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

BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA no.5139/Mum./2017
(Assessment Year : 2013–14)

Asstt. Commissioner of Income Tax
Circle–19(1),
Room No. 203, 2nd floor, Matru Mandir Tardeo,
Mumbai-400 007.
……………. Appellant

v/s

M/s Balaji Trust
Essar House, 11 Keshavrao Khade Road
Mahalaxmi, Mumbai 400 037
PAN – AACTB0950C
……………. Respondent

Assessee by : Shri P.J. Pardiwala, Senior Advocate a/w Shri Hiten Chande

Revenue by : Shri Prakash Chhotaray a/w Shri Sanjay J. Sethi

Date of Hearing – 24.09.2021	Date of Order – 25.11.2021

O R D E R

PER S. RIFAUR RAHMAN, A.M.

The present appeal preferred by the Revenue challenges the order dated 31st March 2017 passed by the learned CIT(A)–30, Mumbai for assessment year 2013–14.

2. The brief facts of the case are, the assessee is a private discretionary trust settled on 29th March 2012 by the settlor, viz. Shashikant Ruia with an initial settlement of Rs.10,000/-. The trust was created for the sole and exclusive benefit of the beneficiaries being the members of the Ruia Family i.e. the SNR family unit and the RNR family unit. M/s Essar Investments Limited (hereinafter referred to as *'EIL'*) was holding the *"Essar"* brand including all registered and

unregistered trademarks, copyrights, service marks, certification marks, design, trade names relating to the logo and slogans used in relation thereto a/w the getups incorporating the logo (hereinafter referred to as *"the Brand"*) over a period of time since 1996. It was submitted before the Assessing Officer that EIL on 29th March 2012 had contributed the brand *"Essar"* to the corpus of the assessee trust as a voluntary gift. The *"Essar"* brand having been settled without consideration, was thus, not recognized in the financials of the assessee trust. The assessee trust entered into brand licensing agreements with operative Essar group entities. In terms of the brand licensing agreements, a non-exclusive license to use the *"Essar"* brand in India was granted to the licensees (i.e. the operating companies under the group), in consideration of which license fees was earned by the assessee. The license fees earned by the assessee trust was accounted for by it during the year under consideration and, consistently thereafter, as per the cash system of accounting in accordance with the provisions of Section 145(1) of the Act.

3. The Assessing Officer (hereinafter referred to as *'the A.O'*) observed that the abovementioned license fees was not included by the assessee trust in its return of income as it was claimed to be not chargeable to tax under the provisions of the Act.

4. The return of income of the assessee trust was thereafter selected for scrutiny assessment under section 143(2) of the Act. During the course of the assessment proceedings, the Assessing Officer, inter alia, called upon the assessee to submit evidence relating to ownership of the Brand by EIL. In response, the assessee, vide its letter dated 15thMarch 2016 submitted a copy of the certificate of trademark registration in the name of EIL alongwith evidence regarding trademark registration in the name of the assessee subsequent to the settlement. Subsequently, the A.O vide his order passed under section 143(3) of the Act held, that as the definition of "income" under section 2(24) of the Act was very wide in nature, therefore, receipt of trademark and copyright was in the nature of income taxable under the head "Income from other sources" under section 56(1) of the

Act. Thereafter, the A.O applied the discounted cash flow method and after valuing the trademark and copyright at Rs.1,668/– crore raised a demand of Rs.719.14 crores.

5. Aggrieved with the assessment order the assessee filed an appeal before the CIT(A). As the A.O had observed that the assessee had failed to establish that the trademarks and copyrights were owned by EIL, therefore, the assessee filed an application U/rule 46A(1) for admission of certain documents as additional evidence. The Ld. CIT(A) remanded the matter to the A.O, and the A.O vide his remand report dated 13thFebruary 2017 submitted that the receipt of Brand by the assessee was chargeable to tax under sections 28(iv) and 56(2)(vii) of the Act. The Ld. CIT(A) after considering the detailed submissions of the assessee and the remand report admitted the additional evidence and decided the appeal in favour of the assessee, holding as under:

A. *The additional evidence is crucial to the adjudication of the appeal and therefore, it requires admission.*

B. *The receipt of the Brand is on capital account and, therefore, not covered within the definition of "income" in section 2(24) of the Act and, consequently, is not chargeable to tax under section 56(1) of the Act.*

C. *The trademark and copyright are not chargeable to tax under section 56(2)(vii) of the Act as they are not in the nature of "work of art".*

D. *The provisions of section 28(iv) are not applicable as the receipt of the Brand is not arising during the course of carrying on of any business.*

E. *Cash system of accounting followed consistently by the assessee was accepted and addition made by the AO taxing the difference between mercantile system and cash system was deleted.*

6. Aggrieved with the order passed by the CIT(A) the revenue is in appeal before us raising multiple grounds of appeal. Subsequently, the revenue had filed revised grounds of appeal and additional grounds of appeal before us.

7. The Ld. D.R, Shri P.C. Chhotaray, Sr. Standing Counsel, submitted and argued for admission of additional grounds of appeal and also filed written submissions. First let us deal with the additional grounds of appeal.

> "Additional Grounds of Appeal
>
> 1. Whether, on facts and circumstances of the case and in law, Essar Investment Ltd (EIL) was the genuine owner of the "Essar" brand, trademarks and copyrights, and whether the purported settlement of the "Essar' brand, trademarks and copyrights by EIL in favor of the assessee, M/s.Balaji Trust was a bona fide transaction?
>
> 2. Without prejudice to the above other grounds, whether, on facts and circumstances of the case and in law, the value of the "Essar" brand, trademarks and copyrights is taxable in the hands of the assessee under section 69A of the Income —Tax Act, 1961
>
> 3. Whether, on facts and circumstances of the case and in law, the matter of computation of the value of the "Essar" brand, trademarks and copyrights should be restored to the Assessing Officer for fresh computation after giving opportunity of hearing to the assessee, as the CIT(A) has not adjudicated on this ground of appeal and subsequent to the order of the CIT(A) has not adjudicated on this ground of appeal and subsequent to the order of the CIT(A) it was discovered that there was a mistake in computation of the value of the " Essar" brand, trademarks and copyrights, under the Discounted Cash Flow(DCF) method."

7.1 It was submitted by the ld. D.R that as the adjudication of the aforementioned additional grounds of appeal would not require verification of any fresh facts, therefore, the same be admitted. In order to buttress his aforesaid claim the ld. D.R had filed before us 'written submissions' wherein reliance was placed by him on various judicial pronouncements, as under :

(i). National Thermal Power Co. Ltd. vs. Commissioner of Income-tax (1998) 229 ITR 383 (SC)

(ii). PCIT (Central-1) vs. Grasim Industries Ltd((2018) 256 TAXMAN 0079 (Bombay)

(iii). CIT (Central)- 1 v. Pruthi Brokers and Shareholders Ltd. (2012) 349 ITR 336 (Bom)

(iv). Commissioner of Income-tax v. Jai Parabolic Springs Ltd. (2008) 306 ITR 42 (Delhi)

8. Per contra, the ld. Authorized Representative (for short "A.R") for the assessee, Shri. Percy Pardiwala, Senior Advocate vehemently objected to the admission of the aforesaid additional grounds of appeal as was sought by the department. Objecting to the additional ground of appeal no. 1, it was submitted by the ld. A.R that the same militated against the department's own stand that the assessee had received the brand "Essar" from EIL. It was submitted by the ld. A.R, that while for the very genesis of the controversy involved in the present case was the receipt of the brand "Essar" by the assessee trust from EIL, however, the department by raising the aforesaid additional ground of appeal and questioning the genuineness of the ownership of the "Essar" brand, trademarks and copyrights by EIL; and as to whether the settlement of the same by EIL in favour of the assessee was a bonafide transaction, was trying to make a complete volte face. Qua the additional ground of appeal no. 2, it was submitted by the ld. A.R that the same too was in clear contradiction of the stand that was taken by the department in the assessment order. Elaborating on his aforesaid contention, it was submitted by the ld. A.R that the provisions of Sec. 69A are triggered in the assessment year in which the assessee is found to be the owner of the asset in question. Backed by his aforesaid contention, it was submitted by the ld. A.R that as the brand "Essar" was received by the assessee from EIL on 29.03.2012 i.e the period relevant to A.Y 2012-13 and not the year under consideration, therefore, de hors the receipt of the said brand during the year under consideration the additional ground of appeal no. 2 did not merit admission. It was further submitted by the ld. A.R, that as the provisions of Sec. 69A can be triggered only if the A.O is satisfied that the assessee had failed to prove the 'nature' and 'source' of acquisition of the asset in question, therefore, in the absence of any opinion of the A.O regarding the explanation furnished by the assessee as regards the 'nature' and 'source' of acquisition of the asset under consideration the provisions of Sec. 69A could not have been brought into play. It was, thus, submitted by the ld. A.R that as the very facts necessary for admission of the additional ground of appeal no. 2 were not borne out from the records, therefore, the same did not merit admission. Further, it was submitted by the ld.

A.R that the seeking of admission of the additional ground of appeal no. 2 by the department was in clear conflict with the observations arrived at by the A.O in the assessment order. Elaborating on his said contention, it was submitted by the ld. A.R that while for the A.O had, inter alia, on the one hand invoked the provisions of Sec. 56(1) of the Act, on the ground, that the assessee had received a gift of the brand from EIL, while for in clear contradiction of his said stand, he had in a volte face sought to assess the assessee under Sec. 69A, on the basis, that the brand was not received by the assessee but represented an undisclosed investment of the assessee. It was further submitted by the ld. A.R that the department by seeking admission of the additional ground of appeal no. 2 was trying to change the entire complexion of the case and improve upon the assessment, which was not permissible under Sec. 254 of the Act. Elaborating on his aforesaid contention, it was submitted by the ld. A.R that if any error had crept in an assessment order, then, the legislature in all its wisdom had provided for remedies to the department that can be traced in Sec. 147, Sec. 154 and Sec. 263 of the Act, and the same can be cured subject to satisfaction of the jurisdictional conditions therein prescribed within the time limitation provided under the said respective statutory provisions. It was submitted by the ld. A.R that the department by raising the additional ground of appeal had tried to set at naught compliance with the jurisdictional conditions and the timelines for exercise of the respective remedies. Backed by his aforesaid contention, it was submitted by the ld. A.R that in case if such improving of a case by the department in the course of the proceedings before the Tribunal is allowed then, the same would render the preconditions and the time frame for exercise by the department of the remedies provided by the legislature in the other statutory provisions, say, Sec. 147, Sec. 263 and Sec. 154 of the Act, as redundant, otiose and in fact meaningless. In support of his contention that the additional grounds of appeal raised by the revenue did not merit admission the ld. A.R had relied on a host of judicial pronouncements, as under :

- *DCIT Vs. Padinjarekkara Agencies Ltd. (53 ITD 317) (Cochin)*
- *ACIT Vs. DHL Operations BV (108 TTJ 152)(Mum)*
- *Prakash L. Shah 115 ITD 167 (Mum)(SB)*

- *Mahindra & Mahindra Ltd. Vs. DCIT 122 ITD 216 (Mum)(SB)*
- *CIT Vs. S.A Builders Ltd. (38 taxmann.com 255)(P&H)*

Apart from that, the assessee had also assailed the additional grounds of appeal qua the merits therein involved.

9. We have heard the ld. Authorized representatives for both the parties qua the issue pertaining to admission of the additional grounds of appeal that have been raised by the revenue before us. As stated by the ld. D.R, and rightly so, as held by the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383 (SC), the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee, notwithstanding the fact that same was not raised before the lower authorities. Also, we find that the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 349 ITR 336 (Bom), had held, that even assuming that the Assessing Officer is not entitled to grant a deduction on the basis of a letter filed by the assessee in the course of the assessment proceedings requesting for an amendment to the return filed, the appellate authorities, however, are entitled to consider the said claim and adjudicate the same and it is not necessary that the deduction be allowed only if a revised return of income is filed. In fact, the Hon'ble Jurisdictional High Court while concluding as hereinabove had relied on a host of judicial pronouncements, viz. Jute Corporation of India Ltd. vs. CIT (1991) 187 ITR 688 (SC); Ahmedabad Electricity Co. Ltd. vs. CIT: (1993) 199 ITR 351 (Bom)(FB); and National Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC). Also, as rightly pointed out by the ld. D.R, the Hon'ble High Court of Delhi in the case of Commissioner of Income-tax v. Jai Parabolic Springs Ltd. (2008) 306 ITR 42 (Delhi) had after, inter alia, drawing support from the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. (supra), observed, that Tribunal is vested with the powers to allow deduction for expenditure to an assessee to

which it was otherwise entitled even though no claim was made by him in the return of income. On a perusal of the aforesaid judicial pronouncements, it can safely be concluded that the issue that the Tribunal is vested with the jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee, notwithstanding that the same was not raised before the lower authorities is no more *res integra*. But then, in the present case before us, we find, that the revenue by seeking admission of the additional grounds of appeal raised before us, had in fact sought our indulgence for adjudication of issues which are either found to militate against the very foundation on the basis of which the A.O had framed the assessment, or are based on facts which are not discernible from the records.

A).Re : Admission of 'additional ground of appeal no. 1' :

As regards the additional ground of appeal no. 1, we find that the revenue has sought our indulgence, for adjudicating, as to whether EIL was the genuine owner of the "Essar" brand, trademarks and copyrights, and also, as to whether the settlement of the "Essar" brand, trademarks and copyrights by EIL in favour of the assessee was a bonafide transaction. After giving a thoughtful consideration, we are of the considered view, that as stated by the ld. A.R, and rightly so, the aforesaid additional ground of appeal no. 1 raised by the revenue clearly militates against the department's own stand that the assessee had received the brand "Essar" from EIL. As is discernible from the assessment order, the very genesis of the controversy involved in the present case is the receipt of the brand "Essar" by the assessee trust from EIL. However, the department by raising the aforesaid additional ground of appeal, and therein questioning as to whether EIL was the genuine owner of the "Essar" brand, trademarks and copyrights; and as to whether the settlement of the same by EIL in favor of the assessee was a bonafide transaction, is undoubtedly trying to make a complete volte face. Although, we are in agreement with the claim of the ld. A.R that the Tribunal is vested with the jurisdiction to examine a question of law which arises from the facts as found by the authorities below and have a bearing on the tax liability of the assessee, notwithstanding that the same was not raised before the lower authorities, however, the scope and realm of such jurisdiction can by no means be stretched or construed in a manner to change the entire complexion of the case and seek improving upon the assessment, which we are afraid is not permissible under Sec. 254 of the Act. Our aforesaid conviction is fortified by the order of the 'Special Bench' of the ITAT, Mumbai in the case of ACIT Vs. Prakash L. Shah (2008) 115 ITD 167 (Mum)(SB). Elaborating on the limitation on the powers of the departmental representatives qua raising of contentions that are found to be contrary to the stand taken by the A.O, the 'Special bench' of the ITAT, Mumbai in the case of Mahindra & Mahindra Ltd. Vs. DCIT 122 ITD 216 (Mum)(SB) (2009) 122 TTJ 577 (Mum)(SB), had observed, that a departmental representative cannot be permitted to take a stand contrary to the one taken by the A.O. Also, we find that the Hon'ble High Court of Punjab & Haryana in the case of CIT(Central), Ludhiana Vs. S.A Builders Ltd. (2013) 38 taxmann.com 255 (P&H), had held, that the Tribunal cannot allow a party to change its stance by referring to new facts that were not pleaded or asserted before the Assessing Officer or Commissioner (Appeals). Backed by our aforesaid deliberations, we are of the considered view that as the revenue by raising the additional ground of appeal no.1 is trying to change the entire complexion of the case and improve upon the assessment by canvassing facts which clearly militate against the observations drawn by the A.O while framing the assessment, which as observed by us hereinabove is not permissible as per the mandate of Sec. 254 of the Act, therefore, we decline to admit the same.

B). **Re : Admission of 'additional ground of appeal no. 2'** :

As regards the additional ground of appeal no. 2, we find that the revenue has sought our indulgence, for adjudicating, as to whether or not on the facts and circumstances of the case and in law the value of "Essar" brand, trademarks and copyrights could be brought to tax in the hands of the assessee under Sec. 69A of the Act. Before proceeding any further, we think it apt to cull out the provisions of Sec. 69A of the Act, which reads as under :

> ***"Unexplained money, etc.***
>
> *Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the [Assessing Officer], satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee of such financial year."*

10. At the first sight, it appeared as if the seeking of our indulgence for adjudicating the aforesaid issue required looking no further beyond the records and was in conformity with the view taken by the A.O, but we are afraid that the facts are not so. As stated by the ld. A.R, and rightly so, the contention sought to be raised by the assessee vide additional ground of appeal no. 2 is in clear contradiction of the stand that was taken by the A.O in the assessment order. As observed by us hereinabove, the provisions of Sec. 69A are triggered in the assessment year in which an assessee is found to be the owner of the asset in question. Now, in the case before us, the brand "Essar" was received by the assessee trust from EIL on 29.03.2012, i.e during the period relevant to A.Y 2012-13 and not during the year under consideration. Accordingly, there is substance in the claim of the ld. A.R that as the facts as regards receipt of the brand "Essar" are not borne from the records of the assessee for the year under consideration, therefore, on the said count itself the additional ground of appeal no. 2 could not be admitted. Also, we concur with the ld. A.R, that the satisfaction of the A.O that the assessee had failed to prove the 'nature' and 'source' of acquisition of the asset in question is the sine qua non for triggering the provisions of Sec. 69A of the Act. Accordingly, as in the course of the assessment proceedings for the year in question no question was raised by the A.O as regards the applicability of Sec. 69A of the Act, therefore, in the absence of there being

any opinion of the A.O qua the explanation of the assessee on the 'nature' and 'source' of acquisition of the asset in question, the applicability of the provisions of Sec. 69A could not be looked into. In sum and substance, we concur with the ld. A.R that as the requisite facts for looking into the applicability of Sec. 69A of the Act qua the asset in question, viz. brand "Essar" are not borne from the record, therefore, on the said count itself the seeking of admission of the aforesaid additional ground of appeal no. 2 by the revenue is liable to be dismissed. Apart from that, we are also persuaded to accept the contention of the ld. A.R that the additional ground of appeal no. 2 raised by the department is in clear conflict with the observations arrived at by the A.O in the assessment order. As is discernible from the assessment order, the A.O had, inter alia, on the one hand invoked the provisions of Sec. 56(1) of the Act, on the ground, that the assessee had received a gift of the brand from EIL, while for in clear contradiction of his said stand had in a volte face sought to assess the assessee trust under Sec. 69A, on the basis, that the brand "Essar" was not received by the assessee but represented its undisclosed investment. In our considered view, as the assessee by seeking admission of the additional ground of appeal no. 2 is trying to take a stand contrary to the one taken by the A.O, the same, we are afraid is not permissible under Sec. 254 of the Act. Our aforesaid view is fortified by the orders of the 'Special Bench' of the ITAT, Mumbai in the case of Mahindra & Mahindra Ltd. Vs. DCIT 122 ITD 216 (Mum)(SB) (2009) 122 TTJ 577 (Mum)(SB) and ACIT Vs. Prakash L. Shah (2008) 115 ITD 167 (Mum)(SB). As observed by us hereinabove, though there can be no second thought on the settled position of law that the Tribunal is vested with the jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee, notwithstanding that the same was not raised before the lower authorities, however, in the garb of such innate powers vested with the Tribunal the revenue cannot seek to change the entire complexion of the case by attempting an improvement of the assessment framed by the A.O.

We concur with the ld. A.R that the legislature in all its wisdom had contemplated different remedies for the department to cure any such error that had crept in the assessment order, viz. Sec. 147, Sec. 154 and Sec. 263 of the Act. However, recourse to the said remedies is subject to the satisfaction of the jurisdictional conditions within the timelines therein prescribed. As such, if the department is allowed to use the Tribunal as a platform for correcting all the errors that had crept in the assessment order, then, beyond any doubt the aforesaid statutory provisions, viz. Sec. 147, Sec. 154 and Sec. 263 of the Act a/w the timelines prescribed for exercising the same would be rendered as redundant, otiose and meaningless. In our considered view, the attempt on the part of the A.O to improve upon the assessment order in the garb of an additional ground of appeal, is a proposition which if allowed would demolish the concept of finality of an assessment order. Backed by our aforesaid deliberations, we are unable to find favor with the raising of the additional ground of appeal no. 2 by the revenue, which is accordingly dismissed.

C).Re : Admission of 'additional ground of appeal no. 3' :

As regards the additional ground of appeal no. 3, we find that the revenue by seeking liberty to raise the same had sought restoration of the computation of the value of "Essar" brand, trademarks and copyrights to the file of the A.O, for the reason, that subsequent to the order passed by the CIT(A) it was discovered that there was a mistake in the computation of the value of "Essar" brand, trademarks, copyrights under the DCF method. We have given a thoughtful consideration to the aforesaid additional ground of appeal no. 3 raised by the revenue. Although, the department has sought liberty for admission of the aforesaid additional ground of appeal, imputing – a mistake in computation of the value of the Essar brand, trademarks, copyrights under the DCF method, but as pointed out by the ld. A.R, and rightly so, there are no facts available on record regarding the alleged error on the part of the A.O. Apart from that, we also concur with the claim of the ld. A.R that the subject matter of appeal before the Tribunal is not regarding the valuation of the brand received by the assessee trust from EIL. Backed by the aforesaid facts, we are of the considered view that as neither the facts as regards the alleged error on the part of the A.O are discernible from the record, nor the valuation of the Essar brand, trademarks, copyrights is the subject matter of appeal before the Tribunal as the CIT(A) had not decided the question of valuation, therefore, the request of the department for admission of the additional ground of appeal no. 3 cannot be accepted and is accordingly rejected.

