed that the appellant at sold 50,000 scripts of "Nouvea Multimedia" four ₹ 5,643,000 zero 84/- in financial year 2000 – 11 to different parties. In the script, Nova global ventures Limited total trade of ₹ 2,038,723,071/- has been done and it was shown in the transaction details. From the perusal of data, it was evident that most of the purchases were on abnormal higher rates and were done by the identified paper companies controlled by entry operators, most of them on oath admitted to have been engaged in providing entries.

6.2 In view of the above discussion, it was establish that the appellant has introduced his unaccounted income in the form of long-term capital gain by manipulating the penny stock to the tune of ₹ 5,643,000 zero 84/- and this amount had not been offered for taxation in the return of income.

7. I have considered the facts and circumstances of the case, submission of the appellant and perused the assessment order. The case was rural upon by the appellant were also gone through. In this regard, the case law in the following cases which are in favour of the revenue relied upon:-

[XXXXXXXXXXXXXXXXXXXXXXXX] 7.1 The facts clearly show that the appellant has not tendered cogent evidence to explain how the share price in an unknown company had jumped in no time. The fantastic sale price was not at all possible as there was no economic or financial basis to justify the price rise. The appellant had indulged in a dubious a transaction meant to

account for the undisclosed income in the garb of long-term capital gain. The gain is accordingly to be assessed as undisclosed credit u/s

68. In view of the facts as discussed above, I am of the considered view that the AO was justified to disallow the claim of the appellant u/s 10 (38) of the IT act."

30. In the above circumstances, it is to be seen whether the assessee has discharged its onus or not because the assessing officer as well as the learned CIT – A has held that the amount added under sections 68 of the income tax act. To discharge the onus, the assessee has submitted i. details of the purchase of the shares showing the purchase bill from the broker of buying the shares at the market rate on the online trading platform of Bombay stock exchange and ii. making the payment of the shares by an account by cheque immediately after purchase.

iii. The assessee also showed before the assessing officer that above shares have been received by him in his Demat account and subsequently the shares remained in the Demat account as claimed by the assessee for three years and iv. sold from the same Demat account through the same broker online trading platform of Bombay stock exchange at the prevailing market price of that particular share. v. Sales contract notes vi. Consequent payment were also received by account payee cheque. vii. The assessee also submitted the copies of the account of the assessee from the books of the broker.

Therefore, the assessee has discharged the prime of onus cast up on him. In the circumstances we are reminded of the decision of the honourable Delhi High Court which dealt with the taxability of accommodation entry and consequent pendulum of action required from the side of the assessee as well as AO in case of Commissioner of Income-tax v. Nova Promoters & Finlease (P) Ltd. [2012] 18 taxmann.com 217 (Delhi)/[2012] 206 Taxman 207 (Delhi)/[2012] 342 ITR 169 (Delhi)/[2012] 252 CTR 187 (Delhi) wherein it has been held as under:-*

"38. The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec. 68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan – a smokescreen – conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec. 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary."

31. In the present case, the assessee has furnished all the information available with him. The learned assessing officer had the investigation wing report available with him. Undoubtedly in the report of the Principal Director Of Investigation, Kolkata dated 27 April 2015 contains the name of 84 companies, out of which one company at serial number 71 is Nouvea global venture limited (NOUVEAU) wherein total alleged transactions of ₹ 2,038,723,071/- took place. It is alleged to be bogus transaction. The assessee has shown that he has earned the long-term capital gain exempt u/s 10 (38) of the income tax act of this company. In the same report at Chapter number 3, the list of all these 84 companies are given with reference to action taken on them by Securities and Exchange Board of India [SEBI]. At serial number 71 is the name of this company against which no such action has been mentioned. Further, at para number 10 of the report it has shown that there are 18 exit providers and 5 accommodation entry providers in the whole scheme. Thus, if it is true that assessee has obtained a bogus long-term capital gain, assessee should have obtained the accommodation entry of the purchase of those shares from any of the accommodation entry providers and when the shares are sold the sales should have been taken as a purchase by any of the exit providers. In such circumstances to prove that the assessee has obtained the bogus long-term capital gain, The learned assessing officer should have examined i. The assessee by issue of summons u/s 131 of the act to know about the basic facts about these investments such as the business of the company, how assessee came to know about investment credentials of these company, history of the investments made by the assessee in earlier years and subsequent years, ii. Examination of the brokers of the assessee with the screen shot of the time and date stamp of transactions, liquidity of the stock, when the order from purchases and sales were entered by the broker and when it was executed on online platform iii. Obtaining the details of the transaction from stock exchange and details of counter parties purchasing these shares and selling those shares . It would have given ld AO lead to the accommodation entry providers and exit providing companies iv. Where from in the Demat account of the assessee the shares of the above-alleged company has entered into. This information would have been available to the assessing officer had he examined the depository in which the shares are held in the Demat account.

v. When the assessee has sold shares there has to be date and time stamped transaction at the respective stock exchange. Time and date stamped transaction would have shown that the broker of the assessee has entered into a synchronized trade with the broker of the buyer. If the synchronized trade showed that the shares have been purchased by any of the 18 exit providers mentioned in the list of the investigation wing, it would have been conclusively proved that assessee has obtained bogus long-term capital gain.

vi. When the assessee has purchased the shares, the AO could have examined identically by verifying the date and time stamp transactions to know from where the assessee has purchased those shares. Hence the assessee purchased the shares from any of the entry operators mentioned in the investigation wing report it would have thrown a light that whether the assessee has purchased a bogus long-term capital gain or not. vii. The AO could have further examined the receipt of shares in the Demat account of the assessee as to whose account is debited for transferring the shares in the Demat account of the assessee. He should have also examined whether the shares are transferred in the Demat account of the assessee are from the same person who has sold the shares on online trading platform of the Bombay stock exchange. This information could have been availed from the depository.

viii. We have also been informed that there is standard operating procedure set up by the department for the guidance of assesseeing officer to investigate the peeny stock cases. None of those steps were found in this case All these information could have been obtained by the assessing officer by issue of 133 (6) notice to the depository as well as to the stock exchange and the respective broker. However, despite having the basic information available with the assessing officer he has chosen to sit and become a mute spectator. When the assessee has provided the complete information, which would have been available with the assessee in the documentary format, the role of the assessing officer starts as an investigator of the information furnished by the assessee, when he recorded the reason, he formed a prima facie reason to believe that there is an escapement of income. He should

have converted his reason into the fact by making an investigation on the information provided by the assessee. For the reasons best known to the assessing officer, he did not do anything on the information provided by the assessee. He merely made the addition holding that assessee has not shown justification for purchase of shares at a very high price. The assessee has submitted a complete month -wise chart of highs and lows of the share of the company. Assessee purchased those shares in the month of December 2007. The purchase price of the assessee is ₹ 35 per share. The high price of that script on the Bombay stock exchange in December 2007 was ₹ 37.85 per share and low price was 29.5 per share. The assessee sold all these shares in the month of August 2010 when the all-time high price of the share was 122.4 per share and low was ₹ 91 per share, sale price shown by the assessee was rupees 110/-per share. The all-time high of the above script was in the month of February 2011 when the share price of this company reached ₹ 205 per share. Both the transaction of the purchase of the share in sale of the share was on stock exchange on online trading platform. But no doubt, the fictitious long-term capital gain as proved by the report of the investigation wing, would also have been on the online platform. The sale of shares will have to be on online platform of recognized stock exchange to obtain benefit of section 10 (38) of the act. The reason of the learned assessing officer for making an addition in para number 10.1 and 10.2 is merely rejection of the submission of the assessee without confronting the assessee with any investigation.

32. The learned authorised representative has also shown us the financial of the above company of which assessee has sold the shares. It is shown before us that the revenue from operation of the above company for the year ended on 31st of March 2012 is ₹ 1 97,85,04,467/- and similarly the revenue for 31st of March 2011 is Rs. 143,89,32,805/-. He also showed us the profits of the company for both the years, which is in the range of ₹ 75 lakhs. The learned authorised representative has also tabulated a detailed chart showing the financials of the company for last several years. He also referred that there is no allegation against the company about any wrongdoing either in the securities market or under The Companies Act. He further submitted that the profit and loss account the assessee has shown

payment of tax and therefore it is also income tax assessee. He submitted that for year ended on 31st of March 2012 company that company has paid a tax of ₹ 24.50 lakhs and for the earlier year 26.14 lakhs. Therefore, it cannot be said to be penny stock company at all. The learned assessing officer has not brought on record any material to show that this company is not having the genuine shareholding.

33. However we disagree with the argument of the ld AR that assessee if he is a habitual investor cannot enter in to the penny stock transaction of obtaining bogus long term capital gain. Assessee has shown that he has earned long term capital gain in many companies in subsequent year, but many of those companies are also in the list of penny stock prepared by the Investigation wing such as UNNO Industries . Therefore we reject that argument.

34. In these circumstances, the addition in the hands of the assessee is not sustainable when the details furnished by the assessee were not at all controverted by bringing cogent material and investigation made thereon by the ld AO. The assessee has shown the long-term capital gain exempt u/s 10 (38) of the act amounting to ₹ 3,866,678. The purchase value of those shares was ₹ 1,756,121/-. The learned AO has made the addition of the full value of the consideration received by the assessee on sale of those shares amounting to ₹ 5,643,084/-. Thus, ground number two of the appeal of the assessee is allowed.

vii) **Delhi ITAT in case of M/s A.K. Lumbers Ltd ITA No. 8761/DEL/2019 Date of Pronouncement : 10.07.2020**

<u>Held on validity of reopening</u>

5. The challenge before us is that while recording reasons for reassessment, the Assessing Officer has not at all applied his mind.

6. A perusal of the aforesaid reasons would show that statement of one Shri Kishori Sharan Goyal was recorded u/s 131 of the Act during the course of search proceedings conducted in Spaze group of cases on 17.02.2016. Shri K.S. Goyal was once again examined and his statement was recorded on oath on 28.03.2016 and 16.06.2016, who in his statement, admitted that these concerns/firms were controlled and managed by him only and were engaged in providing accommodation entries for bogus purchases and sales. Had the Assessing Officer applied his mind, he would have known that Shri K.S. Goyal never mentioned the name of the appellant.

7. A perusal of the information received from the Inv. Wing shows that the assessee has sold goods to Sai Kripa Enterprises and Balaji Enterprises amounting to Rs. 10 lakhs each. It is claimed that the bank statements of these two enterprises were made available which contained transactions in cash. Had the Assessing Officer applied his mind before reopening assessment and had he examined the bank statement, he would have known that the transaction with Sai Kripa Enterprises amounted to Rs. 27,41,837 and the transactions with Balaji Enterprises amounted to Rs. 65,93,089/-.

8. It appears that the Assessing Officer has simply relied upon the information from the INV Wing and without applying his mind reopened the assessment by giving the aforesaid reasons for reopening. Had the Assessing Officer applied his mind to the nature of the business of the assessee, he would have known that before selling the log woods, the assessee had to take permission from the Forest Department. We find that such

certificates are placed in the paper books which contain the names of the aforementioned two parties, alongwith transporters names and truck numbers.

9. A perusal of the record shows that the Assessing Officer has not examined such documents and reopened the assessment solely on the half-baked information received from the INV Wing.

13. Had the Assessing Officer applied his mind before issuing notice u/s 148 of the Act, he would have known that this is not a case of some unsecured loan/cash credits taken by the assessee. The information was that the assessee has provided accommodation bills to two parties namely, Sai Kripa Enterprises and Balaji Enterprises and, that too, information was only in respect of sales made of Rs. 10 lakhs each. As mentioned elsewhere, total sales to these two parties was around Rs. 94.28 lakhs.

14. On several occasions, the assessee asked the Assessing Officer to give opportunity to cross examine Shri Kishore Sharan Goyal but that was denied by the Assessing Officer who relied upon some decisions of the Hon'ble Allahabad High Court in the case of Prem Casting Ltd and Moti Lal Padampat Udyog Limited. Both these decisions of the Hon'ble High Court are totally on different set of facts and do not lay down any ratio in so far as the opportunity of cross examination is concerned.

15. The Hon'ble Supreme Court in the case of Andaman Timber Vs. CIT in Civil Appeal No. 4228 of 2006 has categorically laid down the ratio that denial of natural justice would make an assessment void. 16. The Hon'ble Delhi High Court in the case of Pradeep Kumar Gupta 203 ITR 95 had the occasion to consider the situation where assessment was framed on statement of a third party and the assessee requested for cross examination which was denied.

19. We are not into the information received from the INV Wing, but, on application of mind of the Assessing Officer before issuing such notice. As explained elsewhere, the entire assessment based upon the information received is devoid of any application of mind. At this juncture, it is pertinent to mention that neither Shri Kishore Sharan Goyal nor Sai Kripa Enterprises and Balaji Enterprises are related to the assessee.

20. At the cost of repetition, the transaction is not of unsecured loan/cash credits where the assessee has introduced its own unaccounted cash in the form of sales. Sales are supported by C Forms, VAT Nos and Sales Tax numbers of the parties, further supported by the certificates from the forest department. All these have not been examined by the Assessing Officer and had he examined these documents/evidences or made necessary enquiries, he may not have issued notice u/s 148 of the Act but for non-application of mind, the assessment was reopened.

Held on section 68 qua sales shown in books

10. The entire additions revolve around the enquiries made through an Inspector who, in his report, stated that the transporters were not available on the given address. Transactions took place in the year 2011 and the enquiries were made by the Inspector in the year 2018. If after a lapse of 7 years the parties are not available at the given address, in our view, the assessee cannot be found faulted with. '

11. Had the Assessing Officer applied his mind, then he would have not believed the theory of the Investigation Wing that the appellant is engaged in providing accommodation entries as the total turnover of the appellant is Rs. 37.58 crores and the quarrel is only in respect of sales made to the two parties totalling to Rs. 94.28 lakhs.

12. At this point, it would be pertinent to mention that sales made to these two parties were duly recorded in the books of account under the head "Sales' and the Assessing Officer has made same addition once again u/s 68 of the Act. Once the assessee has himself included the amount as its income, the action of the Assessing Officer is nothing but double addition of the same amount. At the most, the Assessing Officer should have disregarded the sales and increased the stock in trade of the appellant by that amount.

22. Considering the underlying facts in issues, we are of the considered opinion that the assessee succeeds on both the counts – reopening is devoid of any application of mind and additions are solely based upon assumptions, conjectures

and surmises. Therefore, the assessee succeeds on both the counts.

viii) Shri Gurdeep Singh, ITA No. 170/C HD/ 2018 APPELLATE TRIBUNAL DIVISION BENCH, 'A ' CHANDIGARH

Section 2(22)(e)of the Act, therefore, does not talk about the dividend actually declared or received. The dividend taken note of by this provision is a deemed dividend and not a real dividend. For certain purposes, the Legislature has deemed such a loan as 'dividend' and the effect of such deeming provision is that there is no option to the share holder to say that it is a mere loan and not his actual income. If it is proved that a loan has been given out of the accumulated profits of the company to the share holders having substantial interest in the company or to any other concern in which such a share holder has also substantial share holding, then as per the provisions of section 2(22) (e) of the Act, there will be a presumption that such loan has been given for the benefit of the share holder and hence, is taxable in the hands of such a share holder. It has been made so by legal fiction created under section 2(22)(e)of the Act read with section 56 of the Act. 9. The words "deem" or "fiction" or irrebuttable presumption have not been defined in the Income Tax Act. For better understanding of the statutory presumptions and legal/deeming fictions, we deem it appropriate to refer to the relevant provisions of The Indian Evidence Act, 1872. Though the provisions of the Evidence Act are not strictly applicable to the procedures of this Tribunal as envisaged under the Income Tax Act, 1961, but the principles underlying the provisions of Evidence Act do constitute valuable guides. Section 4 of the Evidence Act, read as under:- "4. "May presume".—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. "Shall presume".—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. "Conclusive proof".—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it." (emphasis supplied) The Conclusive Presumptions/proofs can be considered as one of the strongest presumptions. With regards to Conclusive proofs, the law has absolute power and shall not allow any proofs contrary to the presumption. The general definition of Conclusive Proof is a condition when one fact is established beyond doubt, then the other facts or conditions become conclusive proof of another as declared under the elevant provision. Legal fictions compel to believe the existence of an artificial state of facts which may be contrary to the real state of facts. When a fiction is created by law, it is not open to anybody to plead or argue that the artificial state of facts created by law is not true. The basic purpose of a deeming provision is an assumption that something is true even though it may be untrue. It creates a presumption that accepts something as fact without the benefit of evidence and further the legal consequences of such facts have to

follow accordingly. Under such circumstances, when on the proof of one fact, which, in the case in hand is fact of advancement of loan to the share holder or to the concern in which such a share holder is having substantial share holding, the other fact that such a loan is a diversion of the accumulated profits of the company for the benefit of such a shareholder, hence income of the share holder, is to be assumed automatically. For raising such an irrebuttable presumption, the first set of facts which are deemed to be conclusive proof of the other, i.e. regarding the advancement of loan to shareholder or to the concern in which such a share holder has substantial interest has to be proved strictly and beyond reasonable doubt and such first limb of the facts cannot be assumed or presumed merely on the basis of suspicion, howsoever strong it may be.