11. Although, the assessee had also filed submissions assailing the additional grounds of appeal nos. 1 to 3 on merits, however, as we have declined to admit the said additional grounds of appeal nos. 1 to 3, therefore, we refrain from adverting to the contentions advanced by the ld. A.R (in writing) qua the merits of the said additional grounds of appeal, which, thus, are left open.

12. **Resultantly, we decline to admit the additional grounds of appeal Nos. 1 to 3 raised by the revenue before us.**

13. Coming to the main grounds of appeal, we prefer to address each amended ground raised by the revenue individually and independently in the below paragraphs:–

Ground no. 1: Whether on facts and circumstances of the case and in law, the Ld. CIT(A) erred in admitting additional evidences under Rule 46A of the Income-tax Rules, 1962, ignoring that there was no sufficient cause for admitting the same.

The relevant facts relating to above ground are that during the assessment proceedings, the assessee had furnished the following documents to substantiate ownership of the Brand in the name of EIL and the subsequent transfer of the same to the assessee as a gift before AO, vide letters dated 15 March 2016 and 18 January 2016 (pages 199-203 and 151,152 of the assessee's paper book).

a. One sample trademark registration certificate in the name of EIL since 1996 (along with renewal certificate in 2006) (Pg 204-205 of assessee's paper book)

b. Certificate of registration of all the trademarks in the name of the assessee transferred from EIL evidenced by a letter from the Registrar of trademarks with a list of 82 trademarks transferred (Pg 206-208 of assessee's paper book)

c. Copy of the shareholder and board of director's resolution dated 29 March 2012 for the settlement of the Brand in the name of the assessee (Pg 186-189 of assessee's paper book)

13.1 After submission of the aforesaid documents, the AO completed the assessment vide his order passed u/s 143(3) of the Act, dated 31.03.2016, observing as under :

> *"5.3.1. In the instant case, in spite of repeated opportunities given, the Assessee has not brought any evidence on record to prove that EIL is the rightful owner of "Essar" brand along with trademarks and copyrights, which has now been purportedly settled in the Assessee. Similarly, the Assessee did not provide any registration details of "Essar" brand along with trademarks and copyright and the cost, if any, incurred in such 'registration'. In the submission dt. 15/03/16, the Assessee has annexed a paper (Annexure 2) purportedly containing 'evidence' in relation to the name EIL with Trade Mark Registry since 1996 However, on perusal of the said paper, it is seen that the said paper is the registration of a* ***single*** *Trade mark in respect of "industrial oils and greases, lubricants, fuels etc. It is further seen that Annexure 3 of the aforesaid letter is the registration document in respect of various trade marks (numbering to around 80) in the name of Balaji Trust. The Assessee could not explain from where these Trademarks have been transferred to the Balaji Trust or to furnish any evidence, in this regard. The Assessee has also not brought any evidence on record with regard to the 'Essar' brand and its origin."*

13.2 Aggrieved, the assessee preferred an appeal before the CIT(A) and also submitted additional evidence before him (Page 265-267 of the assessee's paper book) and submitted the following documents:

> *a) 82 trademark certificates;*
>
> *b) 2 copyright certificates;*
>
> *c) Certified true copy of the Form 23 filed with the Registrar ofCompanies along withthe resolution passed by the shareholders in an Extraordinary general meeting.*

13.3 After receipt of additional evidence, Ld CIT(A) directed the A.O to file a remand report with regard to admissibility of the additional evidence submitted by the assessee. In response, the A.O vide his remand report dated 13 February 2017 objected to the admission of the additional evidence on the following grounds :

a. *It was stated by the A.O that in the course of the assessment proceedings the assessee had in response to the notice dated 16.12.2015 and 08.03.2016submitted only one certificate of registration of trademark in the name of EIL, and the same was not accepted as the said certificate nowhere mentioned that the brand 'ESSAR' was registered in the name of EIL. It only mentioned that Industrial oil, lubricants, etc. were registered in the name of EIL. It was, thus, stated by the A.O that the claim of the assessee that details were not called for in the course of the assessment proceedings was not acceptable.*

b. *Objecting to the additional evidence filed by the assessee, on merits, it was stated by the A.O that as the assessee had only submitted photocopies of several trademark registration certificates that certified that the trademark was in the name of EIL since 1996, which not having been certified as a true copy by any authority were completely unauthenticated and could not be acted upon.*

c. *Further, objecting to the admission of the admission of the documents filed by the assessee as additional evidence, it was stated by the A.O that a perusal of the copies of trademarks/certificates revealed, that in none of these certificates the name of the brand "Essar" was mentioned. Rather, as stated by the A.O, the certificates only mentioned the name of the products such as tobacco, agricultural, horticultural products, coffee, tea, honey, cereals, meat, fish, poultry, precious metals etc.*

d. *It was further stated by the A.O that the assessee had failed to substantiate its claim that the Brand was self generated. In order to support his aforesaid claim, it was stated by the A.O that though EIL was under full control of Mrs. Manju Ruia who was holding 99.95% shareholding in the said company, but she did not have any major shareholding in any of the flagship companies belonging to the Essar group. It was, thus, on the basis of the aforesaid facts stated by the A.O that Mrs. Manju Ruia had not been shown to have made any contribution to the creation of the Brand. It was further stated by the A.O that the Brand was not recorded in the books of EIL; and EIL did not receive any income by way of royalty from the use of the Brand by the companies belonging to the Essar Group even though it was incurring losses.*

13.4 After considering the submissions of the assessee and the remand report submitted by the A.O, the Ld CIT(A) came to the following conclusion on the additional evidence:

a. *The assessee trust had in the course of the assessment proceedings vide its letter dated 15th March, 2016 filed a sample copy of registration certificate of trademark held by one of the trustees i.e EIL, which revealed that EIL was the owner of the trademark "ESSAR" since 1996. It was noticed by the CIT(A) that alongwith its aforesaid letter the assessee had also submitted a certificate dated 12thMarch, 2014, which revealed that the trademarks were* *registered in the name of assessee trust after their contribution by EIL. Adverting to the claim of the AO in his remand report dated 12 February 2017, that the documents submitted were photocopies and they not having been authenticated by any authority, the CIT(A) was not persuaded to accept the same. It was observed by the CIT(A) that in case the A.O had any doubts as regards the photocopies of the documents that were filed by the assessee, then, nothing stopped him from calling for the original documents for verification. It was, thus, observed by the CIT(A) that a photocopy cannot be dispensed as no evidence unless material proving to the contrary is brought on record to show that the copies filed were fake documents.*

b. It was observed by the CIT(A) that objection of the A.O to the admission of documents that were filed by the assessee before him as additional evidence, for the reason, that the assessee had failed to file the same in the course of the assessment proceedings and had only submitted one certificate of registration of trademark in the name of EIL, did not merit acceptance. It was observed by the CIT(A) that the A.O had in the course of the assessment proceedings, vide his letter dated 08.03.2016 called upon the assessee to furnish evidence that the trademark was earlier registered in the name of EIL. In reply, the assessee had vide its letter dated 15.03.2016furnished one certificate of registration of trademark in the name of EIL. It was observed by the CIT(A) that the A.O had thereafter at no stage called upon the assessee to furnish any further information in addition to what was already furnished by it. It was, thus, observed by the CIT(A) that under the aforesaid circumstances it could safely be concluded that as the A.O had in the course of the assessment proceedings neither called upon the assessee to produce any further information in addition to what was already submitted by him nor pointed out that the sample evidence furnished by him was inadequate, therefore, there were justifiable reasons for the assessee to conclude that the information so provided to the A.O was sufficient and nothing more was required.

c. *It was further observed by the CIT(A) that the additional evidence furnished by the assessee in the course of proceedings before him did not bring any new facts on record, but only substantiated the fact that EIL was the owner of trademark and copyrights since 1996. It was, thus, observed by the CIT(A) that the assessee had during the course of assessment proceedings, submitted sample copy of registration certificate of trademark evidencing the ownership of the same with EIL, which had now further been substantiated by filing exhaustive evidence in the course of the appellate proceedings.*

d. *It was observed by the CIT(A), that even if the additional evidence submitted by the assessee before him was to be considered as an additional evidence, it had to be admitted, because the same throws light on the fact of ownership of the Brand and subsequent gift of the same in favour of the assessee.*

13.5 Aggrieved with the admission of the additional evidence by the CIT(A), the revenue has, inter alia, assailed the same before us. The Ld D.R had assailed the admission of the additional evidence by the CIT(A), as under :

"(i) In this case in spite of several opportunities given by the Assessing Officer, the assessee did not produce evidence before the Assessing Officer that Essar Investment Limited was owner of the brand. The opportunities given by the Assessing Officer are given below:

(a) P 113 Assessment order Page 3. Para 3.2- By order sheet entry dated 16.12.2015, the Assessing officer asked the representative of the assessee to explain the modality

of the Essar brand coming into existence, its valuation etc.. The AR of the assessee was asked to submit documentary evidence for substantiating its written submission.

(b) P 116 Assessment order Page 6. – last para – AO records that EIL did not provide any registration details of "Essar" brand. It has been noted that Mrs. Manju Ruia, who is almost sole owner of EIL, does not have controlling interest in any flagship company of the Essar group. Then how could EIL be owner of the brand?

(c) P 120 Assessment order Page 10 – A comprehensive show cause notice was sent to the assessee dated 8.2.2016. At page 11 para 2.3, the AO has recorded that no registration details of Essar brand along with trademarks, and copyrights were provided. At page 122, para 3.2, again it has been noted by the AO that no registration details or the cost of the brand has been provided. ***The AO also show caused to the assessee why the value of the brand should not be computed by applying the Discounted Cash Flow (DCF) method.***

(d) P.123 Assessment order Page 13.para 4.1.2- Assessee furnished its reply dated 19.2.2016 but did not provide the details called for.

(e) P. 128 Assessment order page 18 AO in his letter dated 8.3. 2016 noted that no evidence has been provided to prove that EIL is the owner of the brand.

Thus till this date, in spite of repeated queries, the assessee did not provide the evidences to establish how the EIL became the owner of the brand.

(f) P.129 Assessment order page 19 Reply of the assessee dated 15.3.2016. Submits a few papers (vide Department's Paper Book 1- Item No.2). It submitted that the brand is a capital receipt not chargeable to tax.

(g) P.136/137 Assessment order Page 26 . The Assessing Officer was not satisfied with the explanation. He observed as under: (para 5.3)

> *"In the instant case, in spite of repeated opportunities given, the assessee has not brought any evidence on record to prove that EIL is the rightful owner of the "Essar" brand along with trademarks and copyrights, which has now been purportedly settled in the assessee. Similarly, the assessee did not provide any* ***registration details*** *of the "Essar" brand along with trademarks and copyrights and the* ***cost,*** *if any incurred in such 'registration'. In the submission dated 15.03.16, the assessee has annexed a paper (Annexure 2) purportedly containing 'evidence' in relation to the name EIL with Trade Mark Registry since 1996. However, on perusal of the said paper, it is seen that the said paper is registration of a* ***single*** *trademark in respect of "industrial oils and greases, lubricants, fuels etc.." It is further seen that Annexure 3 of the aforesaid letter is the registration document in respect of various trademarks (numbering to about 80) in the name of Balaji Trust. The assessee could not explain from where these trademarks have been transferred to the Balaji Trust or to furnish any evidence in this regard. The assessee has also not brought any evidence on record with regard to the "Essar" brand and its origin.* ***Moreover, the moot question which will arise at this juncture is that if such a brand was in existence, why the same was not commercially exploited earlier by EIL. It has not been established by the assessee or EIL that if arguably the contention of the assessee that the brand is registered in the name of EIL in 1996, then why the value of the said brand or trade mark or copyright has not been recognised in the books of account of EIL.*** *The reference made*

by the assessee to para 50 or para 51 of the Accounting Standard 26 is also irrelevant as these paragraphs should be read harmoniously with other provisions of the Accounting Standard 26, especially due to the fact that it may not be able to identify at what point of time the asset has been generated and at what cost. ***But arguably in the instant case, if the brand has been developed, created and registered in 1996, then the brand or trademark or copyright can be recognised in the Books of Account which will be the normal course of action for a prudent businessman as he will know the value of what he has created and at what cost.***"

(h)Thus, up to the level of the Assessing Officer, the assessee did not produce the necessary evidence about the creation and ownership of the brand.

(ii) But before the CIT(A) the assessee produced additional evidence in the form of a bunch of papers running into about 120 pages containing the certificate of registration of trademarks of various concerns of the Ruia group and two extracts of the register of copyrights. The CIT(A) mechanically forwarded these documents to the Assessing Officer and admitted the additional evidence ignoring the objection of the Assessing Officer.
(iii) These additional evidences are placed in Departmental Paper Book No. VI. The different certificates of registration, furnished as additional evidence before the CIT(A) were read out by me before the Hon'ble Bench. It was pointed out only that one certificate at page 57 relating to Industrial Oil and Grease etc. may have connection with Essar Oil Ltd; the other certificates have no connection with the companies referred to in the brand licence agreement. To give samples:

Page no of the Paper Book	Product name.
7	Tobacco -raw or manufactured….
9	Agricultural, Horticultural and Forestry Products..
11	Coffee, Tea, Cocoa, Sugar, Rice
13	Meat, Fish, Poultry………..
15	Games and Playthings, Gymnastics…
17	Carpets, Rugs , Mats…….
19	Lace and Embroidery….
21	Tissues,(piece goods) bed and table covers….
23	Yarns and Threads………
25	Ropes, Strings, Nets Tents……

The above are samples. All the trade mark certificates bear similar product names which have no connection with the products of the companies with whom brand licence agreements were signed.

It is not understood why such junk material was entertained by the CIT(A) and the Assessing Officer was burdened with verification of these material.

(iv) It appears that the assessee did not deliberately furnished all these certificates before the Assessing Officer. This is because the Assessing Officer could have raised searching questions such as- why so many trademarks with wide range of products were given to assessee trust free of cost and what income was earned by the assessee from so many trademarks etc.. The Assessing Officer could have considered enhancing the value of the brand considering all these trademarks. It is also important to note that the trademark at page no.57 was selected to be furnished before Assessing Officer because it represented the product – industrial oil etc. which may not raise an eye brow as it may be linked with the company Essar Oils

Ltd. It was not a mere coincidence or a sample. The assessee may be held guilty of suppressing vital materials from the Assessing Officer.

(v) So it is a mystery why the trademarks of so many products of the Essar group were suddenly transferred to the assessee trust free of cost.

(vi) In view of the above discussion, the following submission is made:

(a) The assessee was given sufficient opportunity by the Assessing Officer to produce all evidence in support of its claim that EIL was the owner of the brand, trademarks and copyrights. It failed to produce them before the Assessing Officer. Hence, the CIT(A) erred in entertaining the additional evidence.

(b) Moreover, what was produced was no evidence at all. They were irrelevant material perversely admitted by the CIT(A) without any application of mind.

(vii) It is, therefore, prayed that the first ground of appeal raised by the Revenue may be allowed."

14. On the other hand, in rebuttal of the aforesaid submission of the ld. department representative, the Ld A.R supporting the admission of additional evidence by the CIT(A) had furnished his submissions before us, as under :

"1. It is submitted that the registration certificate of the trademark submitted by the assessee vide the submission dated 15 March 2016 clearly states that trademark "Essar" is registered in the name of EIL. Similarly, the additional evidence submitted vide letter dated 13 October 2016 substantiated the ownership of EIL to the brand "ESSAR" which was registered with the relevant authorities. Therefore, the additional evidence submitted before the CIT(A) merely substantiated the fact which was already on record that EIL is the owner of the Brand. Therefore, the CIT(A) was fully justified in admitting the additional evidence during the appellate proceedings.

2. It is further submitted that during the course of the assessment proceedings, after the assessee submitted evidence relating to ownership of EIL vide letter dated 15 March 2016, the AO did not raise any concern or doubt regarding the documents submitted. However, in the order dated 31 March 2016 the AO gave a finding that the ownership of the Brand by EIL was not proved by the assessee and, therefore, it was in response to the finding of the AO raising doubts about the ownership of the brand by EIL that the additional evidence was submitted by the assessee vide its letter dated 13 October 2016. Since, the additional evidence submitted by the assessee dispelled the doubts raised by the AO and proved the ownership of EIL to the Brand, the CIT(A) was correct in law to admit the additional evidence for the purpose of adjudication of the appeal.

3. Without prejudice to the above, it is also submitted that the CIT(A) under section 250(4) of the Act has the power to make further enquiry into the subject matter of appeal. Therefore, even if it is assumed that the appellant did not satisfy the requirement of rule 46A(4), the CIT(A) was justified in considering the additional evidence for the purpose of adjudicating the appeal as the additional evidence produced by the assessee went to the root of the matter and was crucial for the adjudication of the appeal. Therefore, it is submitted that the CIT(A) was right in admitting the additional evidence submitted by the assessee vide letter dated 13 October 2016.

4. In this regard reliance is placed on the judgment of the Bombay High Court in Smt. Prabhavati S. Shah v. CIT (231 ITR 1) wherein it has been held that the provisions of rule 46A do not put a fetter on the power of the CIT(A) to entertain additional evidence as the powers of the CIT(A) are very wide and it is incumbent upon him to exercise the discretion under section 250(4) of the Act when the facts and circumstances of the case justify so. The relevant portion of the judgment is reproduced as under:

"On a plain reading of rule 46A, it is clear that this rule is intended to put fetters on the right of the appellant to produce before the AAC any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the ITO except in the circumstances set out therein. It does not deal with the powers of the AAC to make further enquiry or to direct the ITO to make further enquiry and to report the result of the same to him. ***<u>This position has been made clear by sub-rule (4) which specifically provides that the restrictions placed on the production of additional evidence by the appellant would not affect the powers of the AAC to call for the production of any document or the examination of any witness to enable him to dispose of the appeal. Under subsection (4) of section 250, the AAC is empowered to make such further inquiry as he thinks fit or to direct the ITO to make further inquiry and to report the result of the same to him.</u>****Sub-section (5) of section 250 empowers the AAC to allow the appellant, at the hearing of the appeal, to go into any ground of appeal not specified in grounds of appeal, on his being satisfied that the omission of the ground from the form of appeal was not willful. It is clear from the above provisions that the powers of the AAC are much wider than the powers of an ordinary court of appeal. The scope of his powers is coterminous with that of the ITO. He can do what the ITO can do. He can also direct the ITO to do what he failed to do.* ***<u>The power conferred on the AAC under sub-section (4) of section 250 being quasi-judicial power, it is incumbent on him to exercise the same if the facts and circumstances justify.</u>*** *If the AAC fails to exercise his discretion judicially and arbitrarily refuses to make enquiry in a case where the facts and circumstances so demand, his action would be open for correction by a higher authority.*

*4.****<u>On a conjoint reading of section 250 and rule 46A, it is clear that the restrictions placed on the appellant to produce evidence do not affect the powers of the AAC under sub-section (4) of section 250.</u>****The purpose of rule 46A appears to be to ensure that evidence is primarily led before the ITO."*

5. Similarly, the Delhi High Court in the case of CIT vs. Virgin Securities and Credits (P.) Ltd. (332 ITR 396) has held that if additional evidence produced by the assessee is crucial to the adjudication of the appeal, the CIT(A) can admit the same under rule 46A of the Rules. The relevant portion of the judgment is extracted as under:

> *"8. The aforesaid contention appears to be devoid of any merit. It is a matter of record that before admitting the additional evidence, the Commissioner of Income-tax (Appeals) had obtained a remand report from the Assessing Officer. While submitting his report, the Assessing Officer had not objected to the admission of the additional evidence, but had merely reiterated the contentions in the assessment orders. It is only after considering the remand report, the Commissioner of Income-tax (Appeals) had admitted the additional evidence. <u>It cannot be disputed that this additional evidence was crucial to the disposal of the appeal and had a direct bearing on the quantum of claim made by the assessee. The plea of the assessee which was taken before the Assessing Officer remains the same. The Assessing Officer had taken adverse note because of non-production of certain documents to support the plea and it was in these circumstances, the additional evidence was submitted before the Commissioner of Income-tax (Appeals). It cannot</u>*

> *be said nor is it the case of the Revenue that additional evidence is not permissible at all before the first appellate authority. On the contrary, rule 46A of the Rules permits the Commissioner of Income-tax (Appeals) to admit additional evidence if he finds that the same is crucial for disposal of the appeal. In the facts of this case, therefore, we are of the opinion that on this aspect, no substantial question of law arises."*

6. Similarly, the Punjab and Haryana in case of PCIT vs. Daljit Singh (247 Taxman 240) has held that under the provisions of the Act real income of the assessee is to be determined and if additional evidence is necessary to arrive at the real income of the person then it must be admitted for the purpose. The operative portion of the judgment is reproduced as under:

> *"In view of the above facts and circumstances, we find that no doubt assessee did not co-operate with the Assessing Officer in completion of assessment proceedings but the fact remains that in the delivery of justice the real income of assessee has to be assessed and that too after hearing the assessee. The learned CIT(A) has not commented upon the nature of evidence filed under Rule 46A of the Act. Such evidence might have been relevant for the calculation of real income of the assessee, therefore, in view of the substantial justice, we direct the learned CIT(A) to admit additional evidence and decide the case afresh after affording a reasonable opportunity to the assessee of being heard."*

7. Further, he submitted that similar view has been taken in the following judgments wherein the additional evidence was admitted as it was necessary for the adjudication of the appeal:

a. CIT vs. Suretech Hospital & Research Centre Ltd. (293 ITR 53) (Bom.)

b. ACIT vs. Vikrant Puri (82 taxmann.com 48) (Delhi)

c. Basir Ahmed Sisodia vs. ITO (424 ITR 1) (SC)

8. In view of the above, it is submitted that the CIT(A) had rightly admitted the additional evidence as:-

a. the additional evidence was submitted in response to the allegations made by the AO in the assessment order dated 31 March 2016;

b. the additional evidence was submitted since the AO did not raise any concern or doubt regarding the documents submitted vide letter dated 15 March 2016;

c. the additional evidence submitted was crucial to the adjudication of the appeal and the CIT(A) is duty bound to consider such additional evidence in terms of the provisions of section 250(4) of the Act.

9. Without prejudice to the above, it is submitted that if the Department is right in its contention that the additional evidence ought not to have been admitted by the CIT(A) and the appeal of the assessee ought to have been adjudicated based on the evidence submitted in the assessment proceeding, then, the consequences would be that either it is accepted that EIL is the owner of the Brand basis the documents furnished during the course of the assessment proceedings or, in the alternative, a view is taken that basis the documents on record EIL is not the owner of the Brand but, in that event, it must necessarily follow that since EIL is not the owner of the Brand, the assessee has also not received the same from EIL and, consequently, *the question of treating the value of the Brand so received as the income of the assessee does not arise.*

10. In view of the above, it is submitted that even if the additional evidence was not admitted by the CIT(A), the assessee would not have been chargeable to tax as the entire transaction would have been rendered void ab initio."

15. Considered the rival submissions and the material placed on record in context of the aforesaid issue under consideration. As noticed by us hereinabove, the A.O in the course of the assessment proceedings vide his letter dated 08.03.2016 had, inter alia, called upon the assessee to furnish evidence that EIL was the owner of the "Essar" brand. In reply, the assessee had vide its letter dated 15.03.2016 filed with the A.O certain documents evidencing that the brand "Essar" was registered in the name of EIL and the same thereafter was settled with the assessee vide EIL's board and shareholder's resolutions dated 29th March, 2012. On a perusal of the record, we find that the following documents were filed by the assessee with the A.O alongwith its aforesaid reply dated 15.03.2016 :

(i) Copy of one sample trademark registration certificate in the name of EIL since 1996 (alongwith renewal certificate in 2006) was filed by the assessee in the course of the assessment proceedings, vide its letter dated 15.03.2016. [Page 204-205 of the 'APB'].

(ii). Copy of the certificate of registration of all the trademarks in the name of the assessee transferred from EIL as was evidenced by a letter from the Registrar of trademarks with a list of 82 trademarks that were transferred was filed by the assessee in the course of the assessment proceedings, vide its letter dated 15.03.2016. [Page 206-208 of the 'APB'].

(iii). Copy of the shareholder and board of directors resolution dated 29th March, 2012 for the settlement of the Brand in the assessee, was filed by the assessee in the course of the assessment proceedings, vide its letter dated 18.01.2016. [Page 186-189 of the 'APB'].

16. Notably, the A.O in his assessment order passed u/s 143(3), dated 31st March, 2016 observed, that the assessee in spite of sufficient opportunity had not brought any evidence on record to prove that EIL was the rightful owner of "Essar" brand alongwith trademarks and copyrights which thereafter were purportedly settled in the assessee trust. It was further observed by the A.O, that the assessee had not provided any registration details of "Essar" brand alongwith trademarks and copyright

and the cost, if any, incurred in such registration. Further, referring to the details that were filed by the assessee alongwith its reply dated 15th March, 2016, it was observed by the A.O that the assessee had merely annexed a paper (Annexure 2) purportedly containing 'evidence' in relation to the name EIL with the Trade Mark Registry since 1996, however, the same was only as regards registration of a single Trade mark in respect of "industrial oil and greases, lubricants, fuels etc." It was further stated, that though the "Annexure 3" of the aforesaid letter dated 15th March, 2016 was a registration document in respect of various trade marks (around 80) in the name of the assessee trust, however, no evidence was filed as to from where these trademarks had been transferred. It was also stated that the assessee had not brought on record any evidence with regard to "Essar" brand and its origin.

17. In the backdrop of the aforesaid observations of the A.O, the assessee vide its letter dated 13th October, 2016 in order to dispel all doubts as regards the ownership of the Brand "Essar" by EIL prior to its settlement in the assessee trust had submitted certain documents as additional evidence before the CIT(A), as under :

(i). 82 trademark certificates
(ii). 2 copyright certificates
(iii). Certified true copy of the Form 23 filed with the Registrar of Companies along with the resolution passed by the shareholders in an Extraordinary general meeting.

It was the claim of the assessee that after the submission of the letter dated 15th March, 2016 a/w supporting documents with the A.O, there was no further query raised on the latters part as regards the ownership of the Brand, and the assessee remained under an impression that nothing more was required to be filed for substantiating the ownership of EIL. It was, thus, on the basis of the aforesaid fact that the assessee had requested the CIT(A) for admitting the additional evidence. The CIT(A) called for a remand report from the A.O with regard to the admissibility of the additional evidence. The A.O vide his remand report dated 13th February, 2017 objected to the admission of the additional evidence as well as commented on the documents so filed by the assessee. However, the CIT(A) after considering the objections of the A.O admitted the additional evidence.

18. The revenue is aggrieved with the admission of the additional evidence by the CIT(A). As observed by us hereinabove, the A.O had in the course of the assessment proceedings, vide his letter dated 08.03.2016 had, inter alia, called upon the assessee to furnish evidence that EIL was the owner of the "Essar" brand. In reply, the assessee had vide its letter dated 15.03.2016 filed with the A.O certain documents evidencing that the brand "Essar" was registered in the name of EIL and the same thereafter was settled with the assessee trust vide EIL's board and shareholder's resolutions dated 29th March, 2012. After filing of the aforesaid reply dated 15th March, 2016, the A.O neither called upon the assessee to produce any further information in addition to what was already submitted before him, nor pointed out that the sample evidence furnished was inadequate. It was, thus, under the aforesaid circumstances that the assessee remained under an impression that the material provided to the A.O was sufficient for evidencing that ELI was the owner of "Essar" brand prior to its settlement in the assessee trust. On a perusal of the order of the CIT(A), we find, that he had while admitting the additional evidence observed, that a perusal of the remand report filed by the A.O nowhere revealed that he had in the course of the assessment proceedings after filing of the sample copy of the registration certificate of trademark in the name of EIL by the assessee vide its reply dated 15.03.2016, had thereafter issued any letter to the assessee, therein calling upon it to furnish more information in addition to what was already furnished. In the backdrop of the aforesaid facts, we are of the considered view that as the A.O had passed the assessment order without giving any opportunity to the assessee to adduce evidence that EIL was the owner of "Essar" brand prior to its settlement in the assessee trust, therefore, its case clearly falls in the circumstances provided in Rule

46A(1)(d) of the Income-tax Rules, 1962. We, thus, backed by our aforesaid observations find no infirmity in the admission of the aforesaid documents as additional evidence by the CIT(A) and uphold his order to the said extent.

19. Apart from that, we are of the considered view that as the fact that EIL was the owner of the brand/trademarks since 1996 was a fact that was available in the domain of the A.O even during the course of the assessment proceedings, therefore, the additional documentary evidence filed by the assessee with the CIT(A) vide its letter dated 13th October, 2016 did not bring any new facts on record, but only substantiated the aforesaid factual position. In other words, the exhaustive list of evidence filed by the assessee with the CIT(A) only substantiates that the trademark "Essar" was registered in the name of EIL, a fact which is borne from the assessment record. Accordingly, as the additional evidence filed by the assessee was not with a purpose or motive of bringing any fresh facts on the record, but with a limited purpose of dispelling all doubts and substantiating to the hilt that EIL was the owner of "Essar" brand prior to its settlement in the assessee trust, therefore, on the said count also no infirmity can be related to the admission of the same by the CIT(A). We, thus, in terms of our aforesaid observations not finding any infirmity in the admission of the additional evidence by the CIT(A), uphold his order to the said extent. The **Ground of appeal No. 1** is dismissed.

Ground no. 2 and 3 — Whether on facts and circumstances of the case and in law, the Ld. CIT(A) erred in not upholding the AO's finding that the value of the 'Essar' brand, trademarks and copyrights purported to have been settled by EIL to the assessee without any consideration, constituted taxable income as per section 56(1) of the Act. Whether on facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in not upholding the AO's finding that the value of the 'Essar' brand, trademarks and copyrights purported to have been settled by EIL to the assessee without any consideration, was income as per section 2(24) of the Act."

20. Before us, the Ld D.R made elaborate submissions and submitted that the issues involved in the Ground no 2 and 3 are inter–connected and he made the combined submissions on both the grounds which are as under:

(i) The Assessing Officer proposed to tax the value of the brand calculated at Rs. 1668.10 crores as income from other sources. The assessee contended that it is a capital receipt not taxable. According to the assessee, the brand value could have been taxed u/s 56(2)(vii) but as it is not an individual or HUF and also the property does not fall in any of the items of property mentioned in the Explanation (d) to section 56(2)(vii), section 56(2)(vii) is not applicable. The status is no longer the issue as the CIT(A) has held that the status of the trust is Individual here and the assessee has not challenged it. The issue is now whether the brand would be taxable under section 56(1) or section 56(2).

(ii)The Assessing Officer held that even though the taxability of the value of brand may prima facie be examined from the angle of the provision of section 56(2)(vii) which deals with taxability of certain capital assets, because of that, the generality of section 56(1) is not affected. The applicability of section 56(2) (vii) does not bar the applicability of the general provision of section 56(1). He pointed out that the section 56(2) starts with a without prejudice clause as under:

> *"In particular and without prejudice to the generality of the provisions of section 56(1) ….".*
>
> *The Assessing Officer relied on the Judgment of the Hon'ble Supreme Court in the case of Andhra Pradesh State Financial Corporation v. Gar Re – Rolling Mills, AIR 1994 SC 2151 which explains the implication of the use of the words "without prejudice".*

(iii) A copy of the said judgment of the Hon'ble Supreme Court in Andhra Pradesh State Financial Corporation v. Gar Re – Rolling Mills, AIR 1994 SC 2151is placed in Departmental Paper Book No.II. The relevant extracts of the said judgment are reproduced below.

> *"12. Section 31 in terms provides that action under the said provision may be taken "without prejudice to the provisions of section 29 of this Act and of section 69 of the Transfer of Property Act, 1882. What is the import of the term without prejudice to the provisions of section 29 of the Act?"*
>
> *13. On a conjoint reading of sections 29 and 31 of the Act, it appears to us that in case of default in repayment of loan or any installment or any advance or breach of an agreement, the Corporation has two remedies available to it against the defaulting industrial concern, one under section 29 and another under section 31 of the Act. The choice for availing the remedy under section 29 or section 31 of the Act is that of the Financial Corporation alone and the defaulting concern has no say whatsoever in the matter, as to which remedy should be taken recourse to by the Corporation against it for effecting the recovery. The expression "without prejudice to the provisions of section 29 of this Act as appearing in section 31 of the Act clearly demonstrates that the Legislature did not intend to confine the Corporation to take recourse to a particular remedy against the defaulting industrial concern for recovery of the amount due to it. It left the choice to the Corporation to act in the first instance under section 31 of the Act and save its rights and remedies under section 29 of the Act to be availed at a later stage, with the sole object of enabling the Corporation to recover its dues….."*
>
> *xxxxxxxxxxx*
>
> *"17. The relief available to the Corporation under section 29 of the Act to realise its dues in the manner prescribed therein is wider in scope than the limited reliefs available to it under section 31 of the Act and is not controlled by section 31 of the Act.*

The Legislature clearly intended to preserve the rights of the Corporation under section 29 of the Act, by expressly stating in section 31 of the Act that its recourse under the section is without prejudice of the provisions of section 29 of the Act….."

xxxxxxxxxxxxx

"18. There is no equity in favour of a defaulting party which may justify interference by the courts to exercise its equitable extraordinary jurisdiction under Article 226 of the Constitution of India to assist it in not repaying the debts. The aim of equity is to promote honesty and not to frustrate the legitimate rights of the Corporation which after advancing the loan has taken steps to recover its dues from the defaulting party. Thus the intention of the Legislature in using the expression " without prejudice to the provisions of section 29 of the Act" clearly appears to be that recourse to the provisions of section 29 is not prohibited , when an order or decree under section 31 of the Act obtained by the Corporation has not been complied with or honored by the defaulting party or is otherwise insufficient to satisfy the dues of the Corporation and the Corporation withdraws and abandons to pursue further proceedings under section 31 of the Act. Passing a money decree for recovery of the outstanding dues, not being under the jurisdiction of the court under section 31 of the Act, the Corporation retains its right to recover the dues by invoking the provisions of section 29 of the Act in the manner prescribed therein notwithstanding any order, final or interim, obtained by it under section 31 of the Act by withdrawing from and abandoning those provisions at any stage of the proceedings. A court of equity, when exercising its equitable jurisdiction under Article 226 of the Constitution must so act so as to prevent perpetration of a legal fraud and the courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from crafty evasions and new subtilities invented to evade law………"

(iv) Apart from expounding the principle of equity, the above judgment would serve as a guide to the approach for a solution of the case under consideration. Here, the assessee has indulged in fraudulent transactions and has misled the Revenue at every stage. It is a unique and complex case. Hence, all the possible provisions of the Income-tax Act should be explored for application. The Assessing Officer has made great efforts in dealing with such a recalcitrant assesee. The CIT(A), instead of strengthening his order, gave wholesale relief with a superficial and perverse approach. One important point to be noted in this multiprong approach is that, the assessee is not being taxed more than once on the same amount.

(v) Referring to the above judgment, the Assessing Officer held that section 56(2) will not exclude or limit the application of section 56(1) (p. 21 of assessment order). He consideration the application of this provision. and taxed the amount as income from other sources under section 56(1) of the Act.

(vi) The CIT(A) allowed the appeal holding that it was a capital receipt. It inter alia, relied on the decision of the Hon'ble ITAT, Mumbai in the case of DCIT -3(2) v. KDA Enterprises (P) Ltd. ITA No.2662/M/2013 dated 11.0.3.2015 AY 2009-10, 57taxman.com284 (2015). (vide p.87). A copy of the said judgment is placed in Departmental Paper Book No. III.

(vii) A comparison of the case of the assessee under consideration here and the facts of the case in KDA Enterprises (P) Ltd.(supra) would show that there is no similarities between the case of the assessee and the case of KDA Enterprises (P) Ltd. as pointed out below:

(a) In the case of KDA, the amount of gift received from 4 parties have been quantified at Rs. 161.87 crores (p.3 of the order of ITAT), whereas there is no valuation of the brand "Essar" received by the assessee. The assessee has received the brand without consideration.

(b) In the case of KDA, the amounts were directly received from Reliance Industries Ltd. on account of dividend receivable by the said four companies against their shareholdings in Reliance Industries Ltd. The dividend was credited directly to the bank account of the assessee (p.3 of the order of the ITAT). Nothing of the sort has happened in the case of the assessee. Everything was a closed door inhouse affair. No independent corroboration by third parties. No transaction from banks.

(c) In the case of KDA, the gift so received was claimed as capital receipt and therefore credited to the capital reserve account in its books(p.91 of the order of ITAT). In our case the brand is not recorded in the books. There is no trace of the receipt of the brand. Had the case not been taken for scrutiny through CASS system, the whole transaction would not have come to light.

(d) In the case of KDA, the books of account were prepared as per the requirement of the Companies Act, and the same have been audited and approved by statutory auditors and also adopted by the shareholders in the Annual General Meeting of the assessee. (p.92 of the order of ITAT). Nothing of the sort in the case of the assessee.

(e) In the case of KDA receipt of gift as well as making of gift are authorized by respective Memorandum and Articles of Association of the companies and the assessee (p. 99 of the order of the ITAT). Nothing of the sort in the case of the assessee.

Thus, there is absolutely no similarity of the case of the assessee with the case of KDA Enterprises (P) Ltd. Hence, it is difficult to understand how the CIT(A) observed in para 11.9 of his order (p.87) that ***the principles laid down in KDA Enterprises Ltd. will apply in toto to the case of the appellant trust****. The order of the CIT(A) is passed without application of mind and is perverse.*

(viii) The chief contention of the assessee is that the brand is a capital receipt and hence it does not fall under the purview of section 56(1) which talks of "income". At the outset, it is respectfully submitted that the assessee has forfeited its right to raise this issue at all. For the purpose of arguing as to whether any receipt is capital or revenue, first there should be a receipt in existence in the books of the assessee. Here, admittedly, the brand is not recorded in the books of the assessee. The assessee did not give any value of the brand when specifically asked by the Assessing Officer. Hence, the assessee is not entitled raise this issue. The assessee is only reacting to the proactive step to determine the value of the brand adopted by the Assessing Officer by DCF Method on the basis of the incomes generated in the subsequent years. Hence, the traditional approach to the problem is not applicable by citing the usual case laws. One has start from the basics and the first principles.

(ix) The basic argument of the assessee is that the value of the brand is not 'income' under the definition of income given under section 2(24) the Act. And hence, section 56(1) which speaks of "income of every kind" is not applicable. Conversely, if it is established that the value of the brand falls under the words "income of every kind", the value of the brand would be taxable under section 56(1) of the Act.

*(x)****Judgment of the Supreme Court in the case of Commissioner of Income-tax v. G.R. Karthikeyan, Coimbatore, 1993 AIR 1671, 1993 SCR (3) 328 [Placed in Departmental Paper Book- II]****.*

This judgment of the Hon'ble Supreme Court lays down the basic theory of income. The revenue strongly relies on this binding judgment of the Hon'ble Supreme Court in support of its claim that the value of the brand is taxable as income of the assessee during the previous year.

In that case, the assessee earned prize money of Rs.22,000/-received from a motor rally. The question of law was

> *"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the total sum of Rs.22,000/-received by the assessee from the Indian Oil Corporation and All India Highway Motor Rally should not be brought to tax?"*

***The Income-tax Officer** included the same in the income of the assessee relying upon the definition of 'income' in clause (24) of section 2. [**Please note - the Assessing Officer has done the same in the case under consideration**]*

***The Appellate Assistant Commissioner** held that in as much as the rally was not a race, the amount received cannot be treated as income within the meaning of 2(24)(ix) and allowed the appeal.*

***The ITAT dismissed the appeal of the Revenue**. It gave the following reasoning:*

(a) The rally was not a race. It was predominantly a test of skill and endurance as well as reliability of the vehicle.

(b) The rally was not a game within the meaning of section 2(24).

(c) The receipt in question was casual in nature. It was nevertheless not an income receipt and hence fell outside of the provisions of section 10(3) of the Act.

The Hon'ble High Court in reference held in favour of the assessee observing that the object behind section 2(24)(ix) was to rope in windfalls from lotteries, races including horse races, and card games etc. and does not cover receipts which involve skill in driving the vehicle as in that case.

Thus all the authorities in appeal and reference gave decision against the Revenue. But the Hon'ble Supreme Court reversed their decisions and upheld the order of the Assessing Officer. That Hon'ble Supreme Court discussed and explained the theory of income. The excerpts of the judgment are given below:

SUPREME COURT'S JUDGMENT

P 4-Definition of 'income' in section 2(24) is an inclusive definition.

P 5–It is not easy to define income. The definition in the Act is an inclusive one.** As said by Lord Wright in Kamakshya Narayan Singh v. CIT ,11 ITR 513 PC**:

> ***"Income …….is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation".** In Gopal Saran Narayan Singh v. Commissioner of Income-tax 3. ITR 237 PC, the Privy Council pointed out that **"anything that can properly be described as income is taxable under the Act unless expressly exempted."***

***P.5** Hon'ble Supreme Court had to deal with the ambit of the expression 'income' in Navin Chandra Mafatlal v. CIT Bombay, 26 ITR (SC). It rejected the challenge to imposition of a tax on capital gains on the ground that tax on capital gains is not a tax on 'income' within the meaning of entry 54 of list 1, nor it is a tax on the capital value of the assets of individuals and companies within the meaning of entry 55 of list -1 of the seventh schedule to the Government of India Act, 1935, and upheld the order of the Bombay High Court. It observed:*

"What, then, is the ordinary, natural, and grammatical meaning of the word "income"?. According to the dictionary, it means "a thing that comes in" (See Oxford Dictionary, Vol. V p.162; Stroud, vol II pp 14-16). In the United States of America and in Australia both of which are also English speaking countries, the word "income" is understood in a wide sense so as to include a capital gain....in each of these cases a very wide meaning was ascribed to the word "income" as its natural meaning."

P. 6. *In Bhagwandas Jai. V. Union of India , 128 ITR 315 (SC) the challenge was to the validity of section 23(2) of the Act which provided for bringing self- occupied property under the purview of income from house property. The Hon'ble Court observed:*

"9……………. It was contended that the word income means realisation of monetary benefit and that in the absence of any such realisation, by the assessee, the conclusion of any amount by way of notional income under section 23(2) of the Act in the chargeable income was impermissible and outside the scope of entry 82 of list-1 of the Seventh Schedule to the Constitution. The said contention was rejected affirming that the expression income is of the widest amplitude and that it includes not merely what is received or what comes in by exploiting the use of the property but also that which can be converted into income."