10. Now, in this case in the given facts and circumstances, the Revenue could not establish beyond doubt that the assessee was having substantial interest in CCNPL on the date of advancement of loan by CCNPL to JCTPL. On the other hand, the Ld. CIT(A) has specifically observed that as per the annual return filed with the Registrar of Companies, which is a legal and valid document as per law, the assessee was holder of only one share in CCPNL and the other shares stood transferred to the JCTPL. The Ld. CIT(A) has noted that it is the mere suspicion of the AO that the assessee was having substantial share holding in the CCNPL on the date of transaction. As discussed above, to apply a deeming fiction, the first set of facts is to be proved beyond doubt and the deeming fiction cannot be applied on the basis of assumption, presumption or suspicion about the first set of facts. The Ld. CIT(A) also rightly noted that ss per record of "Registrar of Companies", the effective date of transfer of shares was May 8, 2012. That one can file belated return with the ROC along with "late fee" as applicable, as was done by assessee and since the same was accepted by the ROC, hence, for all intents and purposes, the effective date of transaction will be the date as mentioned in the return. Since, the revenue could not rebut the above stated facts beyond reasonable doubt, hence, the Ld. CIT(A), in our view, has rightly declined to apply the deeming provisions of section 2(22) (e) of the Act in the set of facts and circumstances of the case. Moreover, it has also been observed by the Ld. CIT(A) that in the subsequent assessment years AY 2014-15 and even AY 2015-16, in the scrutiny assessments carried out u/s 143(3) of the Act, the AO has accepted the very transaction of shares effected in May 2012. In view of this, we do not find any infirmity in the order of the CIT(A) on this issue and the same is upheld .

ix) **Anjana Vinayak 23/07/2020 / ITA NO. 247/Chd/2019 Chandigarh ITAT**

10. We have considered the submissions of both the parties and perused the material available on the record. In the present case it is an admitted fact that the assessee was having old

FDR's with the Bank and earning interest @ 9.15%. The assessee raised the loan against the FDR and paid 1% extra interest. The Ld. Counsel for the assessee pointed out that as per the policy of the Bank if the FDR with the bank were encashed prematurely then there was penalty of 1.5% by the bank, therefore by not encashing the FDR prematurely and raising the loans against the same FDR, the assessee saved interest @ 0.5%. So, there is no loss of the Revenue. In the instant case, it is not the case of the Department that the assessee raised the interest bearing funds and utilized the same for giving interest free advances. On the contrary the advances given by the assessee were out of the assessee's own funds. Moreover, by raising the loans against the FDR and not encashing prematurely the assessee saved the interest and also kept the income earning apparatus intact, therefore the disallowance made by the A.O. and sustained by the Ld. CIT(A) was not justified particularly when the assessee has shown the income under the head "income from other sources" and not "the business income". In the present case, the interest paid on the loans raised against the FDR was having the direct nexus with the interest received from the FDRs and the assessee choose to save the penalty of 1.5% by raising the loans at 1% higher rate of interest than the interest rate on FDR thus there were saving of 0.5%. As regards to the decisions relied by the A.O. and considered by the Ld. CIT(A) i.e; CIT Vs. Dr. V.P. Gopinathan (supra) is concerned, it is noticed that the same is distinguishable from the facts of the assessee's case, since the issue in the said case was not relating to the applicability of section 57(iii) of the Act rather in the said case the loan was raised from different bank on which interest was paid while the

interest was earned on the FDR with the different bank, so there was no nexus. We therefore by considering the facts of the present case as discussed herein above, are of the view that the disallowance sustained by the Ld. CIT(A) was not justified, accordingly, the same is deleted.

x) **Jaipur ITAT in case of** Shri Sudesh Kumar Gupta

ITA No. 976/JP/2019 @Date of Pronouncement: 09/06/2020

8. We have heard the rival submissions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs 21,00,000/- as undisclosed investment in stock from undisclosed income during the course of survey. In the return of income, the same has been offered to tax under the head "business income" and the return of income so filed has been accepted by the Assessing officer without making any adjustment/variation either in the quantum, nature or classification of income so offered by the assessee. The assessee, being an individual, has offered the same to tax applying the slab rate of taxation as applicable to an individual. The case of the Revenue is that the same is taxable @ 30% as per provisions of section 115BBE r/w section 69 of the Act and is thus a mistake apparent from record rectifiable u/s 154 of the Act.

11. In the instant case, as we have noted above, the return of income so filed has been accepted by the Assessing officer without making any adjustment/variation to the income so offered by the assessee and the assessment has been completed u/s 143(3) of the Act. Further, there is nothing on record which shows that the Assessing officer has called for any explanation

of the assessee regarding the nature and source of such investment during the course of assessment proceedings and any formation of opinion and recording of satisfaction by the Assessing officer which is required before invoking the provisions of section 69 of the Act. Though the Assessing officer has issued a show-cause as to why penalty proceedings u/s 271(1)(c) may not be initiated in respect of such investment, however, he has not issued any show-cause for invoking provisions of section 69 of the Act or has called for any explanation of the assessee regarding the nature and source of such investment. In fact, the assessment order so passed by the Assessing officer is silent about invoking the provisions of section 69 of the Act. Where the provisions of section 69 have not been invoked by the Assessing officer while passing the assessment order u/s 143(3), going by the plain language of section 115BBE, the latter cannot be invoked in the instant case. 12. It is therefore not a case where provisions of section 69 have been invoked by the Assessing officer while passing the assessment order u/s 143(3) and at the same time, he has failed to apply the rate of tax as per section 115BBE of the Act. Had that been the case, it would clearly be a case of rectification and powers under section 154 can be invoked. However, in the instant case, the Assessing officer has not invoked the provisions of section 69 at first place while passing the assessment order u/s 143(3), therefore, the provisions of section 115BBE which are contingent on satisfaction of requirements of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act. We therefore upheld the order of the ld CIT(A) and the matter is decided in favour of the assessee and against the Revenue.

xi) **Jaipur ITAT in case of Sh. Prem Chand Jain Date of Pronouncement: 08/06/2020**

18. In the instant case, the assessee has purchased two plots of land during the year under consideration. The sale consideration as per the respective sale deeds amounts to Rs 5,50,000/- and the stamp duty value of such properties as determined by the Stamp duty authority amounts to Rs 8,53,636/- and therefore, there is difference to the tune of Rs 3,03,636/- between the sale consideration as per the sale deeds and the stamp valuation determined by the Stamp Valuation Authority. To this extent, the facts are not disputed and have been accepted by both the parties. The limited point of dispute is the nature of immoveable property which has been purchased by the assessee. The assessee's contention is that which he has purchased are two plots of agricultural land and the same doesn't fall in the definition of capital asset as per the provisions of Section 2(14) of the Act and provisions of section 56(2)(vii)(b) cannot be invoked. The Revenue's contention is that the provisions of Section 56(2)(vii)(b) talks about any immoveable property and thus even an agriculture land falls under the definition of an immoveable property and the provisions of Section 56(2)(vii)(b) are clearly attracted. 19. On reading of provisions of 56(2)(vii)(b), we find that it refers to any immoveable property. Further, provisions of section 56(2)(vii)(c) refers to any property, other than an immovable property. The meaning of the term "property" has been provided in Explanation (d) to section 56(2)(vii) where the term "property" has been defined to mean capital asset of the

assessee namely immoveable property being land or building or both. It has been contended by the ld AR that all immovable properties of any nature are not covered in the definition of property. Only those immovable properties which are held as capital assets and is in ***nature of land or building or both are only covered u/s 56(2)(vii). We agree with the contention of the ld AR that where the term "property" has been defined to mean a capital asset as so specified and where an immoveable property as so specified being land, building or both is not held as an capital asset, it will not be subject to the provisions of section 56(2)(vii)(b) of the Act. In the instant case, therefore, where the agricultural land doesn't qualify as falling in the definition of capital asset, provisions of section 56(2)(vii)(b) cannot be invoked.*** *20. In the instant case, whether agriculture land so acquired falls in the definition of capital asset or not, one has to refer to the provision of section 2(14) which exclude agriculture land in India subject to certain exceptions. However, there are no findings of the lower authorities in this regard. Therefore, we deem it appropriate to set-aside the matter to the file of the AO for the limited purposes of examining whether the two plots of agricultural land so acquired falls in the definition of capital asset or not. Where it is so determined by the Assessing officer that the agricultural land so acquired doesn't falls in the definition of capital asset, difference in the DLC value and sales consideration cannot be brought to tax under the provisions of section 56(2)(vii)(b) of the Act and relief should be granted to the assessee. 21. In a scenario, where it is so determined by the Assessing officer that the agricultural land so acquired falls in the definition of capital asset, the provisions of section 56(2)(vii)(b) of the Act*

would be applicable. In this regard, the contention of the ld AR is that during the course of assessment proceedings, the assessee has objected to the DLC value adopted by the Assessing Officer and therefore before applying the DLC value, the matter should have been referred to the DVO for determination of fair market value.

22. We note that during the course of assessment proceedings, the assessee was issued a show cause as to why the difference of Rs.3,03,596/- may not be added u/s 56(2)(vii) of the Act. In reply thereof, the assessee has submitted that the assessee purchased the land on 22.04.2013 for a consideration of Rs 5,50,000/- only and provisions of section 56(2)(vii) are applicable from 01.04.2014, so no addition should not be made in this case. The AO considered the submissions of the assessee but held that provisions of section 56(2)(vii) are applicable from the A.Y 2014-15 and the case of the assessee is squarely covered by the provisions of section 56(2)(vii) of the I.T. Act, 1961 as amended by the Finance Act, 2013. However, we find that the AO has not appreciated the objection of the assessee regarding adoption of DLC value as against the sale consideration. Therefore, where the assessee has objected to the stamp duty valuation, as per the provisions of section 50C(2) of the Act which are equally relevant for the purpose of provisions of section 56(2)(vii)(b)(ii) of the Act, the matter should have been referred by the Assessing Officer to the DVO for determination of fair market value. Therefore, in the instant case, where it is so determined by the Assessing officer that the agricultural land so acquired falls in the definition of capital asset, he has to refer the matter to DVO to further determine the

fair market value of the two plots of agricultural land and thereafter, decide the matter afresh.

xii) Jaipur ITAT in case of Sh. Ijyaraj Singh ITA No.152/JP/2019 Date of Pronouncement : 18/06/2020

17. The question that arises for consideration is where the full value of consideration has not been discharged by the purchaser of the impugned land as per the sale deed and there is violation of terms of the sale deed, whether the impugned transaction would still qualify as transfer and liable for capital gains tax given that the same is evidenced by the registered sale deed

21. The legal proposition which emerges from reading of aforesaid decisions is that that a registered sale deed does carry an evidentiary value. At the same time, where the assessee is able to prove by cogent evidence brought on record that no sale has in fact taken place, then, in such a scenario, the taxing and appellate authorities should consider these evidences brought on record by the assessee and basis examination thereof, decide as to whether sale has taken place or not in the given case. Further, it has been held that the title in the property does not necessarily pass as soon as instrument of transfer is registered and the answer to the question regarding passing of title lies is the intention of the parties executing such an instrument. The Registration is no proof of an operative transfer and where the parties had intended that despite execution and registration of sale deed, transfer by way of sale will become effective only on payment of the entire consideration amount, then in such a scenario, the transfer will be effected only on payment and

receipt of full sale consideration and not at the time of execution and registration of sale deed.