Page 7 …….. Further, even if a receipt does not fall within sub-clause (ix) or for that matter any of the sub-clauses in section 2(24), it may yet constitute income. To say otherwise, would mean reading several clauses in section 2(24) as exhaustive of the meaning of "income" when the Statute expressly say that it is inclusive. It would be a wrong approach to try to place a given receipt under one or other sub-clauses in section 2(24) and if it does not fall under any of the sub-clauses, to say that it does not constitute income. Even if a receipt does not fall within the ambit of any of the sub-clauses in section 2(24), it may still be income if it partakes of the nature of the income. The idea behind providing inclusive definition in section 2(24) is not to limit its meaning but to widen its net. This Court has repeatedly said that the word 'income' is of the widest amplitude and that it must be given its natural and grammatical meaning. Judging from the above stand point, the receipt concerned here is also income. May be, it is casual in nature, but it is income nonetheless. That even casual income is 'income' is evident from section 10(3). Section 10 seeks to exempt certain 'incomes' from being included in the total income. A casual receipt which should mean, in the context, casual income is liable to be included in the total income if it is in excess of Rs.1000/-, by virtue of clause (3) of section 10. Even though it is a clause exempting a particular receipt/income to a limited extent, it is yet relevant to the meaning of expression "income". In our respectful opinion, the High Court having found that the receipt in question does not fall within sub-clause (ix) of section 2(24) erred in concluding that it does not constitute income. The High Court has read several sub--clauses in section 2(24) as exhaustive of the definition of income when, in fact, it is not so. In this connection, it is relevant to notice the finding of the Tribunal. It found that the receipt in question was casual in nature but - it opined – it was nevertheless not an income receipt and fell outside the provision of section 10(3) of the Act. We have found it difficult to follow the logic behind the argument.

12. For the above reasons we hold that the receipt in question herein does constitute 'income' as defined in clause (24) of section 2 of the Act. The appeal is accordingly allowed and the question referred to by the Tribunal under section 256(1) of the Act is answered in the negative i.e. in favour of the Revenue and against the assessee."

(xi) The above judgment of the Hon'ble Supreme Court is squarely applicable to the facts of the present case under consideration because of the following reasons:

(a) The case of the assesee here is not a straightjacket case where there is some quantified receipt and the simple issue is to decide whether it is a revenue or capital receipt and then apply the case laws. The CIT(A) has erroneously done that.

(b) This is an extraordinary case where the books of accounts do not record any value to help in determining whether it is revenue or capital receipt.

(c) It is a rarest of the rare case, where the value of the brand i.e the value of the source of the royalty income had to computed by working backward by Discounted Cash Flow method where the value of the source was determined on the basis of the value of the annual yield.

(d) Further, it defies all logic to hold that so much income will be earned by the assessee year after year out of nothing i.e without spending anything for the source.

(e) The Hon'ble Supreme Court has repeatedly emphasized that section 2(24) gives an ***inclusive*** *definition of income. Therefore, no attempt should be made to fit in the value of the brand in one of the items appearing in section 2(24) as has been done by the CIT(A).*

(f) As explained by the Hon'ble Supreme Court, the word "income" is of widest amplitude and it must be given its natural and grammatical meaning. In this case the assessee became suddenly in possession of an extremely valuable asset which became a permanent source of high income, year after year. The assessee became suddenly richer by that amount. So according to the wide definition of income given by the Hon'ble Supreme Court, it falls under the category of income.

(g) Hence, the presumption is that the value of the brand is income in view of the wide and inclusive definition of income given by the Hon'ble Supreme Court in Karthikeyan's case (supra). The assessee has no material to counter it because its books of account do not record the value of the brand.

(xii) Applying the above judgment of the Hon'ble Supreme Court it is respectfully submitted that the value of the brand is income under section 2(24) of the Act and the said value (Rs.1668.10 crores) has been rightly taxed by the Assessing Officer u/s 56(1) of the Act.

(xiii) Capital Receipts Treated as Revenue Receipts

Depending upon the facts of the case, capital receipts have been treated as revenue receipts. Reliance is placed in the judgment of the Supreme Court in the case of CIT v. T.V. Sundaram Iyengar & Sons 88 TAXMAN429 (SC) and the case laws cited there in the said judgment. [Vide Departmental Paper Book II]. They are given below:

(a) CIT v. T.V. Sundaram Ayengar & Sons Ltd.88 TAXMAN429 (SC) – Deposits were received from the customers in course of business originally as capital receipt. Unclaimed credit balances which were time barred were taken to the profit and loss account. The Assessing Officer added the receipts to the income of the assessee. The CIT(A) deleted the addition holding that these were not revenue receipts and were capital receipts. The ITAT dismissed the appeal of the Revenue. It was held by the Hon'ble Supreme Court that these amounts, which were originally capital receipts, changed character and were taxable as income of the assessee in the year in which the amounts were taken to the profit and loss account.

The Hon'ble Supreme Court observed that ***if a common sense view of the matter is taken, the assessee because of the trading operation has become richer by the amount which it transferred to its profit and loss account****.*

This observation of the Hon'ble Supreme Court is most appropriate to our case. The brand came to surface when it entered into brand licence agreement and received royalties. At

that time, the assessee became richer by Rs. 1668.10 crores. Hence the Assessing Officer has rightly brought this amount to tax.

The other judgments referred in the above judgment of the Hon'ble Supreme Court in the case of T. V. Sundarm Iyengar and Sons Ltd. are briefly summarized below.

(b) Punjab Steel Scrap Merchants Association Ltd. v. CIT[1961]43 ITR 164 (Punj.).- The assessee was a dealer in scraps. It received advance deposit from the constituents for supply of scraps. After adjusting the sale price some excess unclaimed amount remained with the assessee which was transferred to the profit and loss account. This excess amount of advance received from its constituents was held to be taxable as it was essentially a trading receipt.

(c) Punjab Distillery Industries Ltd. v. CIT [1959] 35 ITR 519 (SC) – The assessee was a distiller of country liquor. It received some deposit for empty bottles and security deposit from the wholesalers which were recorded in a separate register. The amounts were refunded when the bottles were returned. After the bottle were returned, the assessee was left with a surplus amount. It was held to be trade receipts and taxable.

(d) Poineer Consolidated Co of India Ltd. v. CIT [1976] 104 ITR 686 (All.) – Refund of custom and other duties were received on behalf of the customers. After payment to the customers some unclaimed surplus remained which was held taxable in the hands of the assessee. It was held that though the amount was not income when it was realised, it became his income when it was not claimed and the assessee showed it in its account as income.

(e) CIT v. A.V.M Ltd. [1984] 146 ITR 355- (Mad.) The assessee was a distributor of films. It received deposits from the exhibitors which was adjusted against the collections. The surplus unclaimed deposit remaining with the assessee was held to be chargeable receipts from the trade in the hands of the assessee.

(f) CIT v. Batliboi & Co. (P) Ltd. [1984]149 ITR 604 (Bom.). The assessee was a dealer in machinery. It used to take deposits from the intending purchasers. The deposits were adjusted against purchase price. The surplus unclaimed deposits after adjustment were held to be taxable in the hand of the assessee as trade receipts.

A review of the above judgments would show that there is no watertight division between capital and revenue receipts. Considering the inclusive definition of income under section 2(24) all the receipts first have to be taken as income and thereafter considering the facts and circumstances of the case some of the receipts may be held to be not taxable. But as explained earlier, the assessee is not at all entitled to such benefit, because its books of account do not record any receipt.

(xiv) Capital Receipt taxed as income from other sources
Sumati Dayal v. Commissioner of Income-tax [1995] 214 ITR 801(SC)

(Departmental Paper Book – II)

The assessee showed receipts of Rs.3,11,831/- and Rs.93,500/- as winnings in races in assessment years 1971-72 and 1972-73 and claimed them as capital receipts not taxable. The Assessing Officer rejected the claim of the assessee that these amounts were receipts from races and taxed the amounts as income from other sources for both the years. The matter went to the Income-tax Settlement Commission. Before the Settlement Commission, the Commissioner submitted that the assessee lacked knowledge of race techniques and the theory of probabilities precluded any systematic and continuous winnings at races on as many as 16 occasion during a period of less than two years. The Commissioner also *submitted that the books of account did not indicate the expenses which have been incurred by the assessee for attending races at Bangalore and Hyderabad.* ***(Please note the similarity- The assessee in our case under consideration did not show any expenditure.)*** *The Settlement Commission upheld the view of the Assessing Officer. It observed as under:*

> *"5. It is no doubt true that in all cases in which a receipt sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision and if the receipt is in the nature of income the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee. (See Parimisetti Seetharamamma [1965] 57 ITR 532 at page 536). But in view of section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee for that previous year if the explanation offered by the assessee about the nature and source thereof is, in opinion of the Assessing Officer, not satisfactory. In such a case, there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut it, the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably. (See Srilekha Banerjee's case [1963] 49 ITR (SC) 112 at page 120)*

It is respectfully submitted that this decision is squarely applicable to our case under consideration. Here there is prima facie evidence against the assessee i.e. the receipt of the brand. The assessee has failed to rebut it. The said evidence, being unrebutted, can be used against the assessee by holding that the receipt is of an income nature. Hence, the entire amount of Rs1668.10 crores has been rightly taxed as income from other sources.

(xv). Here, we are faced with a complex, unprecedented situation when the tax system is attacked in an audacious manner. The traditional approach with case laws will be of no help to tackle this situation. In this context, reference is made to Paragraph 13 (iv) above enunciating the Principle of Updating Construction and Paragraph 13(v) above advising the approach of the Courts to deal with newer techniques of tax evasion. Those principles need to be applied here. It should be held that this is income – pure and simple.

(xvi). In view of the detailed discussion in the foregoing paragraphs, it is respectfully submitted that the value of the "Essar" brand constitutes income under section 2(24) of the Income-tax Act and has been rightly taxed by the Assessing Officer under section 56(1) of the Income-tax Act. Therefore, it is prayed that Grounds(2) and (3) of the Revenue may be allowed.

21. On the other hand, the Ld. Authorized Representative, in response to above made the following submissions:

> *"1. It is submitted that section 56(1) of the Act taxes a receipt which falls within the meaning of the term "income" in section 2(24) of the Act. If a receipt by an assessee is not in the nature of income, then, the provisions of section 56(1) are not applicable as it does not bring to tax something which is not income in its normal parlance. It is a settled position in law that the burden is on the Department to prove that a receipt is in the nature of income within the definition of the said term in section 2(24) of the Act.*
>
> *2. In the instant case, the assessee has received a gift of trademark and copyrights to brand "ESSAR" from EIL. Therefore, the question arises whether a gift received by the assessee is in the nature of income within the meaning of the said term in section 2(24) of the Act and, accordingly, chargeable to tax. In this regard, it is submitted that receipt of property by way of a gift is not in the nature of income under section 2(24) of the Act. In this regard, reliance is placed on the judgment of the Bombay High Court in*

*the case of **H.H. Maharani Shri Vijaykuverba Saheb of Morvi vs. CIT (49 ITR 594) (Born.)** wherein the question was whether the payment received by the assessee from his son of Rs. 10,000 every month after he abdicated his gaddi is in the nature of income chargeable to tax. The High Court held that a voluntary payment which is not referable to any binding obligation and depends on the will of the donor is not in the nature of income chargeable to tax under the Act. The relevant para of the decision is reproduced below **(Pg. 5):***

*"There is no doubt that under the Indian Income-tax Act even payments, which are voluntarily made may constitute "income" of the person receiving them. It is not necessary that in order that the payments may constitute "income ", they must proceed from a legal source: in that if the payments are not made the enforcement of the payments could be sought by the payee in a court of law. It does not, however, mean that every voluntary payment will constitute "income". Thus, voluntary and gratuitous payments, which are connected with the office, profession, vocation or occupation may constitute "income" although if the payments were not made the enforcement thereof cannot be insisted upon. These payments constitute "income" because they are referable to a definite source, which is the office, profession, vocation or occupation. **It could, therefore, be said that such a voluntary payment is taxable as having an origin in the office, profession or vocation of the payee, which constitutes a definite source for the income. What is taxed under the Indian Income-tax Act is income from every source (barring the exceptions provided in the Act itself) and even a voluntary payment, which can be regarded as having an origin, which a practical man can regard as a real source of income, will fall in the category of "income", which is taxable under the Act. Where, however, a voluntary payment is made entirely without consideration and is not traceable to any source, which a practical man may regard as a real source of his income, but depends entirely on the whim of the donor, cannot fall in the category of "income".** What we have to see, therefore, in the present case, is whether the payment made by the son Maharaja to the father Maharaja, though voluntary, could be regarded as having an origin in what might be called the real source of income. On the facts found in the present case, we cannot say that the payments would be referable to any such source. The department has not been able to show any material on record, from which such a conclusion can be drawn."*

*3. Similarly, in the case of **Parimisetti Seetharamamma vs. CIT (57 ITR 532)(SC),** the question arose whether the money and jewellery received by the assessee, who was alleged to be the secretary of the Maharani of Baroda, which was paid on account of natural love and affection was chargeable to tax under the Act. The Supreme Court held that every receipt is not chargeable to tax under the Act and the burden is on the department to prove that an amount which is received voluntarily as a gift is an income chargeable to tax under the provisions of the Act. The relevant part of the judgment is extracted as under **(Pg. 4):***

*"In so observing, the High Court, in our judgment, has committed an error of law. **Ely sections 3 and 4 the Act imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision.** Where however a receipt is of the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee. The appellant admitted that she had received jewellery and diverse sums of money from Sita Devi and she claimed that these were gifts made out of love and affection. The*

case of the appellant was that the receipts did not fall within the taxing provision: it was not her case that being income the receipts were exempt from taxation because of a statutory provision. It was therefore for the department to establish that these receipts were chargeable to tax.

….. the Tribunal observed that the burden of proving that the receipts were not income lay upon the appellant. The Tribunal did not infer that as remuneration for disbursing salary to Sita Devi's servants she was given large amounts of money and jewellery. Description of the appellant in the cash memo issued by the Bombay Garage Ltd. as "private secretary to Princess Sita Devi" could have no evidentiary value. It is not claimed that there was evidence on the record that this was the general repute of the appellant. Description of the appellant as private secretary of Sita Devi in a stray cash memo issued by a third party about the source of whose knowledge there is not an iota of evidence, could not evidence a relationship of master and servant much less could it prove that what was given by Sita Devi to the appellant was remuneration for service rendered. The conclusion of the Tribunal is therefore based on matters which may at the highest create some suspicion, and upon its view that the burden of proving that the receipts were not taxable lay upon the appellant. But a conclusion recorded by the Tribunal by wrongly throwing the burden of proof upon the assessee cannot be regarded as binding upon the High Court in a reference under section 66 of the Income-tax Act....."

4. In the case of ***Dilip Kumar Roy vs. CIT (94 ITR 1) (Born.)*** *the question before the Bombay High Court was whether the amount received by the assessee from his devotees was of an income character. The High Court held that money received by the assessee was not on account of the vocation carried on by him but was in the nature of a gift in recognition of his personal qualities and, accordingly, the amount received by the assessee was not chargeable to tax. The relevant paras are reproduced below* ***(Pg. 3):***

"Without deciding the question whether the activities carried on by the assessee constituted a vocation within the meaning of section 10, for the purpose of the present case, we proceed on the assumption that the activities carried on by him constituted a vocation as we are of the view that the second contention urged by Mr. Palkhivala must be upheld. ***Having regard to the provision of section 10 of the Act it cannot be disputed that it is only receipts arising out of profits or gains of business, profession of vocation that can be subjected to tax under that section, but if it is a personal gift for personal qualities to the assessee and as a token of personal esteem it cannot be subjected to tax. It is well settled that by sections 3 and 4 of the Act, the Act imposes a general liability to tax upon all income, but the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision.*** *Where however a receipt is of the nature of income, the burden of proving that it is not taxable, because it falls within an exemption provided by the Act, lies upon the assessee. Where the case of the assessee is that a receipt did not fall within the taxing provision, the source of the receipt is disclosed by the assessee and there is no dispute about the truth of that disclosure, the income-tax authorities are not entitled to raise an inference that the receipt is assessable to income-tax on the ground that the assessee has failed to lead all the evidence in support of his contention that it is not within the taxing provision. See Parimisetti Seetharamamma v. Commissioner of Income-tax*

(1965] 57 ITR 532 (SC). It is further laid down in this case that a conclusion recorded by the Tribunal by wrongly throwing the burden of proof upon the assessee cannot be regarded as binding upon the High Court in a reference under sections 66 of the Act.

Whenever an amount is paid as a personal gift for the personal qualities of the assessee and as a token of personal esteem and veneration it cannot be subjected to tax as income arising out of business, profession or vocation under section 10 of the Act. *Such a principle is quite apparent from the decision of the Supreme Court in Mahesh Anantrai Pattani v. Commissioner of Income-tax (1961] 41 ITR 481 (SC)..."*

5. Similar view has also been taken by the Bombay High Court in case of ***Mehboob Productions (P) Ltd vs. CIT (106 ITR 758) (Born.) [Para 4]*** *wherein the question was whether the benefit received by the assessee on account of waiver of payment of entertainment tax that was collected by the assessee was in the nature of "income" in the hands of the assessee. The Bombay High Court decided the issue in favour of the assessee holding as under:*

"...the term "income" in the Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return and, according to the Privy Council, anything in the nature of a windfall must be excluded from what may be properly regarded as income...

...Thus, it is clear that all receipts by the assessee would not necessarily be deemed to be income of the assessee and the question as to whether any particular receipt is income or not will have to be determined depending upon the nature of the receipts and the true scope and effect of the relevant taxing provision.....

...It is true that the object of the subsidy was to assist the producers (as annexure "A" shows) and to encourage future production of films of sufficiently high quality and which served a high social purpose. Bearing the factual position in mind, which has been indicated earlier in this judgment, ***I would hold that these receipts do not partake of the element of a return which is necessary for it to constitute income, and further that it was of the nature of a windfall—a windfall as to the factum and not a windfall as to mere quantum. On both the counts, therefore, the answer to the question whether these receipts constitute income of the assessee must be in the negative and in favour of the assessee, viz., that they did not constitute income."***

6. ***In view of the above, it is submitted that the gift of the Brand received by the assessee from EIL is not in the nature of income as the said term is defined in section 2(24) of the Act.***

7. ***It is submitted that the word "income" in its normal connotation does not include an amount which is in the nature of a capital receipt. An amount which is received on capital account is regarded as income within the meaning of the said term in section 2(24) of the Act only if specifically included so by the Legislature. In the instant case the Brand received by the assessee is on capital account as the same has been employed by the assessee to earn brand license fees from various licensee companies during the year. Therefore, the Brand received by the assessee formed the profit making apparatus of the assessee and was in the nature of fixed capital which was utilised to earn income during the year.***

Therefore, the receipt of the Brand being on capital account is not chargeable to tax. In this regard, reliance is placed on the judgment of Supreme Court in the case of CIT vs. Vazir Sultan & Sons (36 ITR 175) (SC) wherein it was observed as under (Pg. 8 and 10):

"It would not be profitable to review the various English decisions bearing on this question as they have been exhaustively reviewed in the above decisions of this court. The position as it emerges on a consideration of these authorities may now be summarized. ***The first question to consider would be whether the agency agreement in question for cancellation of which the payment was received by the assessee was a capital asset of the assessee's business, constituted its profit-making apparatus and was in the nature of its fixed capital or was a trading asset or circulating capital or stock-in-trade of his business. If it was the former the payment received would be undoubtedly a capital receipt; if, however, the same was entered into by the assessee in the ordinary course of business and for the purpose of carrying on that business, it would fall into the latter category and the compensation or payment received for its cancellation would merely be an adjustment made in the ordinary course of business of the relation between the parties and would constitute a trading or a revenue receipt and not a capital receipt."***

"In the case before us the agency agreement in respect of territory outside the Hyderabad State was as much an asset of the assessee's business as the agency agreement within the Hyderabad State and though expansion of the territory of the agency in 1939 and the restriction thereof in 1950 could very well be treated as grant of additional territory in 1939 and the withdrawal thereof in 1950, both these agency agreements constituted but one employment of the assessee as the sole selling agents of the company. There is nothing on the record to show that the acquisition of such agencies constituted the assessee's business or that these agency agreements were entered into by the assessee in the carrying on of any such business. The agency agreements in fact formed a capital asset of the assessee's business worked or exploited by the assessee by entering into contracts for the sale of the Charminar cigarettes manufactured by the company to the various customers and dealers in the respective territories. This asset really formed part of the fixed capital of the assessee's business. It did not constitute the business of the assessee but was the means by which the assessee entered into the business transactions by way of distributing those cigarettes within the respective territories. It really formed the profit-making apparatus of the assessee's business of distribution of the cigarettes manufactured by the company. If it was thus neither circulating capital nor stock-in-trade of the business carried on by the assessee it could certainly not be anything but a capital asset of its business and any payment made by the company as and by way of compensation for terminating or cancelling the same would only be a capital receipt in the hands of the assessee."

8. ***Similar view has been taken in the following judgments holding that the amount received which is relatable to the fixed capital employed by the assessee would not fall within the ordinary meaning of the word "income" and is in the nature of a capital receipt.***

a) ***CIT vs. Bombay Burmah Trading Corpn. (161 ITR 386) (SC)***

b) CIT vs. Mahindra & Mahindra Ltd. (91 ITR 130) (Bom.)