24. We are therefore of the considered view that though the sale deed has been registered, given that the terms of the sale deed and the intention of the parties at the time of entering into the said sale deed have not be adhered to whereby full sale consideration has not been discharged, there is no transfer of the impugned land and no income accrues and consequently, no liability towards capital gains tax arises in the hands of the assessee. This brings us to the concept of real income which can only be brought to tax and there cannot be any levy of tax on hypothetical income which has neither accrued/arisen or received by the assessee and useful reference can be drawn to the decision of the Hon'ble Supreme Court decision in case of CIT V/s. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 (SC) wherein it was held as follows:

25. And the latter decision of Hon'ble Supreme Court in case of CIT vs. Balbir Singh Maini (2017) 398 ITR 531 where the Hon'ble Supreme Court has reiterated the principle of real income in context of section 45 and 48 and has held as under:-

26. In the instance case, given that the sale transaction fell through in view of non-fulfillment of the terms of sale deed whereby cheques have been dishonored by Sh. Rajeev Singh and he has failed to discharge the full sale consideration, there is no transfer and no income which has accrued or arisen to the assessee besides the fact that there is no receipt of sale

consideration, thus no real income in hand of the assessee and in absence thereof, the assessee is not exigible to capital gains tax. Similar view has been taken by the Coordinate Bench in case of Appasaheb Baburao Lonkar vs ITO [2019] 176 ITD 115 (Pune)…

29. In light of aforesaid discussions and in the entirety of facts and circumstances of the case and following the decisions referred supra, we hereby affirm the findings of the ld CIT(A) and the matter is decided in favour of the assessee and against the Revenue. In the result, the ground no. 1 of Revenue's appeal is dismissed.

xiii) **Mumbai ITAT in case of** Futura Polyster Limited ITA Nos.1459-1460/Mum/2018 Date of Pronouncement: 16.07.2020

Rather, the fact that the MOU, dated 19.12.2012 was subsequently cancelled vide a deed of cancellation, dated 28.09.2017, therein proves to the hilt that the impugned sale transaction had never crystallized. As a matter of fact, the lower authorities had failed to place on record any material which would rebut the aforesaid claim of the assessee. In fact, it is not even the case of the revenue that the deed of cancellation, dated 28.09.2017 is a sham or a fabricated document. In fact, the subsequent sale of part of the land by the assessee in the period relevant to A.Y 2018-19 and A.Y 2019-20, further fortifies the veracity of the aforesaid claim of the assessee. At this stage, we may herein observe that the revenue by assessing the LTCG in the hands of the assessee had sought to tax a hypothetical income, which finds its roots in a transaction which had never

fructified into a sale transaction. As observed by the Hon'ble Apex Court in the case of CIT Vs. Shoorji Vallabhdas and Co., (1962) 46 ITR 144 (SC), income-tax is a levy on income. No doubt, the Income-tax act takes into account two points of time at which the liability to tax is attracted ,viz., the accrual of the income or its receipt, but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a _hypothetical income', which does not materialize. As observed by the Hon'ble High Court, where the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the _books of account'. On the basis of our aforesaid observations, we are unable to persuade ourselves to concur with the view taken by the lower authorities, and therein vacate the addition towards LTCG made by them, on the basis of the MOU, dated 19.12.2012. Ground of appeal No. 7 r.w additional ground of appeal no. 1, are allowed in terms of our aforesaid observations.

xiv) **Mumbai** *ITAT in case of Yogini Mohit Sahita Date of Pronouncement : 27/07/2020 ITA No. 5419/MUM/2018*

7.1 At this juncture, we turn to the 'Consent Terms' dated 16.03.2013 between the Plaintiffs (1) Smt. Dhairyabala Ashok Parikh, (2) Smt. Sarla Jayantkumar Mistry, (3) M/s H.M. Enterprises and Defendants (1) Smt. Yogini Mohit Kumar Sayta (the appellant), (2) Amit Mohitkumar Sayta, (3) Vidyut V. Sayta and (4) Sauras S. Sayta. We will now refer to the 'Consent

Terms' and the place of the appellant therein. As per it, the defendants admit and acknowledge that the original defendant viz. Mrs. Saraswati Vithaldas Sayta was only a licensee in respect of the flat on the 2nd floor in the building known as "Ganga Sagar" ("the Suit Premises") and did not have any other right, title or interest in the Suit Premises. The original defendant died on 25.09.1993. After the demise of the original defendant, Vidyut V. Sayta and the members of his family have been in use and occupation of the Suit Premises to the exclusion of the other heirs and next-of-kin of the original defendant. Pursuant to and under the registered Deed of Conveyance dated 24.12.2010, M/s H.M. Enterprise has acquired from Smt. Yogini Mohitkumar Sayta (the appellant) and Amit Mohitkumar Sayta (the original landlord), the immovable property consisting inter alia "Ganga Sagar" (in which the suit premises are located). Then M/s H.M. Enterprises paid Rs.25,00,000/- to defendant No. 1 (the appellant) ; Rs.1,15,00,000/- to defendant No. 3 ; Rs.20,00,000/- to defendant No. 4 in consideration of entering into a settlement and vacating and handing over possession of the suit premises to plaintiff No. 3 (M/s H.M. Enterprises). M/s H.M. Enterprises admits and acknowledges receipt of vacant and peaceful possession of the suit premises from the defendants. The defendants declare and confirm to the Hon'ble Court of Small Causes at Mumbai that they have not created any right, title or interest or parted with possession of the suit premises in favour of any other person. Finally, the "Consent Terms" state : "8. The parties hereto withdraw all other claims and allegations made against each other either in the above Suit or otherwise in respect of the Suit Premises as also in respect of any other premises in the building known as "Ganga Sagar"

where the Suit premises is situated. The above Suit shall stand disposed of in terms hereto."

7.2 Let us recapitulate the facts again. Smt. Saraswati Vithaldas Sahita occupies a flat at 2nd floor of the building known as Gangasagar on license basis. She has two sons namely Shri Vidyut Sahita and Shri Mohit Sahita. The appellant in the instant case is wife of Shri Mohit Sahita (daughter-in-law of Mrs. Saraswati Vithaldas Sahita). After demise of Mrs. Saraswati Vithaldas Sahita, her son Shri Vidyut Sahita occupied the said flat with his family. The said building Gangasagar was purchased by M/s H.M. Enterprises. For vacating the premises, M/s H.M. Enterprises filed suit against the occupier of Gangasagar building. An out of Court settlement was made so that occupier could not interfere with possession of M/s H.M. Enterprises. The appellant being daughter-in-law of Smt. Saraswati Vithaldas Sahita received Rs.25,00,000/- for not interfering possessions of M/s H.M. Enterprises.

7.4 In the instant case, Smt. Saraswati Vithaldas Sahita occupied the said flat at 2nd floor of the building known as Gangasagar on license basis. This is crystal clear from the 'Consent Term' before the Hon'ble Court of Small Causes at Mumbai, quoted at length earlier. After demise of Mrs. Saraswati Vithaldas Sahita, her son Shri Vidyut Sahita occupied the said flat with his family. The said building Gangasagar was purchased by M/s H.M. Enterprises. For vacating the premises, M/s H.M. Enterprises filed suit against the occupier of Gangasagar building. An out of Court settlement was made so

that occupier could not interfere with possession of M/s H.M. Enterprises. The appellant being daughter-in-law of Smt. Saraswati Vithaldas Sahita received Rs.25,00,000/- for not interfering possessions of M/s H.M. Enterprises. The distillation of precedents must now be applied to the facts of the present case. We are of the considered view that the ratio laid down in the decisions mentioned at para 7 & 7.3 hereinabove is applicable to the instant case. Following the same, we set aside the order of the Ld. CIT(A).

xv) **Shri Abdul Hamid (GAUHATI 'E'COURT, ATKOLKATA ITAT) /ITA Nos.46 /Gau/2019 Assessment Year:2014-15**

4. Next ground on which ld PCIT has exercised jurisdiction under section 263 of the Act was that the Assessing officer had failed to tax the undisclosed income of Rs. 3,65,933/- as per provisions of section 115BBE of the Income-tax Act, 1961.

In order to understand whether the provisions of section 115BBE are applicable to the assessee or not, let us first go through the provisions of section 115BBE of the Act, which reads as follows: "15BBE. Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D. 1. Where the total income of an assessee includes any income, referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of— a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty per cent; and b) the amount of income-tax with

which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a). 2. Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).”

Before us,the limited question is that whether business receipts/business turnover is taxable under section 115BBE of the Act?As per the intention of legislature, the burden to apply section 115BBE and section 68 to section 69D of the Act rest on revenue shoulder. That burden cannot be discharged on the basis of assumption and presumption made by the assessing officer. Having gone through the section 115BBE, as noted above, we are of the view that business activity related income may not ordinarily get placed u/s 68 to section 69D of the Act. In the assessee`s case under consideration, the assessee submitted before the assessing officer that deposits of Rs.91,48,326/- in bank account No. 21956697434, were business receipts. The relevant para of the assessment order is reproduced below: “On being confronted the assessee made submission on 27/12/2016 stating that out of aggregate deposits of Rs. 95,33,717/- made in the said bank account A/c No. 2195697434 Rs.91,48,326/-was his business receipt, Rs.3,73,870/- are maturity proceeds of daily deposit accounts and Rs 11,521/- was interest Income on savings account. After his father’s death, the assessee was started doing business using the above bank account in question, which was not reflected in his Return of income.”

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15. We note that assessing officer in his assessment order has also treated the undisclosed amount in bank account as undisclosed business receipts/turnover.

We reproduce the relevant para of assessment order where assessing officer treated the undisclosed amount as undisclosed business receipts/turnover: “Accordingly, the amount of Rs.91,48,326/-, which was not accounted for gross turnover in the profit & loss account in the Return of Income of the assessee, has been considered as undisclosed business receipt or turnover of the assessee for the financial year 2013-14 relevant to the assessment year 2014-15 o v e r & above the gross turnover declared by him. The margin of net profit has been taken @ 4% on audited gross turnover in the Return of Income filed by the assessee. Accordingly, margin of profit has been taken @ 4% on undisclosed turnover of Rs.91,48,326/- which comes to Rs.3,65,933/- and added back as undisclosed business income to the returned income.”

Since, the assessing officer has applied his mind and treated the undisclosed amount in bank account as undisclosed business receipt or turnover of the assessee, therefore provisions of section 115BBE does not apply to the assessee. Since, ld PCIT has himself treated the amount of undisclosed bank account as undisclosed business receipts/turnover, therefore the question of application of the provisions of section 115BBE does not apply to the assessee under consideration.

18. Our view is further fortified by the Judgment of the Coordinate Bench of Mumbai in the case of ACT Central Circle -13 Mumbai Vs. Rahil Agencies, order dated 23 November, 2016 wherein it was held that section 115BBE does not apply to business receipts/business turnover. The findings of the Coordinate Bench are given below:

"19. We have considered rival contentions and found that by applying provisions of Section 115BBE the AO has declined set off of business loss against income declared during the course of survey/search. The provisions of Section 115BE are applicable on the income taxable under section 68, 69, 69A, 69B, 69C or 69D of the Act. The income declared by the assessee is unrecorded stock of diamond found during the course of search. The assessee is in the business of diamond trade and such stock was part of the business affair of the company. Therefore, since income declared is in the nature of business income, the same is not taxable under any of the section referred above and accordingly section 115BBE has no application in case."

At the cost of repetition we state that while making the original assessment under section 143(3) dated 30.12.2016, the assessing officer has treated undisclosed amount in bank account as undisclosed business receipts/turnover. The ld PCIT while exercising jurisdiction under section 263, vide his order dated 2.2018, treated undisclosed amount in bank account as undisclosed business receipts / turnover. The assessing officer while giving appeal effect of the order of ld PCIT under section 263 of the Act, vide order under section 143(3)/263 of the Act

dated 28.11.2019, treated undisclosed amount as undisclosed business receipts/turnover. Since the Department itself accepting the undisclosed amount of assessee in his bank account as undisclosed business receipts/turnover, therefore, section 115BBE does not attract here and hence order passed by the assessing officer, after application of mind, under section 143(3) dated 30.12.2016 is neither erroneous or prejudicial to the interest of revenue.

xvi) Mumbai ITAT IN CASE OF Tata Education and Development Trust ITA Nos 1423 and 1424/Mum/2018
Date of pronouncement : July 24, 2020

22. It is necessary to bear in mind the fact that as on the point of time when the appeal came up for adjudication before the CIT(A), the impugned disallowance of claim of exemption, amounting to Rs 197,79,27,500, for the assessment year 2011-12 and to Rs 25,37,00,0000 for the assessment year 2012-13, was already deleted by the Assessing Officer by passing orders under section 154 dated 8th December 2015. These orders are identically worded, and, for ready reference, extracts from the order for the assessment year 2011-12 are reproduced below: The assessee has filed rectification application on 26.11.2015 for grant given to Cornell University and Harvard Business School to be considered income applied outside India. In support, the assessee has submitted copy of CBDT Order No. F.No.180/9/2010-ITA-1 dated 10.11.2015. In the assessment order u/s.143(3) passed in the case of the assessee on 28/03/2014 the A.O. had not allowed Rs.197,99,94,581/- as income actually applied towards objects outside India against

the income of Rs.229,34,27,501/-. On perusal of the records, it is found that during the assessment proceedings, the A.O. observed that the assessee had filed an application seeking approval /s. 11(1)(c) of the Act. As there was no direction by the Board, CBDT by general or special order stating that the assessee's income applied outside India shall not be included in the total income of the person in receipt of such income, the A.O. had disallowed Rs.197,99,94,581/- and treated the same as taxable income. Now, the assessee has submitted a copy of order u/s. 11(1)(c) of the Income Tax Act, 1961 vide CBDT order No.180/9/2010-ITA-1 dated 10.11.2015 wherein CBOT has directed the claim of the assesee regarding the extent to which such income is applied to such purposes outside India will be subject to verification during the assessment proceedings as per the Income Tax Act, 1961. Further, CBDT has directed this order shall have effect for the period covered by Assessment Years 2009-10 to 2016-17. Issue is covered as per CBDT order No.180/9/2010-1TA-1 dated 10.11.2015 for A.Y.2011-12. Since the mistake is apparent from record (in light of the said Board's order) is hereby rectified u/s 154 of the Income Tax Act, 1961. The Revised income computed as under:- Gross receipts as per computation Rs. 229,34,27,501.00 Less: Income actually applied towards Objects (i) In India Rs. 8,16,25,444.00 (ii) Outside India Rs, 197,79,37,500.00 Rs. 205,95,62,944.00 Rs. 23,38,64,557.00 Exemption u/s.11(1) of the Income Tax Act allowed to the extent of income available Rs. 229,34,27,501.00 Total Taxable Income Rs. N I L Give credit for taxes paid after verification. Issue revised notice of demand/refund order accordingly.

23. The rectification order so passed and the original assessment order were, for all practical and for all legal purposes, stood merged, and the disallowance thus ceased to exist as on 8th December 2015. To this extent, grievances raised in the appeals before the CIT(A), against the aforesaid disallowances, became wholly academic and infructuous. Yet, on 29th December 2017, when learned CIT (A) disposed of these appeals, he proceeded to adjudicate on these issues. That course of action, in our considered view, was not permissible. When the very disallowance of exemption, which was agitated in appeal, stood deleted, it was not open to the learned CIT(A) to adjudicate on the correctness of the disallowance. While on this aspect of the matter, we may usefully refer to the following observations made by Hon'ble Gujarat High Court, in the case of Nitin Babubhai Rohit Vs Dharmendra Vishnubhai Patel [(2018) 409 ITR 276 (Guj)] wherein Their Lordships have, inter alia, observed as follows: "……. we find it somewhat unusual to note that the Commissioner (Appeals) even after the revisional authority had set aside the order of penalty, proceeded to decide the appeal of the assessee. Even if the Commissioner of Income Tax (Appeals) was personally of the opinion that the revisional order should not have been passed, once such order was passed, he must abide by the discipline of a quasi-judicial structure and respect the order as it stands. Unless the order of the revisional authority was set aside by competent authority or Court, its effect must be allowed to be felt on record with full force. The only effect of the order was that the order of penalty passed by the Assessing Officer does not survive. If the penalty order was thus set aside by revisional authority, it was thereafter not open for the appellate Commissioner to still

examine the merits of such an order and declare his legal opinion on the same….." 24. Clearly, therefore, once a grievance does not survive because of some other order having been passed giving relief, on that count, having been given by some other authority, it is not open to the CIT(A) to adjudicate on that grievance. Once the disallowance of exemption was thus deleted by the Assessing Officer, by way of a rectification order which stood merged with the assessment order, it was not open to the CIT(A) to still examine the merits of such a disallowance of exemption and declare his legal opinion on the same. In our considered view, therefore, even if the CIT(A) was personally of the opinion that the rectification order should not have been passed, as he apparently was, once such a rectification order was passed, he must abide by the discipline of a quasi-judicial structure and respect the order as it stands. Even if learned CIT(A)'s reservations, on the correctness of rectification order passed by the Assessing Officer under section 154 and thus deleting the disallowance of exemption, had any merits, the remedy was not with him. He was not seized of the matter regarding correctness of relief granted by the Assessing Officer under section 154, and, at the same time, legal effect of the order under section 154 was that the issue, which he was called upon to adjudicate on, was rendered academic.