9. In view of the above, it is submitted that since the receipt of the Brand was on capital account, it was in the nature of a capital receipt not chargeable to tax.

10. It is submitted that the receipt of the Brand by the assessee was not in the nature of income because:- (a) it was in the nature of a gift received from EIL; and (b) the receipt was on capital account as it formed part of the profit making apparatus for the assessee as the asset received was employed to earn brand license fees. Therefore, since the receipt was not in the nature of "income", the provisions of section 56(1) do not apply as it covers a receipt which fall within the ordinary meaning of "income". In this regard, reliance is placed on the judgment of the Bombay High Court ***Cadell Weaving Mill Co. (P.) Ltd. vs. CIT (249 ITR 265) (Born.)*** *wherein it was held that if the amount received is not in the nature of "income" then the provisions of section 56(1) cannot come to the rescue of the Department. The relevant part from the judgment is reproduced as under****(Pg.6):***

> ***"11... However, the department submitted that if the cost of acquisition of a capital asset cannot be computed under the provisions of sections 45 to 55, then the capital gains which arise on transfer may not be chargeable under section 45 but they are chargeable under section 56 as income from other sources. For this purpose, the department has placed reliance on section 2(24). We do not find any merit in the above contentions. It is true that section 2(24) defines the word 'income. That, the definition is an inclusive definition. However, it is well-settled that capital receipts do not come within the ambit of the Act except to the extent of any capital receipt being expressly sought to be covered by the act of the Parliament as in the case of section 2(24)(vi).*** *In fact, in the present matter, the surrender value received by the assessee has accrued on transfer of the capital asset but it is not chargeable under section 45 for want of cost of acquisition. However, from that, one cannot bring such a receipt under section 10(3) because section 10(3) refers to types of income which do not form part of total income. In other words, a receipt has to be income before it comes within the purview of section 10(3). Section 10(3) does not apply to a capital receipt."*

11. The aforesaid judgment of the Bombay High Court stands approved by the Supreme Court in CIT vs. D.P. Sandu Bros. Chembur (P.) Ltd. (273 ITR 1) (SC) wherein it was held as under ***(Pg.5):***

> ***"16. There is no dispute that a tenancy right is a capital asset the surrender of which would attract section 45 so that the value received would be a capital receipt and assessable if at all only under Item E of section 14. That being so, it cannot be treated as a casual or non-recurring receipt under section 10(3) and be subjected to tax under section 56. The argument of the appellant that even if the income cannot be chargeable under section 45, because of the inapplicability of the computation provided under section 48, it could still impose tax under the residuary head is thus unacceptable.*** *If the income cannot be taxed under section 45, it cannot be taxed at all. (See : S.G. Mercantile Corporation (P.) Ltd. v. CIT (1972] 83 ITR 700 (SC)].*
>
> ***17. Furthermore, it would be illogical and against the language of section 56 to hold that everything that is exempted from capital gains by statute could be taxed as a casual or non-recurring receipt under section 10(3) read with section 56.*** *We are fortified in our view by a similar argument being rejected in Nalinikant Ambalal Mody v. S.A.L. Narayan Row, CIT (1966] 61 ITR 428, 432, 435."*

12. Similar view has been taken by Bombay High Court in the case of Vodafone Services Pvt. Ltd. vs. Union of India (368 ITR 1) wherein the question was whether the amount received on issue of shares in excess of fair market value of such shares would be chargeable to tax under section 56(1) of the Act and consequently whether the provisions of Chapter X would be applicable. The High Court rejected the argument of the Department holding as under (Pg.22):

> *"42.It was contended by the Revenue that in any event the charge would be found in Section 56(1) of the Act.* ***Section 56 of the Act does provide that income of every kind which is not excluded from the total income is chargeable under the head income from other sources. However, before Section 56 of the Act can be applied, there must be income which arises. As pointed out above, the issue of shares at a premium is on Capital Account and gives rise to no income.*** *The submission on behalf of the revenue that the shortfall in the ALP as computed for the purposes of Chapter X of the Act give rise to income is misplaced. The ALP is meant to determine the real value of the transaction entered into between AEs. It is a re-computation exercise to be carried out only when income arises in case of an International transaction between AEs. It does not warrant re-computation of a consideration received/given on capital account. It permits re-computation of Income arising out of a Capital Account Transaction, such as interest paid/received on loans taken/given, depreciation taken on machinery etc. All the above would be cases of income being affected due to a transaction on capital account. This is not the revenue's case here.* ***Therefore, although Section 56(1) of the Act would permit including within its head, all income not otherwise excluded, it does not provide for a charge to tax on Capital Account Transaction of issue of shares as is specifically provided for in Section 45 or Section 56(2)(viib) of the Act and included within the definition of income in Section 2(24) of the Act."***

13. It is important to note that the aforesaid principle of law laid down by the Bombay High Court in the case of Vodafone (supra) has been accepted by the Government as expressed in the Press release dated 28 January 2015 the relevant part of which is reproduced as under:

> *The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, in a major decision has decided to accept the order of the High Court of Bombay and not to file SLP against it before Supreme Court in the case of Vodafone India Services Pvt. Ltd ("VISPL'). VISPL, is a wholly owned subsidiary of a non-resident company, Vodafone Teleservices (India) Holdings Limited, Mauritius. VISPL issued shares (at a premium of Rs 8,509) receiving a total consideration of Rs 246.39 crore from Vodafone Mauritius, on issue shares and this was shown as "Capital Receipts" in the books of accounts. VISPL reported this transaction as an "International Transaction" and stated that this transaction does not affect its income. The DRP held that the premium determined by the TPO, to the extent not received, is an income arising from issue of shares. The High amongst other things observed, that the tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of arm's length pricing to the transactional value does not arise. Further, if its income which is chargeable to tax, under the normal provisions of the Act, then alone Chapter X of the Act could be invoked. Sections 4 & 5 of the Act brings to tax total income of the previous year. This would take us to the meaning of the word income under the Act as defined on Section 2(24) of the Act.* ***The amount received on issue of shares is admittedly a capital account transaction not separately brought within the definition of Income, except in cases covered by Section 56(2)(viib) of the Act. Thus such capital account transaction cannot be brought to tax as already discussed herein above while***

> ***considering the challenges to the grounds as mentioned in impugned order.*** *The Bombay High Court quashed the reference dated 11.07.2011 by the AO to the TPO, order dated 28.01.2013 of the TPO, draft AO 22.03.2013 of the AO and order dated 11.02.2014 of the DRP on the preliminary issue of jurisdiction to tax, setting them aside as being without jurisdiction, null and void.*

14. Similarly, the Mumbai Tribunal in the case of DCIT vs. DP World Pvt. Ltd. (140 ITD 694) has held that the receipt of gift in the form of residential flats by the assessee from its sister concern was not in the nature of income and, consequently, was not chargeable to tax either under section 56(1) or section 28(iv) of the Act.

15. Further, the Mumbai Tribunal in the case of DCIT vs KDA Enterprises Ltd (68 SOT 349) again held that gift received by the assessee from four group concerns in the form of transfer of dividend receivable by them on the shares held in a company is not chargeable to tax as it was in the nature of capital receipt under the provisions of the Act. It has been held by the Tribunal that the provisions of section 56(2)(v), (vi), (vii) and (viia) specifically cover the instances of gift which are taxable under the provisions of the Act; and all other gifts received by the assessee other than those covered in other sections are not chargeable to tax being capital receipt in nature.

16. Similar view has been taken by the Tribunal in the following cases where gifts received by theassesse therein were held to be not chargeable to tax:

> *a. Chennai Tribunal in the case of ITO v. Rasi Exports Pvt Ltd (12 TTJ 239) held that the character of receipt needs to be judged based on surrounding circumstances, whereby machine received without any consideration would still qualify as a capital receipt as long as consideration is not received as a part of revenue account.*
>
> *b. Mumbai Tribunal in the case of DCIT vs Nerka Chemicals Pvt Ltd (4423/Mum/2014,4585/Mum/2015, 4850/Mum/2016) held that the receipt of shares by way of a gift shall not be taxable under section 56(1) of the Act unless the said capital receipt is specifically covered under the definition of income whereby, the same would be taxed under section 56(2)(viib) of the Act had they been in force. Similarly, the same shall not be taxable under section 28(iv) of the Act as the receipt of shares without consideration had no direct nexus with the assessee's business.*

17. If the Revenue's contention was to be accepted the consequence would be that section 56(2)(v), (vi), (vii), (viia) and (x) of the Act are all surplus and would be rendered otiose. It is submitted that a construction that would render the entire section redundant cannot normally be countenanced.

22. Considered the rival submissions and the material placed on record. We notice that the issue raised by the revenue in the present grounds is as follows:

> *d. The Essar brand along with trademarks registered or not had been purported to have been settled in the name of assessee without any valid consideration.*
>
> *e. EIL has passed resolution in order to settle the brand along with trademarks and copyrights to the assessee, which is also ratified by the shareholders but Assessee has not brought any evidence on record to prove that EIL is the rightful owner of Essar*

brand along with trademarks and copyrights and the cost, if any, incurred in such registration of brands.

f. *Sec.2(24) of the Act defines the income, which is an inclusive definition and not exhaustive. Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income tax under the head income from other sources, if it is not chargeable to income tax under any other head specified in sec.14, items A to E.*

g. *When this transaction is not covered under the sec.56(2) of the Act then it will certainly fall under the sec.56(1) of the Act for the simple reason that the sec.56(2) begins with "In particular, and without prejudice to the generality of the provisions of sub-section (1), the following income shall be chargeable to Income-tax…….". By relying on the case law, it is submitted that 'without prejudice' provision cannot limit the operation of the other provision, accordingly, it is submitted that operation of sec 56(2) do not in any way restrict other provisions from the sweep and ambit of sec 56(1) of the Act, reliance is placed on G.R Karthigeyan case(Supra).*

22.1 We have observed from a perusal of the material submitted before us, that EIL had transferred its brands along with the trademarks and copyrights to the assessee, as a gift, or akin to a gift, without any consideration. Admittedly, the aforesaid brands form the very basis for the assessee trust to generate substantial income from its operative group companies under the management of Ruia family. In our view, the brands a/w trademarks and copyrights did not carry any value in the books of accounts, may be, for the reason that they were acquired several years back, and also because they did not have any independent value outside the group since they were inextricably interwoven or in fact intertwined with the group. Fact, that the brands along with trademarks and copyrights were transferred by EIL to the assessee trust by passing board resolution and was ratified by the shareholders, further fortifies the genuineness of the assessee's claim that the assets in the form of brands/trademarks/copyrights which were earlier used by the EIL were transferred to the assessee trust. We find that the assessee trust had declared the aforesaid receipt of royalty or brand utilization charges from the licensees i.e its group entities in its books of account, and had offered the same for tax as per the cash system of accounting that was followed by it during the year under consideration, and consistently in the ensuing years. On a perusal of the records, we find that the department had only after taking note of the brand license fees that was receivable by the assessee trust from the brand licensees i.e its group entities, had after taking the same as a base determined the value of brands. We are asking ourselves, what happens if the group companies decide to reduce the royalty by 90% of what they have paid in this assessment year by passing proper resolutions. Will the tax authorities rework the value of brands?.

22.2 In our considered view, the tax authorities have no role to play or question the validity of the transaction when the shareholders had unanimously passed the resolutions and ratified the transaction, unless it is either illegal or against the national interest. The assessee obviously received the gift in the form of brands, which constituted its profit-making apparatus, and thus, was in the nature of its fixed asset/capital. As observed by us hereinabove, as the brand "Essar" contributed as a gift by EIL to the corpus of the assessee trust formed the latters profit-making apparatus, that was exploited by it by entering into non-exclusive brand licensing agreements with its group entities and, earning substantial license fees therefrom, thus, the same formed its fixed capital. Accordingly, as the brand "Essar" (supra) was only a means by which the assessee had entered into non-exclusive brand licensing agreements with its operative group entities, therefore, it could not be anything but its capital asset. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Vazir Sultan and Sons (1959) 36 ITR 175 (SC). Also, support is drawn from the judgment of the Hon'le Apex Court in the case of CIT Vs. Bombay Burmah Trading Corporation (1986) 161 ITR 386 (SC); and that of the Hon'ble High Court of Bombay in the case of CIT Vs. Mahindra & Mahindra (1973) 191 ITR 130 (Bom). It is in the backdrop of the aforesaid settled position of law, that we shall hereinafter deal with the issue before us, viz. whether the transaction in question i.e contribution of brand "Essar" as a gift by EIL to the corpus of the assessee trust, which thereafter formed the latters profit-making apparatus for generating income i.e license fees by granting of non-exclusive brand licenses to its group entities, involved any profit element which can be brought within the meaning of "Income" under Sec. 56(1) or Sec. 56(2) of the Act? We are in agreement with the revenue that once it is determined that there is an element of profit involved, then, if it does not fall under any head of income specified under Section 14 of the

Act, items A to E, it can be brought to tax under the residual head of income i.e "Other sources". Also, in case, the above said income does not fall under any specific category mentioned in sec 56(2) of the Act, then, such income can be charged under sec 56(1) of the Act. But then, as per the mandate of law, there should be an income under the categories mentioned under section 2(24) of the Act; or it should be such that it has an element of revenue that can be classified as an income. In the case before us, we are of the considered view, that that the brands received by the assessee trust does neither carry any element of profit, nor falls under any category of income specified under sec. 2(24), sec. 56(2) or sec. 56(1) of the Act. It is the claim of the ld. D.R that as the transaction under consideration is a special kind of transaction, therefore, it has to be evaluated in a special manner so that it fits in the general residual section i.e Sec. 56(1) of the Act. We are not able to accept the aforesaid proposition of the ld. D.R that irrespective of the nature of the transaction, the transaction has to brought under any category of income, doesn't matter how. As observed by us hereinabove, the transaction in question does not involve any exchange of consideration between the parties, and is in the nature of a Gift of a profit-making apparatus which has huge potential to generate royalty income, which too is possible only when the group companies are willing to contribute, otherwise, it literally has no value. Therefore, in the backdrop of our aforesaid observations, we are of the considered view that as the transaction under consideration i.e contribution of the brand "Essar" as a gift by EIL to the corpus of the assessee trust does not fall under any category of income, therefore, we find no reason to interfere with the view taken by the CIT(A), who had rightly concluded that as the contribution of brand "Essar" as a gift by EIL to the corpus of the assessee trust did not involve any profit element which could be brought within the meaning of "Income" under Sec. 2(24) of the Act, therefore, it could not be subjected to tax under the residuary head i.e "Other sources" u/s 56(1) of the Act, thus, uphold his view to the said extent.

Coming to reliance on case laws by the Ld. D.R, we shall first take up the case of G R Karthikeyan (supra) as had been relied upon by him. In this case the assessee had participated in the All India Highway Motor Rally and had won the first prize of Rs. 22,000. The ITO included the amount of prize money in the income of the assessee by relying upon the definition of `income' in cl. (24) of s. 2. On appeal, the AAC held that inasmuch as the rally was not a race, the amount received cannot be treated as income within the meaning of s. 2(24)(ix). Further, the appeal preferred by the Revenue was dismissed by the Tribunal. On a reference by the revenue, the Hon'ble Madras High Court answered the issue in favour of the assessee. On further appeal, the Hon'ble Supreme Court did not concur with the view taken by the High Court, and held, that if the monies which are not earned in the true sense of the word, viz. winning from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever, constitute income, then, there is no reason as to why the monies earned by skill and toil would not constitute income. Concluding as hereinabove, the Hon'ble Apex Court was of the view that the expression "income" must be construed in its widest sense and thus, even if a receipt does not fall within sub-cl. (ix), or for that matter, any of the sub-clauses in s. 2(24), it may yet constitute income. It was observed by the Hon'ble Court that reading the several clauses in s. 2(24) as exhaustive of the meaning of `income' when the Statute expressly says that it is inclusive, would result to a wrong approach. For concluding as hereinabove, the Hon'ble Apex Court was of the view that if a receipt does not fall within the ambit of any of the sub-clauses in s. 2(24), it may still be income if it partakes of the nature of the income. In our considered view, the aforesaid judicial pronouncement relied upon by the revenue is clearly distinguishable on facts as against those involved in the case before us. As observed by the Hon'ble Supreme Court in the case of Parimisetti Seetharamamma Vs. CIT (1965) 57 ITR 532 (SC), in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision; and if the receipt is in the nature of income, then, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee. Now, unlike the facts involved in the aforesaid case of G R Karthikeyan (supra), as in the case of the present assessee before us, the department had failed to discharge the burden cast upon it, and therein prove, that the contribution of brand "Essar" as a gift by EIL to the corpus of the assessee trust either fell within the meaning of "Income" as contemplated in Sec. 2(24) of the Act; or partook the nature of income, therefore, as observed by the CIT(A), and rightly so, it could not have been assessed as the income of the assessee trust.

Coming to the case of Kamakshya Narayan Singh (supra), it was observed by the Privy Council by drawing support from its earlier order in the case of Gopal Saran Narayan Singh Vs. CIT-3, (1935) 3 ITR 237 (PC), that "income' is a word difficult and perhaps impossible to define in any precise general formula, and anything that can properly be described as income is taxable under the Act unless expressly exempted. Admittedly, there is no doubt that the definition of "income" in Sec. 2(24) of the Act is an inclusive one, and the receipt may still be income if it partakes the nature of income. As observed by us hereinabove, as per the mandate of law the capital transaction cannot be brought to tax, unless specifically provided for. Although, there can be no second thought on the proposition that anything that can properly be described as income would be taxable under the Act unless expressly exempted, but then, the department as noticed by us hereinabove in the present case had utterly failed to discharge the burden cast upon it, and therein prove, that the contribution of brand "Essar" as a gift by EIL to the corpus of the assessee trust either fell within the meaning of "Income" as contemplated in Sec. 2(24) of the Act; or partook the nature of income

Coming to the case of Bhagwandas Jai (supra), the Hon'ble Supreme Court observed that the definition of Income as contemplated in Sec. 2(24) is inclusive and not exhaustive. It was observed by the Hon'ble Apex Court, that the expression "Income" is of the widest amplitude and that it includes not merely what is received or what comes in by exploiting the use of property, but also that which can be converted into income. It was further observed by the Hon'ble Apex Court that even if a receipt does not fall within any of the sub-clauses of Sec. 2(24) of the Act, it may still be income if it partakes the nature of income. Now, as per the settled position of law, in the present case before us, the important point to consider is that the receipt should be in the nature of income. However, income does not include capital transaction unless it is specifically expressed under the Act [**Cadell Weaving Mill Co. (P.) Ltd. (supra)**]. In the present case before us, the contribution of brand "Essar" as a gift by EIL to the corpus of the assessee trust, being in the nature of a profit-making apparatus and, thus, a capital asset, therefore, the facts involved in the aforesaid case law relied upon the ld. D.R being distinguishable on facts would not assist the case of the revenue.

Coming to the case of T V Sundaram Iyengar & Sons (supra), the Ld. D.R had by way of an alternative contention submitted, that the courts have in certain special circumstances and situations treated the capital receipts as revenue receipts. In the aforesaid case, the assessee had received deposits from its customers in the course of its business, i.e as a capital receipt. However, as the customers did not claim the amounts for several years, the unclaimed credit balances, recovery of which had became barred by limitation were taken by the assessee company to its profit and loss account. The Hon'ble Supreme court held, that as the amounts which were originally capital receipts changed their character into revenue receipts, hence, the same were taxable as income of the assessee in the year in which the amounts were taken by the assessee to its profit and loss account. We have given a thoughtful consideration and are of the considered view that as the facts involved in the aforesaid judicial pronouncement are distinguishable as against those involved in the case of the assessee before us, therefore, reliance placed by the ld. D.R on the same would not assist the case of the revenue. Also, the other cases referred in the case of T V Sundaram Iyengar (supra), pertain to unclaimed advances/deposits received by the respective assesses from their customers, which thereafter were either left as surplus with the said assessee's or were taken by them to their respective profit & loss a/c, being distinguishable on facts would by no means advance the case of the revenue before us.

Coming to the case of Sumati Dayal (supra) relied upon by Ld D.R, we find that in the said case the assessee had, inter alia, declared income from winnings from races and claimed the same as being in the nature of a capital receipt. Observing, that the assessee lacked the knowledge of the race techniques, and her books of accounts did not indicate the expenses which were incurred by her for attending the races at Bangalore and Hyderabad, the Hon'ble Apex Court having regard to the conduct of the assessee and the material on record, applied the principle of preponderance of human probabilities and, concluded, that it could reasonably be inferred that the winning tickets were purchased by the assessee after the event, and the majority opinion of the Settlement Commission that was arrived at by applying the test of human probabilities was right, i.e the assessee's claim about the amount being her winnings from races was not genuine. Ld D.R stressed that as in the present case before us, the assessee had not declared any expenditure, therefore, on a similar footing a similar conclusion as in the aforementioned case be taken. On careful consideration of the material placed on record, we notice that the assessee had commenced its operations and received the income only from this year, and the year under consideration was its first year of operation. As observed by us hereinabove, the assessee had received and recorded its income on cash basis and had only credited the income in their books of account at the end of the year and not incurred any expenditure either towards collection of income or administration. As per the facts on record, the assessee who had during the year under consideration, and consistently in the succeeding years, recognized its revenue as per the cash system of accounting, had declared its income during this year only to the extent the group companies had deducted tax at source on the amount of license fees that was credited by them to the account of the assessee during the year in question. Since the group companies had already deducted and deposited the TDS, therefore, for the sake of compliance, the assessee has declared only the TDS portion as its income for the year under consideration. In the backdrop of the aforesaid facts, the assessee had not declared the corresponding expenses during the year under consideration. Since the facts in the case of the assessee are completely different for not claiming the expenses, as in comparison to those involved in the case of Sumati Dayal (supra), therefore, the latter case being distinguishable on facts would thus not advance the contentions of the ld. D.R before us.