The rectification order under section 154 could have been at best subjected to revision under section 263, and the time limit under section 263(2) was very well available at that point of time, but then such a revision could only have been done by the Principal Commissioner of Income Tax concerned, and not by the CIT(A); as we have noted earlier in these discussions, it is

only elementary in law that what cannot be done directly, cannot be done indirectly either. As long as such a revision does not take place, and that has not happened till now, and as long as the rectification orders passed under section 154 are set aside by any other mechanism provided under the law, it was not open to the CIT(A) to ignore the effect of the rectification order, on the order impugned in appeal before him, and thus proceed to adjudicate on a question which was wholly academic and infructuous at that point of time.

25. In our considered view, therefore, the very adjudication on denial of exemption, in respect of monies spent on application of charitable objectives of the appellant trust outside India, by the learned CIT(A) was incorrect in law, and is, accordingly, liable to be set aside for that short reason alone. 26. That, however, is not the only reason as to why the assessee must succeed in appeal on this point.

27. As learned counsel for the assessee rightly contends, once an authority, which has the jurisdiction to pass an order, passes an order, unless that order is set aside by the process of law, it cannot be ignored. The powers of granting approval for the purpose of application of income of the trust, for objects of the charitable institution, vests with the Central Board of Direct Taxes, and, in exercise of these powers, the Central Board of Direct Taxes had granted the approval dated 10th November 2015. On the question as to whether, in the course of assessment proceedings, such an approval can be called into question, we find guidance from Hon'ble Supreme Court's judgment in the case of Gestetner Duplicators(supra) wherein Their Lordships have, inter alia, observed as follows: ……..However, we

would like to make some observations with regard to the true impact of the recognition granted by the Commissioner of Income-tax to a provident fund maintained by an assessee. The facts in the present case that need be stressed in this behalf are that it was as far back as 1937 that the Commissioner of Income-tax had granted recognition to the provident fund maintained by the assessee under the relevant rules under 1922 Act, that such recognition had been granted after the true nature of the commission payable by the assessee to its salesmen under their contracts of employment had been brought to the notice of the Commissioner and that said recognition had continued to remain in operation during the relevant assessment years in question; the last fact in particular clearly implied that the provident fund of the assessee did satisfy all the conditions laid down in rule 4 of Part A of the Fourth Schedule to the Act even during the relevant assessment years. In that situation we do not think that it was open to the taxing authorities to question the recognition in any of the relevant years on the ground that the assessee's provident fund did not satisfy any particular condition mentioned in rule 4. It would be conducive to judicial discipline and the maintaining of certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that the recognition granted and available for the particular assessment year implies that the provident fund satisfies all the conditions under rule 4 of Part A of the Fourth Schedule to the Act and not sit in judgment over it…….. [Emphasis, by underlining, supplied by us now]

28. It was, therefore, not open to the CIT(A) to question, directly or indirectly, the decision of the CBDT in granting approval, under section 11(1)(c), to the assessee. In any case, whether the

approval was justified on merits or not, as long as that order subsisted, it was not open to the CIT(A) to ignore the same. As Hon'ble Rajasthan High Court has observed, in the case of Prakash Chitra (supra), "The efficacy of the order……. depends on operating force of the order".

38. In the light of the above discussions, even though there is no res judicata in the income tax proceedings, the principles of consistency apply to the income tax proceedings nevertheless, and, in the light of these principles of consistency, it was not open to the Assessing Officer to decline the benefit of section 11(1)(c), in respect of application of income of the trust outside India by making contributions to Cornell University USA and Harvard University USA, only for these two years, when, on the same set of facts, the benefit of section 11(1)(c) has been allowed for all other years.

Our conclusions on the core issue in appeal:
41. For the detailed reasons set out above, we are of the considered view that the learned CIT(A) was in error in upholding the denial of claim of the assessee for exemption in respect of application of income of the trust outside India, by way of contributions made to Cornell University USA and Harvard University USA and amounting to Rs 197,79,27,500, for the assessment year 2011-12, and of Rs 25,37,00,000 for the assessment year 2012-13. The claim of the assessee must be allowed, and, we order so
42. As we part with the matter, we may however add that this is unique case in which the CBDT has approved the exemption

being granted in respect of payments made by the assessee trust to the Cornell University USA and Harvard University USA, in which the Assessing Officer has duly given effect to the stand so taken by the CBDT, and yet a hyper-pedantic, even if a bonafide, approach of the learned CIT(A), seemingly more loyal to the CBDT than CBDT itself, has resulted in this wholly avoidable litigation which does not only clog the serious litigation before the judicial forums but also diverts scarce resources of the philanthropic bodies, like the assessee before us, to the areas which do no good to the society at large. It appears that the view taken in the matter by the CIT(A) in reviving an issue which was already concluded by the Assessing Officer in favour of the assessee, and in the Assessing Officer defending the action of the CIT(A), is inher ently incompatible with much appreciated and very forward looking approach of the Government of India towards minimising litigation and thus creating a taxpayer friendly environment. We hope that the admirable work being done by the Government of India, in pursuing such forward looking policies at the macro level, is not allowed to be overshadowed by the isolated situations like this, at the field level, which must be minimized by sensitising the authorities concerned. An effort should be made to create a taxpayer friendly atmosphere by adopting just and fair approach at every level of the tax administration.

xvii) **Mumbai ITAT IN CASE OF Renu T Tharani ……Appellant ITA No. 2333/Mum/2018**
Date of pronouncement : July 16 ,2020

Reason for re-opening the assessment The case of THARANI RENU TIKAMDAS was centralized with the undersigned vide order u/s 127 of the IT Act- 1961 bearing No. 45/Centralization/CIT-IV/2013-14 dated 20.12.2013. Information has been received in respect of her from .the office of DIT(Inv.), Bangalore." The information pertains to her having a bank account with HSBC Bank, Geneva bearing a number BUP_SIFIC_PER_ID-5090178411. From the said bank statement, it is seen that she is having a peak balance of USD 39738122 in the said account during the period 2005-06. The records of this office show that this amount has not been considered by her in her return of income and this income therefore has escaped assessment. This evidence has come into the possession of the undersigned; therefore, I have reason to believe that the income to the extent of at least USD 3,97,38,122 has escaped assessment within the. meaning of para (d) to the Explanation 2 below section 147 of the Act. In light of this, notice u/s 148 of the Income Tax Act, 1961 is issued.

8. ***As we have given our careful consideration to the rival contentions and the material on record in the light of applicable legal position, we have also taken of the factual matrix of this case. Here is an assessee who files her return of income, disclosing a meagre income of Rs 1,70,800, giving a Bangalore address and files the income tax return a ward which was meant for resident assessees. Going by the facts placed by the assessee on record, which are also set out in the paper-book, the Bangalore property was sold in the year ended March 2003, but yet income tax return continued to be filed at that address. It is not clear as to what was the basis of filing***

the income tax return at Bangalore but then let"s leave it at that for the time being. The income tax return filed by the assessee, a copy of which is placed before us at page 62 of assessee"s paper-book, does not at all tick the status as "non-resident", but there is a clearly visible mark in the status as "resident". On these facts, the Assessing Officer, to whom this case was transferred as a result of order under section 127, notices that the assessee has a bank account, as per information in his possession, with HSBC Private Bank Geneva, bearing a number BUP_SIFIC_PER_ID-5090178411 with a peak credit, during the relevant period, of a sum of more than US $3.97 crores equivalent to around Rs 200 crores at that point of time. The base note, a copy of which is placed at pages 3 to 12 of assessee"s paper-book, clearly shows "Tharani Renu Tikamdas" as "beneficial owner/ beneficiary" of this account, that her date and place of birth are10th May 1934 and Hyderabad (Pakistan) respectively, and that the account was opened on 28th July 2004. This note also shows, under the heading "personnes liees aux profile client" (which as simple google translation would show as meaning "people linked to customer profile"), GWU Investments Limited as with "power of administration". The overall "patrimoine max constaté sur la period" (which as simple google translation would show as meaning "max wealth observed during the period") on 02/2007 as US $ 5,62,47,590, but then that aspect of the matter is not relevant for this year. Suffice to note that the residential status of the assessee as shown in the income tax return was "resident", and definitely not "non-resident", that the peak credit at her disposal in this Swiss Bank account was over 11,500 times of her annual

income, and that the assessee had admittedly not taken into account this account in her return of income. The claim of the assessee regarding her having a non-resident status in the relevant previous year came much after the reasons recorded, and, quite contrary to this claim, as our perusal of records shows, the assessee herself had claimed the residential status as "resident" in the income tax return. The Assessing Officer has to record his satisfaction about income escaping assessment as on the basis of material in his possession and on record as on the time of recording the reasons for reopening the assessment. A subsequent claim, which was not on record at the time of the reasons being recorded, cannot affect the correctness of these reasons, even though once this claim is made in the assessment proceedings, it will have to be examined on merits and it will have to be adjudicated as such in the outcome of the assessment proceedings. Nothing, therefore, turns on the facts not on record before the Assessing Officer as on the stage of recording the reasons of reopening the assessment. In any case, when the assessee herself is making an incorrect claim in the income tax return, she cannot claim that because the Assessing Officer believed the claim so made, and took initial steps on that basis, the Assessing Officer was in error in taking that path. Of course, all this does not affect the question of determination of her residential status on merits, but that is not the question as on now. The question is whether the Assessing Officer had reasons to believe income escaping the assessment, or not. It is also important to bear in mind the fact that at the stage of issuance of notice, the Assessing Officer is to only form a prima facie view. Explaining this principle, Hon"ble