23. In the backdrop of our aforesaid deliberations, we neither find any substance in the aforesaid contentions advanced by the ld. D.R as regards the issue in hand, nor any justification to interfere with the reasoned view arrived at by the CIT(A). In our considered view, the CIT(A) had rightly concluded, that as the contribution of brand "Essar" as a gift by EIL to the corpus of the assessee trust did neither involve any profit element which could be brought within the meaning of "Income" under Sec. 2(24) of the Act, nor partook the nature of income, therefore, it could not be subjected to tax under the residuary head i.e "Other sources" u/s 56(1) of the Act, thus, uphold his view to the said extent. The **Grounds of appeal Nos. 2 & 3** are dismissed.

Ground no. 4: Whether on facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in holding that the provisions of section 56(2)(vii) of the Act would not apply to the value of the 'Essar' brand, trademarks and copyrights purported to have been settled by EIL to the assessee without any consideration.

24. The brief facts relating to this ground are, the Assessing Officer in his remand report, dated 27th March 2017 filed with the CIT(A) submitted, that as the registration of "Essar" brand that was gifted by EIL to the corpus of the assessee trust was done as an 'artistic work' under the Copyrights Act, 1957, therefore, the same falls within the category of "any work of art" contemplated in the definition of "property" under the 'Explanation' to section 56(2)(vii) of the Act. Accordingly, the A.O was of the view, that the receipt of the "Essar" brand was taxable by virtue of section 56(2)(vii) of the Act as it was in the nature of "any work of art". (refer <u>para 8.2</u> of <u>Page 68-69</u> of CIT(A) order)

25. On Appeal, Ld. CIT(A) held as under:

h. *The AO misunderstood the term 'artistic' referred to in the extracts from the register of copyrights issued by the Deputy Registrar of Copyrights, Government of India. The details available under the said extract is about the brand registered and not about the nature of property. Essar brand has nothing to do with artistic promotion. This is a brand promoted by EIL which is now being used by the group companies and for such use, royalty is paid by the said group companies. None of the Essar group companies are in the field of artistic promotion. The AO considered the entire brand of Essar to be promoting only artistic value and nothing beyond. The brand Essar is the reflection of the business undertaken by various companies under the flagship of Essar. (Para 13.3 of CIT(A) order (Page 91)].*

i. *The CIT(A) held that he had no doubt in his mind that 'artistic' does not refer to the characterization of the brand but is simply a reference as to how does the symbol look like. The view taken by the AO that the brand name "Essar" is a work of art is highly untenable. (Para 13.3 of CIT(A) order (Page 92)]*

j. *Neither the brand received by the assessee by the name "Essar" is falling as property under Explanation (d) of section 56(2)(vii) of the Act, nor an item of income either under section 56(1) or section 56(2) of the Act to fall under the category of income assessable to tax under the head 'Income from Other Sources' (Para 13.4 of CIT(A) order (Page 92)]*

26. At the time of hearing the Ld D.R submitted before us as hereinbelow:-

3. (i) This ground was raised before the CIT(A) by the Assessing Officer in his remand report [Vide page 71] The Assessing Officer submitted:

> "*The assessee during the appellate proceedings submitted letter dated 13.10.2016 where the assessee has introduced new evidence. The assessee along with the said letter page nos 116 to 120 submitted xerox copies of Extracts from Register of Copyrights claiming that the 'Essar' brand was registered by M/s Essar Investments Ltd. On perusal of the same (page no 116 to 118) it is seen that the category 'Class and description of the work" it is registered as Artistic work with the title of the work 'Essar'. On perusal of page no 119 and 120 of the letter dated 13.10.2016, it is seen that the Category 'Class and description of the work' it is registered as Artistic work with the title of the work 'Essar' with a '+' sign and words 'POSITIVE ACTION'. Thus, the logo of the brand 'Essar' registered and which is transferred to the assessee for use is registered as 'Artistic' work. The assessee trust uses the name 'Essar' with +ve sign and words 'POSITIVE ACTION' by virtue of settlement of brand and by exploiting the logo of ESSAR it derives income by way of royalty. The definition of property as per the provision of sec 56(2)(vii)(d) is as under:*
>
> *'(d) "Property" means the following capital assets of the assessee namely*
>
> *(i)Immovable property being land or building or both;*
> *(ii) Shares and securities;*
> *(iii) Jewellery;*
> *(iv) Archaeological collections;*
> *(v) Drawings;*
> *(vi) Paintings;*
> *(vii) Sculptures;*
> ***(viii) Any work of art;***
> *(ix) Bullion*
>
> *The registration of the brand "Essar" is done as artistic work in nature and, therefore, the same falls in the category of 'Any work of art' in the definition of*

property as per section 56(2)(vii) of the I.T. Act as the assessee uses the same logo. Hence, the explanation of the assessee that the transfer of the brand does not fall in the definition of property as per the provision of section 56(2)(vii) is not acceptable.

(ii) The assessee contended that the work of art mentioned in the section is a different concept and the brand does not fall under that. The CIT(A) accepted the contention of the assessee and rejected this ground raised by the assessee. Hence, the issue in the present appeal whether the brand is a property falling under clause 56(2)(vii)(c) Explanation (d).

(iii)The Assessing Officer has relied on the extracts from the Register of Copyrights to hold that the brand is a property under the provision of section 56(2)(vii) of the Act. In this context, it would be useful to refer to the Practice and Procedure Manual 2008 published by the Copyright Office, Government India on Artistic Works a copy of which is placed in Departmental Paper Book –III at page 172. The relevant extracts are given below:

Page1 "1. INTRODUCTION

This document reflects the general practices and procedures of Copyright Office for examination and registration of artistic works. It explains the process for examination of artistic work application(s), documentation of ownership, provides guidelines on how to identify the work of authorship, copyrightable subject matter and discusses the grounds on which a discrepancy letter may be issued."

Page 2 "2.ARTISTIC WORK

Any work which is an original creation of an author or an owner fixed in a tangible form is capable of being entered into the Register of Copyrights, irrespective of the fact whether such work possesses any artistic quality or not."

"1. Definition of Artistic works

"Artistic work" means – a painting, a sculpture, a drawing (including a diagram, map, chart or plan) an engraving or a photograph, whether or not any such work possesses artistic quality, a work of architecture and any other work of artistic materialship; as provided under section 2(c) of the Copyright Act."

Page 3 1.5 "Work capable of being used in relation to goods and services

A work capable of being represented graphically, which is capable of distinguishing goods or services of one undertaking from those of the goods or services of another undertaking shall be considered for the purpose of registration "Work capable of being used in relation to goods or services" such as brand symbols, labels, logos, packaging, Cartoons etc."

Page 10 & 11

"4. COPYRIGHTABLE SUBJECT MATTER

1. Works neither used nor capable of being used in relation to goods or services

Works neither used nor capable of being used in relation to goods or services may include but not limited to painting, photograph, sculpture, drawing, sketches, maps, charts etc.

2. Works used or capable of being used in relation to goods or services

Works used or capable of being used in relation to goods or services may include but not restricted to labels, symbols, marks or logos, associated with a brand or a business

3. How to differentiate between artistic works capable of being used in relation to goods or services and artistic works which are not capable of being used in relation to goods or services.

Such artistic works which have potential to eventually turn into trademarks, or such marks which are outwardly associated with any brand identity represented by a business protected under trademarks, are treated as artistic works capable of being used in relation to goods or services, for Copyright registration purposes and require submission of search Certificate (TM-C) issued by the Trade Mark Registry, in pursuance to section 45 proviso of Copyright Act. 1957. These include, brand logos, labels, packaging, designs, potentially applicable in relation to goods or services, cartoon & figurative drawings potentially applicable in relation to goods or services, and henceforth. Rest may be treated as Artistic works which are not capable of being used in relation to goods or services, for which Search certificate is not required to be submitted, such a paintings, drawings, sculptures, lithographs etc.

<u>Definition of artistic work under Corresponding items in Expl (d) to Sec 2© of Copyright Act section 56(2)(vii) defining property</u>

Painting	*Painting*
Sculpture	*Sculpture*
Drawing	*Drawing*
Any other work of	*Any work of art artistic Craftsmanship*

The above comparison would show that the definition of artistic work in the Practice and Procedure Manual [Artistic Work] published by the Copyright Office is almost the same as the definition of property covering the corresponding items in the Explanation (d) under section 56(2)(vii) of the Income-tax Act. It is also important to note that property under the explanation (d) to section 56(2) is not confined to only work of art, it includes other items like painting, sculpture and drawing also as in the case of definition of artistic work under the Copyright Act.
'
(iv)Page 7 and paragraph 3.4 contains a proforma for submitting the statement of particulars. That form is uniform for both forms of art pure and applied. The copies of the extracts from the Register of Copyrights which represent the forms filled by the assessee is placed at pages 108 and 111of the Departmental Paper Book VI. For ready reference they are reproduced below.

EXTRACTS FROM THE REGISTER OF COPYRIGHTS

Col. No.	*Particulars of the item*	*Extract at P 108- Year of first publication 1993*	*Extract at P 111- Year of first publica–tion 2008*	*Remarks*
1	*Registration Number*	*A-53222/96*	*A-87315/2009*	
2	*Name, address, Nationality of the applicant*	*Essar Investments Limited, 13th Floor, Maker Chamber IV,*	*Essar Investment Limited, Essar House, Mahalaxmi,*	

		Nariman Point, Bombay -400021, Indian	*Mumbai-400034, Indian*	
3	*Nature of the applicant's interest in the copyright of the **work***	*Owner*	*Owner*	
4	*Class and description of the **work***	***Artistic***	***Artistic***	*Artistic*
5	*Title of the work*	*ESSAR*	*ESSAR with + sign and words POSITIVE ACTION*	
6	*Language of the work*	*English*	*English*	
7	*Name, address, nationality of the author and, if the author is deceased, the date of his death*	*Sudarshan Dheer,6, Kartar Bhavan, Minoo Desai Road, Colaba,Bombai-400005 Indian*	*Mr. Michael CurtisStart Creative Ltd., 2,Sheraton Street, Soho, London, U,K.Indian*	*They are the artists*
8	*Whether it is published or unpublished*	*Published*	*Published*	
9	*Year and country of first publication and name, address and nationality of the publishers*	*1993, India, Add. As in col.2 above*	*2008, India, same as in col.2 above*	
10	*Years and countries of subsequent publications, if any, and names and addresses and nationality of the publisher*	*Published from time to time and last published in 1994*	*Published from time to time and last published in 2009*	
11	*Names, address and nationalities of the owners of various rights comprising the copyright in the work and extent of rights held by each, together with particulars of assignments, and licenses, if any*	*Essar Investments Limited, 13th Floor, Maker Chamber IV, Nariman Point, Bombay -400021, Indian*	*Same as in col.2 above.*	
12	*Names, address and nationalities of other persons, if any, authorised to assign or license the rights comprising the copyright*	*Essar Investments Limited, 13th Floor, Maker Chamber IV, Nariman Point, Bombay -400021, Indian*	*Same as in column 2 above*	
13	*If the work is an artistic work, the location of the*	*Bombay Essar Investments Limited, 13th Floor,*	*Same as in col.2 above,*	

	original work, including name, address and nationality of the person in possession of the work (incase of an architectural work, the year of completion of the work should also be shown)	*Maker Chamber IV, Nariman Point, Bombay -400021, Indian*		
14	*If the work is an 'artistic work' which is used or is capable of being used in relation to any goods or services, the application shall include a certificate from the Registrar of Trade Marks in terms of the proviso to sub-section (1) of section 45 of the Copyright Act, 1957*	*Not filled*	*Not filled*	
15	*If the work is an 'artistic work' whether it is registered under the Designs Act 2000, if yeas give details*	*Not filled*	*Not filled*	
16	*If the work is an 'artistic work' if capable of being registered as a design under the Designs Act, 2000, whether it has been applied to an article through an industrial process and , if yes, the number of times it is reproduced*	*Not filled*	*Not filled*	
17	*Remarks*	*A copy of the work is annexed*	*A copy of the work is annexed*	

AO observed that an examination of the above table would show the following:

(a) There were two registrations made for two brands. One related to the publication in 1993, but registration no. was allotted in 1996. There the Title was "ESSAR". The other related to publication in 2008, but the registration no. was allotted in 2009. Here the Title was different; it was "ESSAR with + sign and words POSITIVE ACTION. Copies of both the works are annexed. The assessee has granted licence to different companies for using the second modified logo.

*(b) The class and description of the work is **"Artistic"***

*(c) Two **different artists, Mr Sudarshan Dheer and Michael Curtis,** have been engaged to create the artistic works. They must have been paid money for creating the artistic works. Yet, Essar Investment Limited did not charge any amount from the assessee while settling the brand.*

*(d) Throughout the Practice and Procedure Manual and the above table, the word **"work"**is used to describe the subject matter of copyright.*

(v). On the basis of the above elaborate discussion with reference to the Practice and Procedure Manual 2018, issued by the Copyright Office, Government of India, the Essar Brand will fall under the definition of property under section 56(2)(vii) Explanation (d).

(vi). The assessee objected and filed the submission to the remand report of the Assessing Officer raising the ground on applicability of the provision of 56(2)(vii), the assessee quoted Rule 11UA (refer P.74 of CIT(A)'s order). This rule is framed for the purpose of valuation u/s 56 of the Act. The relevant part of the said Rule is reproduced below:

"*11UA (1)(b) – Valuation of archaeological collections, drawings, paintings, sculptures or any work of art*

(x) *the fair market value of archaeological collection, drawings, paintings or sculptures or any work of art (hereinafter referred to as **artistic work**) shall be estimated to be the price which it would fetch if sold in the open market on the valuation date.*

*(ii) in case the **artistic work** is received by way of purchase on the valuation date from a registered dealer, the invoice value of the **artistic work** shall be the fair market value.*

*(iii) in case the **artistic work** is received by any other mode and the value of the artistic work exceeds rupees fifty thousand, then the assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date.*"

*The above Rule would show that "archaeological collection, drawings, paintings or sculptures or any work of art" have been put under one basket (category) named "**artistic work**" in the Rule 11UA . This definition is pari material with the definition of "**artistic work"** under the Copyright Act. The definition of artistic work is not confined to work of art only. It includes archaeological collections, drawings, paintings and sculptures also which are included in the definition of artistic work under the Copyright Act.*

*(vii) The above analysis would show that there is no doubt that since the brand has been registered as **"artistic work"** under the Copyright Act, ipso facto, it falls under the category of property under section 56(2)(vii)© read with Explanation (d).*

(viii)Rule 11U defines 'valuation date' as the date on which the property is received by the assessee. Here, in absence of any assistance from the assessee, the brand "ESSAR" has been valued at Rs. 1668.10 crore by the Discounted Cash Flow (DCF) method which is a recognised method of valuation.

(ix)The assessee has cited case laws to narrow down the definition of artistic work. When we have a statutory comprehensive definition of artistic work which has been adopted in Income-tax Rules, there is no case for referring to case laws for definition.

(x)In view of the above, it is respectfully prayed that the Ground No.4 may be allowed

27. In response, Ld AR submitted his submissions as under:

1. It is submitted that the definition of "property" in the Explanation to section 56(2)(vii) of the Act is restrictive in nature inasmuch as it is defined exhaustively as opposed to the definition of a capital asset in section 2(14) of the Act which defines a capital asset to mean property of any kind held by an assessee, whether or not connected with his business or profession and it includes both tangible and intangible property. As against that, Explanation (d) to section 56(2) of the Act coins a definition of "property" which is restricted to include only those capital assets as defined therein. Accordingly, while the meaning of the term property may have a wide amplitude for the purpose of section 2(14) the meaning under section 56(2) is restricted to only include the assets mentioned therein.

Further, it is submitted that `Brand' and `work of art' are different type of capital assets. In this regard, reference is drawn to the definition of "capital asset" under section. 2(14) of the Act, reproduced below:

"2(14) "capital asset" means—

(a) property of any kind held by an assessee, whether or not connected with his business or profession;

(b) ....but does not include—

(i) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes—

(a) .....;

(f) any work of art."

..... On a perusal of the above definition of 'capital asset' u/s 2(14) of the Act, it may be noted that that though "work of art" is a capital asset, it can be treated as being in the nature of 'personal effects' considering that 'work of art' is specifically excluded from the category of capital assets treated as 'personal effects'. However, Brand is an intangible capital asset which is associated with the business of an assessee and hence, cannot be treated as a capital asset falling under the category of 'personal effects'. Therefore, it is submitted that the term 'work of art' as used in section 56(2) is meant to cover personal asset of an assessee and since the "ESSAR" brand is not a personal asset, but an asset which is used for business purpose, it is not covered within the scope of section 56(2)(vii) of the Act.

2. Based on above, it is submitted that as the Brand is not covered within the meaning of "any work of art", it would not fall within the meaning of the word "property" in clause (d) of the Explanation and consequently, the Brand received by the assessee would not be taxable under the provisions of section 56(2)(vii) of the Act.

3. It is submitted that the definition of "property" is a restrictive definition and would include only those capital assets which are specifically covered under the definition of "property" within its domain in the Explanation to section 56(2)(vii) as it uses the word "means". The term 'means' used in the definition of "property" in fiscal interpretation has to be understood in the sense indicated in the provision of the Act and it cannot go beyond or extend to what is defined specifically as "meant".

4. In the present case what has been gifted by EIL to the assessee is the Brand as is borne out by the certificate of registration of the trademarks. The intellectual property in the brand is protected by registering it as a trademark and a copyright. Thus, the asset gifted is not property as defined in clause (d) of the Explanation. The mere fact that a trademark registration is obtained or a copyright protection obtained does not mean that what is transferred is a work of art.

5. The meaning of "work of art" in various dictionaries is as under: ***Corpus Juris Secundum — Volume 6A***

"Work of art. As generally used, it has been said that the term is difficult to define, but the definitions of artists and lexicographers are any human work made with the specific purpose of stirring human emotions; something displaying artistic merit; anything in the formation or into the accomplishment of which art in any sense has entered; specifically, a production of any one of the fine arts, a skillful production of the beautiful invisible form, the handiwork of an artist, or something more than the mere labor of an artisan; and the term has been said to include all works belonging fairly to the so-called fine arts, painting, drawing, and sculpture. The term "works of art', as descriptive of an authorized subject of copyright, is defined in C.J.S. Copyright and Literary Property 32, and as descriptive of importations, in C.J.S. Custom Duties 62."

Cambridge Dictionary

"an object made by an artist of great skill, especially a painting, drawing, or statue"

Merriam Webster Dictionary

"a product of one of the fine arts especially, a painting or sculpture of high artistic quality"

Chambers Dictionary

"a painting, sculpture or other production in the fine arts, especially one of high quality, anything constructed or composed with manifest skill"

Collins Dictionary

"a work of art is a painting or piece of sculpture which is of high quality"

Macmillan Dictionary

"something such as a painting or sculpture that is of very high quality"

6. In this regard it is submitted that a 'brand' as is commonly understood is a design, sign, symbol or a combination of these that is easily identifiable as belonging to a company/concern. This helps to identify a product and distinguish it from other products and services or from its competitors. Over time this image becomes associated with the level of quality and satisfaction in the minds of the customers. The brand thus helps by *standing out for certain benefit and value. Brand identifies distinct products/services of the company by Trade Name and Logo, a message, an image, an idea or an action. Thus, branding isn't to invent something new, but to communicate something that already exists, for a purpose. As against that 'work of art' comprises of paintings, sculptures, drawings, engravings, photographs, works of architecture and means an artistic work which is an artistic innovation and is exceptional in its artistic quality. In general parlance, "work of art" is construed as coming into existence of new thing whereas brand is construed as promotion or marketing of a thing already in existence. It is submitted that the brand "ESSAR" is only a trademark created for the identifying the product and services which are marketed under the brand and is neither an artistic innovation nor possess any exceptional artistic quality and as such cannot be covered under the specific head of "work of art". Therefore, the brand "ESSAR" cannot be considered as "any work of art" within the meaning of section 56(2)(vii) of the Act.*

*7. The term 'work of art' in the definition of property under section 56(2)(vii)(c) has not been defined under the Act. However, a similar term was used by the Legislature in section 5 of the Wealth-tax Act, 1957. A question arose before the Madras High Court in the case of **M.A. Chidambaram vs. CWT (239 ITR 371) (Mad.)** that the trophies and cups won by the assessee in races which were made of silver could be considered as "works of art" and, consequently, the trophies would be exempted from the liability to wealth tax. The High Court rejected the argument of the assessee and held that, for an article to qualify as "work of art" there must be an element of human skill which on a mere look up can be regarded as a work of art and further held that every ordinary article is not a work of art and there must be some artistic innovation to be regarded as work of art. The relevant part of the judgment is reproduced as under (Pg.2):*

*"The expression "works of art" is not a term of art, however, its meaning has to be construed in the context of the provision of section 5(1)(xii) and the expression "works of art" is employed along with other expressions like archaeological, scientific or art collections, books or manuscripts belonging to the assessee. **Therefore, there must be an element of human skill involved or applied in the manufacture of the product which on a mere look up it can be regarded as works of art.** In Halsbury's Laws of England, fourth edition, in paragraph 892, the expression "works of art" is defined as follows:*

"Works of art" applies to paintings, drawings and pastels executed by hand, original engraving prints and lithographs and original sculptures and statutory (sic) in any material."

In Sampath lyengar's The Three New Taxes, the expression and term "works for art" (at page 388) is as under:

"Works of art are those which are the result of human skill applied in various directions, such as, sculptures by Michael Angelo, paintings by Raphael, Ruben, Vandyke, Leonardo da Vinci, Botticelli, Rembrandt, etc., or portraits by Ravi Varma, etc. Leading examples of private art collections in India but to which public entry is permitted are:

(1) the collections of Sir Salar Jang situate in Hyderabad;

(2) the Mullick Art collections at Calcutta;

(3) the vizianagaram collections at Varanasi, and

(4) the Singhania collections at 'The Retreat, Kanpur."

A reading of the above two extracts clearly shows that there must an element of human skill employed in the making of the article and the result of human skill should be apparent in the article to regard them as works of art. <u>It is not every article which is manufactured manually that can be regarded as a work of art and there must be some artistic innovation which would turn them into works of art.</u> *The Tribunal on inspection found that the trophies carry certain engraved markings of the occasion and events in which the assessee won the cups and trophies and there was no human skill applied on the said trophies or cups. Since the Appellate Tribunal has come to the above conclusion on visual inspection of the samples of articles produced before it, we are not in a position to accept the argument of learned counsel for the assessee that the cups and trophies of the assessee should be regarded as works of art. We are of the view that the finding recorded by the Appellate Tribunal is a finding recorded on an examination of the materials and the findings should be regarded as a finding of fact. The assessee has not established that there has been human skill employed which made the article to be regarded as a work of art."*

8. Similarly, the Gujrat High Court in the case of Shantadevi P. Gaekwad v Wealth-tax Officer [2017] 82 taxmann.com 460 (Guj.) *was concerned with the issue as to whether horse chariots, referred to as "Baggi", having exquisite engraving and embossing on the gold panels attached to it could be considered as "a work of art". The High Court accepted the argument of the assessee and held that since the Baggi contained exquisite designs which had an aesthetic quality to it, the Baggi was in the nature of "a work of art". The relevant portion of the judgment is reproduced as under* ***(Pg-_7):***

"17. We may advocate perhaps not so restrictive understanding of the term "work of art" as to confine it to the work of greatest of the artists of the bygone era. The examples cited in the Madras High Court decision from the commentary of Sampath lyengar while explaining the term "work of art" of sculptures and paintings of such legendary artists such as Rapheal, Ruben, Vandayke, Leonardo Da Vincy etc., we would perhaps site with an understanding adopted by the Andhra Pradesh High Court in the case of Sp. Zainab Noorul Sayeeda (supra). ***<u>We would still emphasis that a "work of art" must be a creation through human skill and must present exquisite and rare aesthetic beauty. No article brought into existence by human effort can be called "work of art" but has to be something which is rare and/or exceptional aesthetic beauty with artistic input."</u>***

8.Similar view has been taken by **Calcutta High Court in case of Rajendra Kumar Sethia vs. CWT (194 ITR 218) wherein it was** *held as under* ***(Pg 2):***

"12 In our view, jewellery having been considered separately, it will not come within the purview of 'work of art' Even assuming that a piece of jewellery is a Work of art' and comes within the purview of Section 5(i)(xii), ***<u>it cannot be ordinary piece of iewellery</u>*** *which is meant for personal use and which, by it very nature, is liable to be sold whenever such occasion arises."*

9. It is also submitted that registration of the logo "ESSAR" under the Copyrights Act, 1957 as "an artistic work" does not ipso facto mean that it is in the nature of "a work of art". In this regard reliance is placed on the definition of "artistic work" in section 2(c) of the Copyrights Act, 1957 which reads as under ***(Pg. 3):***

"(i) a painting, a sculpture, a drawing including a diagram, amp, chart or plan, an engraving or a photograph, ***<u>whether or not any such work possesses artistic quality;</u>***

10. The above definition clearly shows that even if the drawing has no artistic quality, for the purpose of Copyrights Act, 1957, it is considered as an artistic work because the purpose of the Copyrights Act is to protect the rights of an artist who has created artistic work so that it cannot be reproduced by any other person without his permission. Therefore, the purpose for which the definition "artistic work" is used under the Copyright Act is different from the purpose with which "work of art" is used by the Legislature in section 56(2)(vii) of the Act. It is further submitted that all "works of art" are "artistic works" but however, all "artistic works" are not "works of art". As held by Madras High Court in M.A.Chidambaram (supra) and the Gujarat High Court in Shantadevi P. Gaekwad (supra) "a work of art" means something which represents artistic innovation and is rare and/or possesses exceptional aesthetic beauty with artistic input.

This has also been confirmed by ***Hon'ble Delhi High Court in the case of Societe Des Produits Nestle v. Continental Coffee Ltd*** *as under:*

"9.. in fact, the definition of artistic work given in Section 2(c) of Copyrights Act makes it evident that a drawing would be an artistic work irrespective of whether the work possesses any artistic quality or not."

Thus, based on above it is submitted that provisions of section 56(2)(vii) shall not apply to the 'Essar' brand as it is not 'a work of art' as provided under the Act and, therefore, the same is not chargeable to tax under the Act.

28. Considered the rival submissions and the material placed on record. As observed by us hereinabove, the genesis of the controversy hinges around the claim of the A.O that as the “Essar” brand was registered by EIL as an ‘artistic work’ under the Copyrights Act, 1957, therefore, the same would fall within the realm of the definition of “property” as contemplated in clause (d) of the ‘Explanation’ to Sec. 56(2)(vii)(c) of the Act, and thus, chargeable to income-tax under the head “Income from other sources” u/s 56(2) of the Act. Controversy qua the issue in hand lies in a narrow compass i.e as to whether or not the ‘Essar” brand registered as an ‘artistic work’ under the Copyrights Act, 1957 would ipso facto bring the same within the meaning of “any work of art” as contemplated in the definition of “property” in the ‘Explanation (d) to Sec. 56(2)(vii) of the Act. Before adverting any further, we may herein observe, that as stated by the ld. A.R, and rightly so, the definition of “property” as contemplated in the ‘Explanation’ to Sec. 56(2)(vii) is restrictive in nature and exhaustively refers to the assets which would fall within the domain of the said definition. On a perusal of the definition of “capital asset” as envisaged in Sec. 2(14) of the Act, we find, that the same, inter alia, provides that it would not include “personal effects”,

with an exception carved out for "any work of art". For sake of clarity the relevant extract of the definition of "capital asset" as provided in Sec. 2(14) of the Act is reproduced as under :

> "2(14) "capital asset" means—
>
> *(c)* property of any kind held by an assessee, whether or not connected with his business or profession;
>
> *(d)* .... but does not include—
>
> **(ii) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes—**
>
> **(a) .....;**
>
> **(f) any work of art."**

On a perusal of the aforesaid definition of 'capital asset' u/s 2(14) of the Act, it can safely be gathered that though "any work of art" is a capital asset, it can be treated as being in the nature of 'personal effects' considering that 'any work of art' is specifically excluded from the category of capital assets treated as 'personal effects'. On the other hand, as a "Brand" is an intangible asset which is associated with the business of an assessee, therefore, it cannot be brought within the meaning of "personal effects" which, inter alia, includes "any work of art". Our aforesaid observations are relevant for distinguishing "any work of art" as against a "brand". As the term "any work of art" as used in Sec. 2(14) of the Act or 'Explanation (d) to Sec. 56(2)(vii) had not been defined in the Act, therefore, we shall look into its dictionary meaning, as under :

> "5. The meaning of "work of art" in various dictionaries is as under: **Corpus Juris Secundum — Volume 6A**
>
> "Work of art. As generally used, it has been said that the term is difficult to define, but the definitions of artists and lexicographers are any human work made with the specific purpose of stirring human emotions; something displaying artistic merit; anything in the formation or into the accomplishment of which art in any sense has entered; specifically, a production of any one of the fine arts, a skillful production of the beautiful invisible form, the handiwork of an artist, or something more than the mere labor of an artisan; and the term has been said to include all works belonging fairly to the so-called fine arts, painting, drawing, and sculpture. The term "works of art', as descriptive of an authorized subject of copyright, is defined in C.J.S. Copyright and Literary Property 32, and as descriptive of importations, in C.J.S. Custom Duties 62."

Cambridge Dictionary
"an object made by an artist of great skill, especially a painting, drawing, or statue"

Merriam Webster Dictionary
"a product of one of the fine arts especially, a painting or sculpture of high artistic quality"

Chambers Dictionary
"a painting, sculpture or other production in the fine arts, especially one of high quality, anything constructed or composed with manifest skill"

Collins Dictionary
"a work of art is a painting or piece of sculpture which is of high quality"

Macmillan Dictionary
"something such as a painting or sculpture that is of very high quality"

As per the dictionary meaning, the term "work of art" means an object made by an artist of great skill i.e something that is considered to have aesthetic value, is beautiful, intriguing, interesting, creative or extremely well done. Say, for example a painting by renowned artists such as Rapheal, Ruben, Vandayke, Leonardo Da Vincy etc. would fall within the realm of the definition of "work of art". Although the term "any work of art" as provided in the definition of "property" under "Explanation (d)" to section 56(2)(vii)(c) had not been defined under the Act, however, a similar term was used by the legislature in Section 5 of the Wealth-tax Act, 1957. Considering the scope and gamut of the term "any work of art" as used in Sec. 5 of the Wealth Tax Act, 1957, the Hon'ble Madras High Court in the case of **M.A. Chidambaram vs. CWT (1999) 239 ITR 371 (Mad.)**, had observed, that the trophies and cups won by the assessee before them, in races, which were made of silver could not be considered as "works of art" and, consequently, the same would not be exempted from the liability to wealth tax. The High Court while rejecting the claim of the assessee, had observed, that for an article to qualify as a "work of art" there must be an element of human skill which on a mere look up can be regarded as a work of art. It was further observed by the Hon'ble High Court that every ordinary article is not a work of art and there must be some artistic innovation for regarding the same as a work of art. The observations of the Hon'ble High Court are culled out as under :

"5. We have carefully considered the submissions of the learned counsel for the parties. Sec. 5 of the WT Act provides that wealth-tax should not be payable in respect of the assets mentioned in various sub-clauses. Sub-cl. (xii) of cl. (1) of s. 5 of the WT Act reads as under:

"any works of art, archaeological, scientific or art collections, books or manuscripts belonging to the assessee and not intended for sale;"

The expression "works of art" is not a term of art, however, its meaning has to be construed in the context of the provisions of s. 5(1)(xii) of the Act and the expression "works of art" is employed along with other expressions like archaeological, scientific or art collections, books or manuscripts belonging to the assessee. Therefore, there must be an element of human skill involved or applied in the manufacture of the product which on a mere look up it can be regarded as works of art. In Halsbury's Laws of England Fourth Edition in paragraph No. 892 the expression "works of art" is defined as follows:

"Works of art" applies to paintings, drawings and pastels executed by hand, original engravings prints and lithographs, and original sculptures and statuary in any material".

In Sampath Iyengar's The Three New Taxes, the expression and term "works of art" (at p. 388) is as under:

"Works of art are those which are the result of human skill applied in various directions, such as, sculptures by Michael Angelo, paintings by Raphael, Ruben, Vandyke, Leonardo de Vinci, Potticelli, Rembrandt, etc., or portraits by Ravi Varma, etc. Leading examples of private art collections in India but to which public entry is permitted are:

'(1) the Collections of Sir Salar Jang situate in Hyderabad,

(2) the Mullick Art collections at Calcutta,

(3) the Vizianagaram Collections at Varanasi, and

(4) the Singhania Collections at "The Retreat", Kanpur' ".

A reading of the above two extracts clearly shows that there must be an element of human skill employed in the making of the article and the result of human skill should be apparent in the article to regard them as works of art. It is not every article which is manufactured manually that can be regarded as works of art and there must be some artistic innovation which would turn them as works of art. The Tribunal on inspection of trophies and cups came to the conclusion that the said trophies carry certain engraved markings of the occasion and events in which the assessee won the cups and trophies and there was no human skill applied on the said trophies or cups. Since the Tribunal has come to the above conclusion on the visual inspection of the samples of articles produced before it, we are not in a position to accept the argument of the learned counsel for the assessee that the cups and trophies of the assessee should be regarded as works of art. We are of the view that the findings recorded by the Tribunal is a finding recorded on examination of the materials and the findings should be regarded as a finding of fact. The assessee has not established that there was human skill employed which made the articles to be regarded as works of art. Therefore, in view of the specific finding of the Tribunal on the cups and trophies won by the assessee in the horse races, we are of the view that the articles cannot be regarded as works of art and the Tribunal was right in holding that the assessee is not entitled to claim

> exemption under s. 5(1)(xii) of the Act. Hence, we are of the view that both the questions of law are liable to be answered against the assessee."

On somewhat similar facts, the Hon'ble High Court of Gujarat in the case of Shantadevi P. Gaekwad Vs. Wealth tax Officer (2017) 82 taxmann.com 460 (Guj) ,was seized of the issue as to whether horse chariots referred to as "Baggi" , having exquisite engraving and embossing on the gold panels attached to it could be considered as "a work of art". Answering the said issue in the affirmative, it was observed by the Hon'ble High Court that since the "Baggi" contained exquisite designs which had an aesthetic quality to it, the same was in the nature of "a work of art". The relevant observations of the Hon'ble High Court are as under :

> *"17. We may advocate perhaps not so restrictive understanding of the term "work of art" as to confine it to the work of greatest of the artists of the bygone era. The examples cited in the Madras High Court decision from the commentary of Sampath lyengar while explaining the term "work of art" of sculptures and paintings of such legendary artists such as Rapheal, Ruben, Vandayke, Leonardo Da Vincy etc., we would perhaps site with an understanding adopted by the Andhra Pradesh High Court in the case of Sp. Zainab Noorul Sayeeda (supra).* ***We would still emphasis that a "work of art" must be a creation through human skill and must present exquisite and rare aesthetic beauty. No article brought into existence by human effort can be called "work of art" but has to be something which is rare and/or exceptional aesthetic beauty with artistic input."***

In the backdrop of our aforesaid observations, we are of the considered view, that a simplicitor registration of the logo "Essar" under the Copyrights Act, 1957 as "an artistic work" would not ipso facto mean that it is in the nature of "a work of art". Our aforesaid view is fortified by the definition of "artistic work" in Sec. 2(c) of the Copyright Act, 1957, which reads as under :

> "(i) a painting, a sculpture, a drawing including a diagram, amp, chart or plan, an engraving or a photograph, **whether or not any such work possesses artistic quality;**

On a perusal of the aforesaid definition of "artistic work" in Copyright Act, 1957, we find that the same provides that even if the drawing including a diagram, amp, chart or plan, an engraving or a photograph has no artistic quality, for the purpose of Copyrights Act, 1957, it is to be considered as an artistic work because the purpose of the Copyrights Act is to protect the rights of an artist who has created artistic work so that it cannot be reproduced by any other person without his permission. In the backdrop of the aforesaid meaning of “artistic work” in Copyright Act, 1957, we are of the considered view that the purpose for which the said term is used under the Copyright Act is different from the purpose with which "any work of art" is used by the Legislature in section 56(2)(vii) of the Act. Also, we find substance in the claim of the ld. A.R, that though all "works of art" are "artistic works" but however, all "artistic works" are not "works of art". Our aforesaid view is fortified by the judgment of the Hon’ble High Court of Delhi in the case of Societe Des Produits Nestle Vs. Continental Coffee Ltd., as relied upon by the ld. A.R, wherein it was observed as under :

> *“9. in fact, the definition of artistic work given in Section 2(c) of Copyrights Act makes it evident that* ***a drawing would be an artistic work irrespective of whether the work possesses any artistic quality or not****."*
>
> (emphasis supplied by us)

On the basis of our aforesaid observations, we are of the considered view that as the brand “Essar” is neither an artistic innovation nor possesses any artistic quality for being brought within the meaning of “any work of art” as contemplated in the definition of “property” in “Explanation (d)” to Sec. 56(2)(vii) of the Act, the same, merely for the reason that it was registered under the Copyright Act, 1957 as “an artistic work” could not be held to be in the nature of “a work of art”.

28.1 Alternatively, we find that the methods for valuing the Fair Market Value (FMV) as specified U/rule 11UA(1)(b), inter alia, for “any work of art” are only three, i.e. (i) the estimated price it would fetch if sold in the open market on the valuation date; (ii) if purchased on the valuation date from a registered dealer, the invoice value of such artistic work; and (iii) if received by any other mode and the value involved is more than Rs. 50000/-, then, the price it would fetch if sold in the open market on the valuation date, as per the report of a registered valuer. Accordingly, the methods specified in Rule 11UA(1)(b) for valuing “any work of art” does not contain the method adopted by the A.O. In the present case before us, the A.O treating the “Essar” brand as “any work of art”, had valued the same by adopting the DCF method, which we are afraid is not the method specified in the aforesaid rule. In the backdrop of our aforesaid observations, we are of the considered view, that though we have held that as the brand "Essar" is neither an artistic innovation nor possesses any artistic quality for bringing it within the meaning of "any work of art" as contemplated in the definition of "property" in "Explanation (d)" to Sec. 56(2)(vii) of the Act, however, alternatively, as observed by us hereinabove, the very method adopted by the A.O for valuing the same by applying DCF method is not as per the mandate of law. We, thus, in terms of our aforesaid observations concur with the view taken by the CIT(A) that the brand "Essar" contributed as a gift by EIL to the corpus of the assessee trust could not have been brought within the meaning of "any work of art" as contemplated in the definition of "property" in 'Explanation (d)" to Sec. 56(2)(vii) of the Act, and thus, on the said count be subjected to tax under the head "Income from other sources". The **Ground of appeal No. 4** is dismissed.

Ground no. 5: Whether on facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in holding that the provisions of section 28(iv) of the Act would not apply to the value of the 'Essar' brand, trademarks and copyrights purported to have been settled by EIL to the assessee without any consideration.

29. Before us, the Ld D.R submitted the below submissions relating to the ground no 5 alongwith the relevant facts:

> *(i) This ground was raised by the Assessing Officer for the first time before the CIT(A) in his remand report as under [vide page 39 of the order of the CIT(A)].*
>
> *"Without prejudice to the arguments in the assessment order of my predecessor, the value of Brand received should be considered taxable under section 28(iv) of the I.T. Act 1961. The following reasons may be considered on this ground.*
>
> *a) The value of "ESSAR" brand acquired by the assessee without making any payment towards cost of acquisition is taxable u/s 28(iv) as any benefit, whether convertible into money or not, arising from the business as taxable under the head "Income from Business or Profession"*
>
> *b) The assessee had obtained the benefit on acquiring the "ESSAR" brand without making any payment towards its cost of acquisition and the assessee had even not shared its royalty receipts with M/s EIL, thus the assessee has obtained the benefit on obtaining the 'ESSAR' brand free of cost.*

c) Such benefit has arisen in course of assessee's business since the assessee has been assessed at royalty of Rs. 29.59 crores under the head "Income from Business or Profession" "

(ii) The CIT(A) in paragraph14 (p94 of his order) rejected this ground. He observed that prior to the settlement of the "ESSAR" brand and its exploitation, the assessee trust had not commenced any business operation. It was not carrying on any business whatsoever in connection with which it received the brand. The said brand constituted the business generating apparatus and was anterior to the receipt of the brand name; there was no business of any sort being undertaken by the assessee. He relied on a case law.

(iii) It is respectfully submitted that the fundament flaw in the order of the CIT(A) springs from the basic wrong premises that the transactions are genuine and the brand was settled into the trust on 29.03.2012. The stand of the Revenue is that all these were sham transactions. There is no third party independent evidence about the settlement on that date. There was inexplicable lull of ten months before the income from the purported transaction surfaced when the brand license agreements were signed on 6th February 2013 generating royalty income. At that point of time, the source of the periodical perpetual royalty was enquired into and as explained the value of this source, i.e. the brand was determined at Rs.1668.10 crores. So, the source is linked to the returns from the source. The assessee has shown business income. So, a view can be taken that the source is also business income. Nobody knows why the assessee got such a costly asset free of cost. Nobody can vouchsafe that the assessee was not having any business. Everything is shrouded in mystery. In this chaotic situation, since the assessee is showing business income, one legitimate inference can be drawn that the assessee has been the beneficiary of a complex and dubious business deal and has reaped benefit of Rs. 1668.10 crores. Hence, discarding the traditional approach, it can be safely held that benefit of Rs.1668.10 crores arose to the assessee from this dubious business arrangement.

(iv) Hence it is respectfully submitted that alternatively, the value of the brand is taxable under 28(iv) of the Act. It is prayed that this ground of appeal may be allowed.