jurisdictional High Court, in the case of Multi Commodity Exchange of India Ltd Vs DCIT [(2018) 91 taxmann.com 265 (Bom)] [SLP dismissed as reported in (2019) 101 taxmann.com 13 (SC)], has observed that "We find that the power of the Assessing Officer to reopen an assessment under Section 147/148 of the Act on the basis of reasonable belief is not fettled or circumscribed, to be formed only on material found during a tax audit or with material found during examining a case of tax evasion. In fact the basis of fresh tangible material is unqualified i.e. the source of the material could be from any place, however, the only pre-condition is that on the basis of the material so found/obtained by the Assessing Officer, he himself must form a reasonable belief that income chargeable to tax has escaped assessment before issuing a notice for reopening. In fact the Apex Court has observed in Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316/291 ITR 500 has observed that if the Assessing Officer for whatever reasons (material) has reason to believe that income chargeable to tax has escaped assessment then jurisdiction is conferred upon the Assessing Officer to reopen the assessment". As held by Hon"ble jurisdictional High Court, in the case of Multiscreen Media Pvt Ltd Vs CIT [(2010) 324 ITR 54 (Bom)], "the expression "reason to believe" must obviously be that of a prudent person and it is on the basis of the reasons recorded by the Assessing Officer that the question as to whether there was a reason to believe that income has escaped assessment, has to be determined. At the same time, the sufficiency of the reasons for reopening an assessment does not fall for determination, at the stage of a reopening of assessment". In the light of this

legal position, in our considered view, based on the facts above i.e. credible information about existence of her account with HSBC Private Bank Geneva with a peak credit of around Rs 200 crores in the relevant financial year- which is far disproportionate to her reported annual income and which is not taken into account in her return of income, the Assessing Officer was perfectly justified in holding the view that the income has escaped assessment.

9. As regards the judicial precedents cited at the bar, all these cases deal with the situation in which the assessee was stated to be non-resident or when the reassessment was done only for verification of some information. That"s not the case here. The income tax return filed by the assessee, which was available at the time of recording the reasons for reopening the assessment, did not show the status of non-resident. The recording of reasons cannot thus be faulted. Whatever claim is made subsequently is required to be dealt with in the subsequent proceeding but it will not vitiate the validity of reasons recorded for reopening the assessment. The facts of the decision cited on the line of reasoning that cases of nonresidents cannot be reopened on the basis of existence of foreign bank account, in any event, are not in pari materia inasmuch as in none of these cases the assessee had filed the income tax return in the status of resident. As regards the decisions that reopening cannot be done for mere verifications, the present case is not a case which some general and vague information is received about the assessee, which may or may not lead to an income escaping assessment

in the hands of the assessee, and which is thus required to be examined on merits, but of a very specific cogent information regarding a bank account, with complete details that is good enough for holding at least the prima facie view that income has escaped in the assessment in the hands of the assessee. The peak balance in the account, which has subsequently come to the knowledge of the Assessing Officer and on the basis of which reopening is done, is tens of thousand times more than annual income of the assessee.

10. We have also noted that the assessee had shifted to the United States only just seven days before the beginning of the relevant previous year, and it will be too unrealistic an assumption that within these seven days plus the relevant financial year what the assesse could have earned this huge amount of around Rs 200 crores, which, at the rate at which she did earn in India in the last year, would have taken her more than 11,500 years to earn. Even if one goes by the basis, though the material on record at the time of recording reasons did not at all indicate so, that the assessee was a non-resident in this assessment year, which is, going by the specific submissions of the assessee, was admittedly first year of her "nonresident" status, it was wholly unrealistic to assume that the money at her disposal in the Swiss Bank account reflected income earned outside India in such a short period of one year. Viewed thus, whether the assessee was a resident in India in this year or not, the Assessing Officer would have been perfectly justified in holding the "prima facie" view that, de-hors her new acquired non resident status, the peak amount of US $ 3,97,38,122 "not being considered in her

income tax return" shows that "income has escaped assessment" in the hands of the assessee. Be that as it may, since the assessee did not disclose the status of "nonresident" in the income tax return filed by the assessee anyway, and the reasons recorded for reopening the assessment can only be on the basis of material on record or the information coming in the possession of the Assessing Officer- which indicated that the assessee was a "resident" in the relevant previous year, this aspect of the matter is wholly the sole and decisive factor leading to our conclusion about correctness of the reasons recorded for reopening the assessment.

Our conclusions on validity of reassessment proceedings:

11. In the light of the detailed reasons analyzed in the foregoing discussions, as also bearing in mind entirety of the case, in our considered view, the correctness of reopening of assessment, on the facts of this case and in the light of settled legal position, cannot be faulted with. We confirm the action of the authorities below on this point and decline to interfere in the matter.

Challenge to addition of Rs 196.46 crores to the returned income

12. We now turn to the question as to whether or not the learned CIT(A) was justified in upholding the addition in the hands of the assessee for Rs 196,46,79,146, being an amount equivalent to US $ 3,97,38,122 at the relevant point of time, held by HSBC Private Bank, Geneva, Switzerland, in the name of Tharani Family Trust, of which the assessee was a beneficiary.

D: Justification for adverse inferences when consent waivers are declined: 36. It is thus clear that when an assessee declines to give consent waivers about a bank information being collected, the assessee effectively stalls further investigation about the same. Declining consent waiver is, for all practical purposes, enforcing the right of privacy, and enforcing the right to privacy, in the course of an income tax investigation about a transaction, stalling obtaining full, complete and correct information about the same. The presumption thus has to be that such information, as in possession of the income tax department and in respect of which the assessee has declined „consent waiver" for further probe, is correct, and that the assessee is consciously trying to stall further probe in the matter so as to prevent further information, prejudicial to the interests of the assessee, coming to the light. When an assessee seeks protection on account of the position that the income tax department has not conclusively proved the things against the assessee, the assessee also has to show that he contributed to the efforts for getting at the truth or at least that he did not stall the efforts of the income tax department to get at the truth. By not signing the consent waiver, the assessee ends up protecting the actual facts coming to the lights by enforcing his own privacy under the Swiss secrecy and data protection laws, and, therefore, he cannot claim protection of the position that the income tax department has not conclusively established the alleged facts. In such circumstances, in our humble understanding, the Assessing Officer has no choice but to draw an adverse inference. Of course, all the evidences furnished by the assessee are to be considered nevertheless, but, when such evidences turn out to be

unreliable, inconclusive or insufficient, in our considered view, even adverse inference could indeed be justified.

44. The assessee states that she is neither a shareholder nor a director in GWU Investments Ltd. That‟s not even in dispute. GWU Investments Ltd is a Cayman Islands entity, and it needs no special knowledge to know that, more as a rule rather than as an exception, the Cayman Island entities are owned by nominees of the beneficial owners. The operations carried out by these entities, are mainly to facilitate financial manoeuvring for the benefit of its clients, or, with that predominant underlying objective, to give the colour of genuineness to these entities. These offshore entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils. Even a layman, much less a Member of this specialized Tribunal, cannot be oblivious of these ground realities. Nothing, therefore, really turns on the assessee not being a director or shareholder of the GWU Investments Ltd. The relevant question is whether she is beneficial owner of the said company or not. HSBC documents show that she is the beneficial owner, and there is nothing, save and except for self-serving statements of the assessee and contents of some unverified and uncorroborated letter of functionary of HSBC Private Bank- which has been indicted in several parts of the world for colluding with unscrupulous tax evaders and money launderers, to controvert that position. It is also inconceivable that a Rs 200 crore beneficiary in a trust will not know about who has settled that trust. Similarly, while dealing with Cayman Island entities, living in denial about beneficial ownerships, and confining to

legal ownerships, is preposterous. The claim of the assessee, about a thing which is not in the knowledge of the Assessing Officer and further investigations about which are stalled by the assessee, is to be examined in the light of real life probabilities and the very act of the assessee, in stalling the further probe, works against the assessee. The assessee may have something to say and some evidences to file. These evidences and statements cannot always be accepted at the face value without application of mind about their reliability. A conscious call is to be taken, in a fair and objective but a realistic, manner about reliability of such evidence. As observed by Hon‟ble Supreme Court, in the case of CIT Vs Durga Prasad More [(1971) 82 ITR 540 (SC)], "Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities". As Hon'ble Supreme Court has observed, in this case, "..it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make selfserving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of

the recitals made in those documents". As a final fact finding authority, this Tribunal cannot be superficial in its assessment of genuineness of a transaction, and our call is to be taken not only in the light of the face value of the documents sighted by the assessee but also in the light of all the surrounding circumstances, preponderance of human probabilities and ground realties. There may be difference in subjective perception on such issues, on the same set of facts, but that cannot be a reason enough for the fact finding authorities to avoid taking subjective calls on these aspects, and remain confined to the findings on the basis of irrefutable evidences. Hon'ble Supreme Court has, in the case of Durga Prasad More (supra), observed that "human minds may differ as to the reliability of a piece of evidence but in that sphere the decision of the final fact finding authority is made conclusive by law". This faith in the Tribunal by Hon'ble Courts above makes the job of the Tribunal even more onerous and demanding and, in our considered view, it does require the Tribunal to take a holistic view of the matter, in the light of surrounding circumstances, preponderance of probabilities and ground realities, rather than being swayed by the not so convincing, but apparently in order, statements and letters and examining them, in a pedantic manner, with the blinkers on. The same has been the approach adopted by Hon‟ble Supreme Court, in the case of Sumati Dayal Vs CIT [(1995) 214 ITR 801 (SC)], wherein Their Lordships have, inter alia, disapproved acceptance of a claim of winning the appellant claims to have won in horse races a total amount of Rs. 3,11,831 on 13 occasions out of which 10 winnings were from Jackpots and 3 were from Treble events by Chairman of the Income Tax Settlement Commission,

and observed that “This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities”. Their Lordships further observed that “Similarly the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence

45. Viewed in the light of factual backdrop of the case, and in the light of the above legal position, no reasonable person can accept the explanation of the assessee. The assessee is not a public personality like Mother Terresa that some unknown

person, with complete anonymity, will settle a trust to give her US $ 4 million, and in any case, Cayman Islands is not known for philanthropists operating from there; if Cayman Islands is known for anything relevant, it is known for an atmosphere conducive to hiding unaccounted wealth and money laundering, and that does not advance the case of the assessee. This is a jurisdiction which has double the number of companies than resident, most of which remain only on paper, and it will be no naïve to believe that these companies are located here, in a country with around 65,000 residents, for bonafide core activities, rather than the benefits of anonymity, secrecy and liberal tax laws. Cayman Island is one of the few jurisdictions in the world where public records of the beneficiaries of firms and companies, like GWU Investments Ltd, are not maintained, and it is only with effect from 2023, that is if the promises made by the Government of Cayman Islands can be believed at face value, that such public records will be maintained. That is an ideal situation, as on now, for holding the unaccounted monies through a web of proxy corporate entities. The only persons who are privy to vital information about these transactions are the persons who are privy to these transactionsmaybe as owner, as settlor, as beneficiaries or as facilitators or even as accomplices in these manoeuvrings, and when they decline to share the correct information, and thwart further probe in the matter, investigations reach a cul-de-sac. The assessee before us is closely involved with the transaction and it is unconceivable that the assessee will have no direct knowledge of the owners of the underlying company and settlors of the trust which has her, as she herself puts it, as beneficiary of such a huge amount. This inference is all the more justified when we take into account the

fact that the assessee has been non-cooperative and has declined to sign the consent waiver. One of the arguments raised by the assessee, as set out in a chart showing arguments of the assessee- below paragraph 20 earlier in this order, that the assessee could not have performed the impossible act of signing consent waiver because she was not owner of the account is too naïve and frivolous to be even taken seriously. If the assessee was indeed not the owner of the account, there was all the more reason to sign the consent waiver form because it would have established that fact when the HSBC Private Bank (Suisse) Geneva was to decline the information on the basis of that consent waiver. A consent waiver signed by the assessee would have been infructuous in that case, and it could not have done any harm to the assessee. Consent waiver form does not prejudice the claim of the assessee that he does not own the account in question; all it does is, as can be seen from the extracts from consent waiver form format reproduced earlier, is that it waiver assessee‟s rights, if any, under the data protection and banking secrecy laws. The plea of the assessee, as noted earlier, is fit, if at all it is fit for anything, only to be rejected. It is only elementary that direct evidence of illegal transactions of the assessee, as indicated by Hon‟ble Supreme Court in the case of Sumati Dayal (supra), "would be rarely available" as such transactions "take place in secret", and therefore, simply on the ground that such direct evidence is not brought on record by the revenue authorities, the assessee cannot go scot free. As observed by Hon‟ble Supreme Court in the said case, "it is upon the alleger to prove that it is so, ignores the reality". When we follow the path, as laid down by Hon‟ble Supreme Court in the case of Sumati Dayal (supra), by "considering surrounding

circumstances and applying the test of human probabilities" and donot take "a superficial approach to the problem", the inescapable conclusion is that the explanation of the assessee is only fit to be rejected. In the present case, there is even direct evidence available on record. As the base note categorically states, this is "synthèse individuelle" (individual synthesis, in literal meaning, which refers to „individual"s profile") and name of the person is Renu Tikamdas Tharani, and her address is under the heading "Adresses de la personne physique" (i.e. addresses of the natural person). In the heading "Profils client lies a la personne" (i.e. customer profiles linked to the person), GWU Investments Limited is shown as Nom du profil client (customer profile name) but then the same note shows nature de profil (i.e. profile nature) as Nominatif (nominative, or nominal) and that the Détails du lien (i.e. link details) between the individual and the company is that of "beneficiary/ beneficial ownership". It is important to note that the reference to "link details" is in respect of customer profile name, which is stated to be GWU Investments Limited, and only an individual can be beneficiary of the company or beneficial owner of the company, and not the other way round. There is no reference to Tharani Family Trust at this stage and in this section of the base note. That comes at the fag end of the base note under the heading "personnes légales liées" (i.e. related legal persons). Clearly, therefore, the link details, or "détails du lien", are between the individual and GWU Investments Limited, and these link details clearly show that the assessee is a beneficiary and beneficial owner of the GWU Investments Ltd.

49. As we part with the matter, we have a couple of observations to make. The first observation is that we must add that though the hearing in this case was concluded on 28th January 2020, in view of Covid-19 lockdown in Mumbai city- which is, for all practical purposes, still continuing, with limited functionality of our office, the order is being pronouncement today on 16th July 2020. However, in the light of a coordinate bench decision in the case of DCIT Vs JSW Limited, and vice versa [(2020) 116 taxmann.com 565 (Mum)], the period of lockdown is to be excluded in computation of 90 days period. As further noted in the said order, Hon‟ble Bombay High Court has observed that "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly" and the said order continued to operate till 15th July 2020. Viewed thus, this order is being passed within the permissible time limit in terms of Hon‟ble High Court‟s directions. The second point is that this decision cannot be an authority for the proposition that wherever name of the assessee figures in a base note from HSBC Private Bank (Suisse) SA Geneva, an addition will be justified in each case. The mere fact of an account in HSBC Private Bank (Suisse) SA Geneva, by itself, cannot mean that the monies in the account are unaccounted, illegitimate or illegal. The conduct of the assessee, actual facts of each case and the surrounding circumstances are to be examined, on merits, and then a call is to be taken about as to whether the explanation of the assessee merits acceptance or not. There cannot be a short cut and one size fits all approach to this exercise.

Our conclusions on correctness of addition of Rs 196.46 crores in relation to HSBC Private Bank (Suisse) SA, Geneva

50. In view of the above discussions, and for the detailed reasons set out above, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter. The impugned addition of Rs 196,46,79,146, in respect of assessee‟s account with HSBC Private Bank (Suisse) SA, Geneva, is thus confirmed.

xviii) ***Ranchi ITAT in*** **Padam Kumar Jain Date of Pronouncement : 08/07/2020 /ITA No.289/Ran/2019**

18. We note that finality in the legal proceedingsis a must.There must be a point of finality in all legal proceedings and the stale issues should not be re-activitated beyond a particular stage and the lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it is must in other spheres of human activity. For that we rely on the judgment of the Hon'ble Supreme Court in the case of Parashuram Pottery Works Co. Ltd. vs. ITO (1977) 106 ITR 1 (SC), wherein it was held as follows: "It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realizing that price should familiarize themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national

exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi judicial controversies as it must in other spheres of human activity." We note that in assessee`s case the loss and damage expenses of Rs. 4,00,00,000/- has been examined by assessing officer in the original assessment u/s 153A/143(3) of the Act dated 28.12.2016, the said expenditure has also been examined by the assessing officer in the second assessment order passed by the assessing officer u/s 143(3) r.w.s. 263 of the Act which was framed by the assessing officer in pursuance of the direction given by ld PCIT, by his first 263 order. Therefore, the said loss and damage expenses of Rs. 4,00,00,000/- has been examined by the assessing officer twice. Again, in second 263 order, ld PCIT has directed the assessing officer to examine the said loss and damage expenses of Rs. 4,00,00,000/-, this means the assessing officer would examine third time said loss and damage expenses of Rs. 4,00,00,000/-. Likewise, the sales incentive expenses of Rs. 9,45,96,300/- has been examined by assessing officer in the original assessment u/s 153A/143(3) of the Act dated 28.12.2016, the said

expenditure has also been examined by the assessing officer in the second assessment order assed by the assessing officer u/s 143(3) r.w.s. 263 of the Act which was framed by the assessing officer in pursuance of the direction given by ld PCIT, by his first 263 order. Therefore, the saidsalesincentive expenses of Rs. 9,45,96,300/- has been examined by the assessing officer twice. Again, in second 263 order, ld PCIT has directed the assessing officer to examine the said,sales incentive expenses of Rs. 9,45,96,300/- this means the assessing officer would examine third time said sales incentive expenses of Rs. 9,45,96,300/-. Since these expenses have already been scrutinized and examined by the assessing officer twice, that is, in the original assessment u/s 153A/143(3) of the Act dated 28.12.2016, and in the second assessment order passed by the assessing officer u/s 143(3) r.w.s. 263 of the Act. Now, the ld PCIT is directing again to the assessing officer by way of his second 263 order to examine these expenses again, we note that if this is allowed under section 263 of the Act, then there would not be any finality in the legal proceedings/ assessment proceedings in the assessee`s case, and this attitude of the Department is tantamount to do harassment to the assessee which is against the principle of natural justice and the main object of section 263 of the Act.