30. In response, the Ld AR submitted that the AO raised this issue in his remand report and submitted as below:

- *The AO raised the contention as to the applicability of section 28(iv) of the Act for the first time in his remand report dated 13 February 2017. The AO in his remand report stated that the value of the Brand acquired by the assessee without making any payment towards its acquisition is taxable under section 28(iv) of the Act, as any benefit, whether convertible into money or not, arising from the business is taxable under the head "Profits and gains from business or profession"*

- *The assessee had obtained a benefit on acquiring the "Essar" brand without making any payment towards its cost of acquisition and the assessee had not even shared its royalty receipts with EIL, thus, the assessee had obtained the benefit on the "Essar" brand free of cost.*

- *Such benefit has arisen in the course of assessee's business since the assessee has disclosed the royalty of Rs. 29.59 crores under the head 'Profits and gains from business or profession'.*

31. Ld. A.R further submitted that the CIT(A) had rejected the contentions of the A.O with the following observations:

- *The CIT(A) observed that section 28(iv) of the Act was not invoked by the AO in the assessment order. The CIT(A) held that section 28(iv) of the Act taxes the value of any benefit or perquisite, whether convertible into money or not, arising from the business or exercise of any profession. Before the settlement of brand was made by EIL, the assessee has not commenced its business and was not carrying on any business operations or any business activity. In the absence of a business being carried on by the assessee, mere receipt of settlement of the brand will not trigger section 28(iv) of the Act.*

- *The CIT(A) held that the assessee was not carrying out any business activity whatsoever and also relied on the decision of DP World (P) Ltd v. DCIT (supra) wherein it was held that section 28(iv) of the Act does not apply to capital receipts.* ***(Para 14 of CIT(A) order (Page 92)]***

And he submitted before us:

1. In this regard, it is submitted that the assessee is an irrevocable discretionary trust formed on 29 March 2012. EIL gifted the Brand in favour of the assessee vide its boards and shareholders' resolution dated 29 March 2012. The assessee being incorporated on 29 March 2012 itself had not commenced any business operations when the Brand was transferred by EIL. Section 28(iv) of the Act taxes the value of any benefit or perquisite, which arises from the business or exercise of profession carried on by an assessee. In the absence of any business being carried on or exercise of any profession, a mere receipt on transfer of the Brand by EIL to the assessee would not trigger the provisions of section 28(iv) of the Act. The Brand was gifted to the assessee immediately on its coming into existence and, thereafter, the assessee exploited the Brand by executing royalty license agreements from which it now earns brand license fee. Prior to the gift of the Brand the assessee had neither commenced any business operations nor earned any income nor had any business activity. Given this undisputed fact section 28(iv) of the Act cannot have any application.

2.Reliance in this regard is placed on the decision of the Calcutta High Court of ***CIT v/s General Industrial Society Ltd. (2003) 262 ITR 1 (Cal),*** *wherein the question was whether the amount received on transfer of a licence, which was acquired for setting up a new business and remained unutilized could be charged to tax by invoking the provisions of section 28(iv). The High Court held in favour of the assessee holding as under* ***(Pg.6):***

"8. ***First, the licence was not an outcome of the business carried on by the assessee. It was in no way connected with the business carried on by the assessee.*** *On the other hand, this licence was obtained for the purpose of setting up of altogether a new business in respect of an item not covered within the business of the assessee and for which a separate licence was necessary.* ***Therefore, the benefit arising out of the said licence could not be said to be a benefit arising out of a business carried on by the assessee, until pursuant to the licence the new business was set up. The benefit conceived under cL (iv) of s. 28 has to be***

<u>related to the business carried on by the assessee, which, in our view, is not possible to be brought within the scope of the said provision."</u>

The intention of the Legislature that capital receipts were not intended to be covered by section 28(iv) of the Act is gathered from subsequent amendments made in the section. Section 28(iv) of the Act was introduced by Finance Act 1964, the Circular No. 20D dated 7 July, 1964 issued by CBDT, explaining the provisions of section 28(iv) is extracted as under:

"Assessment of the value of any benefit or perquisite arising from business or exercise of a profession, as income from business or profession.

A new clause (iv) has been inserted in section 28 with effect from 1-4-1964 by Section 7 of the Finance Act, 1964, under which the value of any benefit or perquisite (whether convertible in money or not) arising from business or exercise of profession will be chargeable to tax under the head "Profits and gains of business or profession".

The effect of the above-mentioned amendment is that in respect of an assessment for the assessment year 1964-65 and subsequent years, the value of any benefit or amenity, in cash or kind, arising to an assessee from his business or the exercise of his profession, e.g., the value of rent-free residential accommodation secured by an assessee from a company in consideration of the professional services as a lawyer rendered by him to that company, will be assessable in the hands of the assessee as his income under the head "Profit and gains of business or profession."

3. From the above circular, it is clear that the object for the introduction of section 28(iv) of the Act was to tax the income which is received in kind during the course of carrying on of a business or profession. In the instant case, the Brand was not received by the assessee in the course of carrying on of its business. Therefore, the provisions of section 28(iv) of the Act do not apply. The following decisions of the Tribunal have held that a gift received by the assessee cannot be taxed under section 28(iv) of the Act:

a. Reliance in this regard is placed on the decision of the Mumbai Tribunal in DP World (P) Ltd v. DCIT (140 ITD 694), wherein it is held that a transaction by way of a gift is considered to be a capital receipt and cannot be held as a benefit or perquisite arising from business as there is no direct nexus to the business dealings. The relevant extract of the decision is as under:-

"20. We have carefully considered both the provisions. Let us first examine the provisions of sec.28[iv] of the Act relied upon by the CIT(A).

"28. Profits and gains of business or profession. The following income shall be chargeable to income tax under the head "Profits and gains of business or profession",

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession; "

In our humble opinion, the transaction is of a gift which is a capital receipt in the hands of the assessee and therefore it cannot be said to be a case of any benefit or perquisite arising from business. The contention of the Ld. Departmental Representative that by the said transaction the assessee has derived benefit and such benefit has arisen from the business connection of the donor and the donee, cannot be accepted as no direct nexus has been established by any tangible *material brought on record by the Ld. CIT(A). Simply because both the donor and the donee happen to belong to the same group cannot ipso facto establish that they have any business dealings. As we have held that it is a case of a valid gift which is to be treated as capital receipt in the hands of the assessee, in the absence of any specific provision taxing a gift as a deemed business income, provisions of section 28(iv) cannot be applied to the facts of the case. The CIT(A) erred in taxing the value of the stamp duty as income under section 28(iv) of the Act."*

b. *DCIT vs Nerka Chemicals Pvt Ltd (Para 43 to 47 of ITAT Order]*

"So far as the taxability of gifted shares under section 28(iv) of the Act is concerned, we are of the view that the provision of section 28(iv) can be invoked to bring to tax the amount or benefit, if the three conditions are fulfilled; viz (i) the assessee has to receive a benefit or a perquisite; (ii) the benefit or perquisite must be in a form other than cash; (iii) such receipt must arise from the carrying on of the business. Admittedly in the present case the assessee has received the shares in gift and, therefore, conditions (i) and (ii) above is fulfilled but the third condition is not satisfied. We have already noted that the business of the Appellant is trading in chemicals.

With the aforesaid discussion, we are of the view that the revenue has failed to demonstrate that the receipt of share by way of gift is in the nature of income and benefit or perquisite arising in the course of assessee's business and that the receipt of gift of share is taxable under section 28(iv). The assessee is not having have any business transactions of any nature whatsoever with the donors from whom the shares of UPL and UEL were received. In absence of such transactions the provisions of section 28(iv) is not applicable and the finding of Id. CIT(A) in seeking to bring to tax the value of the shares so received in terms of section 28(iv) is also not sustainable."

c. DCIT vs. KDA Enterprises (P) Ltd (68 SOT) 349)(Mum trib) — Relied on the decision of D.P. World (P.) Ltd (supra) — [Para 39 of the order]

4. *Without prejudice to the above, it is also submitted that the provisions of section 28(iv)of the Act do not apply to income which is in the nature of a capital receipt. In this regard, reliance is placed on the following judgments wherein it was held that a capital receipt cannot be taxed under section 28(iv) of the Act.*

a) CIT vs. Stads Ltd. (373 ITR 313) (Mad.) (Para 11]
b) CIT vs. Softworks Computers Ltd. (354 ITR 16) (Bom.) (Para 7]
c) PCIT vs. Rajasthan Co-operative Dairy Federation Ltd. (423 ITR 89) (Raj.) (Para 6]

5. *In view of the above, it is submitted that the receipt of the Brand is not taxable in termsof section 28(iv) of the Act.*

32. Considered the rival submissions and the material placed on record. It is a matter of fact borne from record that the assessee is an irrevocable discretionary trust formed on 29th March 2012. The brands which are the property of the EIL were gifted to the assessee vide its board resolution and shareholders resolution dated 29th March 2012. In the backdrop of the fact that the assessee trust was formed on

the same day when the brands were gifted to it by EIL, it cannot be held that they were generated out of the business carried on by the assessee. As per section 28(iv) of the Act, the value of any benefit or perquisite arising from business or exercise of a profession shall be chargeable to income-tax under the head Profit & gains of business or profession. However, as in the case before us, the brand “Essar” was contributed as a gift by EIL to the assessee trust on the same day on which the assessee trust had commenced its operations, therefore, it cannot be considered that the brands are the benefit which arose from the business carried on by the assessee. Apart from that, as we have categorized the receipt of brand by the assessee from EIL as a profit-making apparatus i.e a capital asset and a capital transaction, therefore, on the said count also we are inclined to reject the arguments of the revenue qua the present ground and, accordingly, dismiss the same. The **Ground of appeal No. 5** is dismissed.

Ground no. 6: Whether on facts and circumstances of the case and in law, the Ld. CIT(A) has erred that only tax deducted at source of Rs. 2,95,91,725 is income of the assessee for FY 2012-13 and not the aggregate amount of Rs.29,59,17,233/–.

33. The brief facts relating to this ground are, that this being the first year of the operation of the assessee, it had adopted the cash system of accounting i.e one of the method permitted u/s 145(1) of the Act for offering its business income to tax. For the year under consideration, though the license fees of Rs. 29,59,17,233/- was credited to the account of the assessee in the books of accounts of the brand licensees i.e its group entities, but the assessee had offered to tax only a sum of Rs. 295,91,725/-. Explaining the reason for offering the aforesaid amount to tax, it was submitted by the assessee that the same was done only for the reason that the group companies had deducted tax at source to the said extent. Otherwise, assessee having adopted the cash system of accounting, as claimed before the A.O, not having received any amount against the aforesaid amount that was credited by the brand licensees i.e the group entities in the account of the assessee as appearing in their respective books of accounts, was not exigible to tax qua any

part of the aforesaid amount of license fees. However, the assessing officer rejected the submissions of the assessee and also the method of accounting that was followed by it, observing as under :

a) When the assessee to show caused why the amount credited by various companies as royalty amounting to Rs. 29,59,17,233/-, appearing in Form 26AS should not be treated as its income for the year under consideration. AO held that the assessee had not substantiated the cash system of accounting. AO made a reference to Accounting Standard 9 issued by ICAI which mandates accrual method of accounting to be followed for royalty. ***(Para 6.2 of AO order)***

b) Parties making royalty payment have already deducted TDS and claimed expenditure on said payments (evident from Form 26AS). Therefore, cash method followed by the assessee is not acceptable. ***(Para 5.4.2 of AO order)***

c) The AO held that the amount of Rs. 26,63,25,508/- (i.e. Rs. 29,59,17,233 — Rs. 2,95,91,725) being the amount of income not declared in the return of income would be treated as business income. ***(Para 6.3 of AO order)***

34. Aggrieved, the assessee filed detailed submissions before the CIT(A), who after considering the same deleted the addition with the following observations:

a. *Cash method of accounting has been followed as provided for in section 145(1) of the Act in the current year and consistently in the subsequent years too.*
b. *The companies from whom assessee is receiving license fees are following accrual basis of accounting while the assessee is following cash method of accounting and both are separate taxable entities.*
c. *AS-9 issued by the ICAI, requires royalty to be accounted on an accrual system of accounting does not apply to the assessee as, there is an exception provided for some entities including a trust. Therefore, AS-9 is not applicable to the assessee.*

35. Before us, the Ld DR had filed the following submissions:

(i) The assessee has received total royalty amount of Rs. 29,59,17,233/– from seven companies. The companies had deducted TDS of Rs. 2,95,91,725/- Vide 26 AS Paper book. No.1 (p 119 of the appeal memo). The details are given below:

Sl.no.	*Name of Deductor*	*Amt. credited (Rs.)*	*Tax deducted (Rs.)*
1	*Essar Projects (India) Ltd.*	*8,00,00,000*	*80,00,000*
2.	*Bhander Power Ltd.*	*1,09,38,273*	*10,93,828*
3	*Vadinar Power Co. Ltd.*	*1,54,25,000*	*15,42,500*
4	*Essar Power Gujrat Ltd.*	*1,08,37,560*	*10,83,756*
5	*Essar Oil Ltd.*	*14,75,00,000*	*1,47,50,000*
6	*Essar Ports Ltd.*	*2,15,97,937*	*21,59,794*
7	*Essar Power Ltd.*	*96,18,463*	*9,61,847*
	Total	*29,59,17,233*	*2,95,91,725*

(ii)While the companies paid the royalty and, following the mercantile system of accounting, claimed these payments as expenses, and reduced their tax liability, the assessee did not pay the corresponding tax on the receipts of royalty on the plea of following cash system of accounting.

(iii) According to the brand licence agreements (vide DPB-1), the companies are required to pay the royalty at the beginning of the quarter. The relevant portion of a brand licence agreement with Essar Ports Limited (p.79) is reproduced below:

"3. Licence Fee

As consideration for the Licence, the Licensee agrees to pay to the Licensor, a licence fee of .25% of the revenue generated by the Business of the Licensee (the "Licence Fee") for each Financial Year.

The Licensor has agreed as a measure of goodwill to waive the Licence Fee for the period of April 1, 2012 to September 30, 2012.

The Licence Fee shall be payable by the Licensee to the Licensor every quarter in advance, and shall be payable at the beginning of each quarter on the basis of the estimated revenue for the Financial Year. Any adjustment of the Licence Fee shall be done on the basis of the financial accounts of the relevant Financial Year, and shall be adjusted with the Licence Fee payable for the next Financial Year."

There is no explanation as to why the payment is not made according to the agreement.

(iv) The Departmental Paper Book-I (pp 141-144) contains copy of Accounting Standard-9 (AS 9). It would be useful to reproduce the following extracts form AS-9.

P.144 "Royalties accrue in accordance with the terms of the relevant agreement and are usually recognised on that basis unless, having regard to the substance of the transaction, it is more appropriate to recognise revenue on some other systematic and rational basis."

Thus, the assessee has flouted all norms by not recognising the revenue this year.

(v) The Licensees are group companies. If they could be commanded to sign the brand licence agreement on the same day, it is not understandable why they were not asked to make the payment to the assessee when they credited the amounts to the account of the assessee. The obvious conclusion is that it is a pre-planned design whereunder the companies and the assessee would follow different methods of accounting and the companies would be asked to defer the actual payment of royalty. By this arrangement the whole group would dodge payment of tax.

(vi) The assessee has made a false claim that it is following cash system of accounting.

A copy of the return of income (Vide DPB-3) would show that the assessee has not shown any expenses. The assessee would have incurred expenses like, telephone, conveyance, stationery, salary and payment to trustees etc. Expenses are also required to meet the obligations and responsibilities under the brand licence agreement (vide para 6 of the agreement P. 81 of the Departmental Paper Book -1). Some of the obligations are as under:

(a) At own cost obtain and maintain registration of the brand.

(b) Periodically organise brand promotional activities

(c) Engage services of the specialised agencies to enhance the value of the brand

(d) Coordinate advertising campaigns

(e) Undertaking activities for the purpose of promoting, developing, managing and legally protecting the brand

(f) Maintaining a brand office to coordinate with the licensees. But the assessee has not shown any expenses. All the columns of expenses are blank in the return. It is not possible that the assessee has not incurred a single rupee as expenses during a whole year of its existence. This shows that the accounts are false.

(g) Thus, the assessee has made a false claim that it is following the cash system of accounting and by this false excuse it has evaded the payment of due tax.

(h) For this conduct, the assesee may be liable to penalty and prosecution

(vii) It is worth noting that the assessee is using this plea of cash system of accounting to evade payment of tax in a well calculated manner. The following table will show how this method has resulted in substantial loss of revenue.

ASSESSMENT YEAR	Brand License Income as per Return of Income	Brand License Income as per 26AS	Difference (26AS - ITR)
2013-14	29591725	295917237	266325512
2014-15	1074570749	1039208633	35362116
2015-16	757650460	994822833	237172373
2016-17	781851421	1721716509	939865088
2017-18	3027033370	3065287196	38253826
2018-19	3181848370	2899119543	282728827
2019-20	1177189817	2237104452	1059914635
Total	10029735912	12253176403	2223440491

(viii) From the above table, it can be seen that over the past 7 years the difference in the income offered by the assessee trust in the return of income and the income reflected in Form 26AS of the assessee trust has swollen to Rs. 222,34,40,491/-. The assessee's plea of following the cash system of accounting and not offering the full royalty income pertaining to a year, if accepted, would bring out a structure of tax avoidance in a corporate scenario where there are multiple entities involved. As explained above, the assessee trust is getting brand license fees from other sister concerns of ESSAR group. These entities follow mercantile system of accounting and the assessee trust follows cash system of accounting. The ESSAR entities claim expense by deducting TDS in the name of brand license fees but not actually paying the brand license fees. The assessee trust does not show the brand license income in

the return of income and avoid paying due taxes. By this arrangement, the group as a whole has benefitted with avoiding taxation on Rs. 222,34,40,491/- over the past 7 years. The gap would widen over the years and there would be great scope for manipulation for tax evasion. There would also be serious problem of reconciliation when most of the returns centrally processed on computer and are accepted.

(ix*) Hence, this being the first year, the system of accounting has to be decided keeping in mind the interest of the Revenue.*

(x) Section 145(3) reads as under:

"Where the Assessing Officer is not satisfied about the correctness and completeness of the accounts of the assessee, or where the method of accounting provided in subsection (1) has not been regularly followed by the assessee, or the income has not been computed in accordance with the standards notified under subsection (2), the Assessing Officer may make an assessment in the manner provided in section 144"

This is the first year and hence there is no precedent to compare with the system of accounting followed earlier by the assessee. As explained above, the accounts are not correct and complete. The assessee is showing income whimsically in an arbitrary manner resulting in substantial loss of revenue.

(xi) The claim that the assessee is following the same system in subsequent years is totally irrelevant because subsequent year's action cannot be used to justify the first year's accounting. It is like arguing in the reverse order.

(xii) The above detailed discussion would show that the assessee is making a fraudulent claim with the sole object of evading payment of tax through manipulation with the group companies by adopting different methods of accounting. The claim of cash system of accounting has no basis and should be rejected.

(xiii) It is, therefore, prayed that the whole amount of Rs.29,59,17,233/- may be brought to tax this year. The appeal of the Revenue may be allowed on this ground.

36. In response, the Ld. A.R had submitted as under:

1. *The assessee has selected the cash basis of accounting as permitted by section 145(1) of the Act for offering its business income to tax. Such method has regularly been followed thereafter from year to year. The fact that the cash basis of accounting has been selected by the assessee can be ascertained from the return of income, notes to computation of income. and the financial statements, filed with the AO vide submission dated 3 August 2015 (at Annexure A and Annexure B), wherein, the method of accounting is reflected as cash method. Further, the said cash method of accounting has been regularly followed by the assessee in the subsequent years. In fact, the AO in the assessment for A.Y. 2014-15 has accepted the cash method of accounting followed by the assessee.* ***(Refer paperbook pg. 230, para 13.1)***

2. *Considering the above, in the year under consideration, although, an income of Rs. 29,59,17,233/- had accrued to the assessee, since the same was not received, basis the cash method of accounting adopted, income of Rs. 2,95,91,725/-, being the taxes deducted at source by the licensees which was deemed to be received during the year was offered to tax as income by the assessee in accordance with section 198 of the Act.*

3. *In this regard, the assessee submits that as per section 145 of the Act, income chargeable under the head "Profits and gains from business or profession" or "Income from Other Sources" shall be computed based on the accounting method regularly followed by the assessee. The provisions of section 145(1) of the Act itself provides that an assessee can follow either method of accounting i.e. cash or mercantile, provided the chosen method is 'regularly employed' by it.*

Section 145 of the Act is reproduced as follows:

"145(1) Income chargeable under the head "Profits and Gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee."

4. *From a perusal of above, it is evident that section 145(1) of the Act provides a choice to the assessee to compute the income under the head "Profit and gains of businessor profession" and "Income from other sources" as per either the cash or the accrual method of accounting so long it is regularly employed by the assessee.*

5. *It is also submitted that the provisions of section 145 of the Act were amended w.e.f. 1 April 1997 whereby the power of the AO to reject the method of accounting was taken away by the Legislature and, therefore, the method of accounting chosen by an assessee is binding on the AO. The un-amended provision, empowered the AO to interfere with the method if, in the opinion of the AO, the method employed by the assessee is such that the income cannot be properly deduced. Such power has been taken away by the amendment. In this regard reliance is placed on the decision of* ***Hon'ble Mumbai Tribunal in the case of Toyo Engineering Corporation (ITA 6600/MUM/2002)*** *wherein it was held as under:*

" .. under Section 145(3) as substituted with effect from 1 April 1997, the AO has no right to reject the method of accounting followed by the assessee on the ground that the income cannot be properly deduced therefrom, a right which was available to the AO under the first proviso to Section 145(1) as it stood before the amendment. Obviously, the legislature thought that if the assessee follows regularly the cash or the mercantile system of accounting it cannot be said that the income cannot be properly deduced therefrom."

6. *It is further submitted that merely because the payer companies have accounted for the brand license fees on the basis of accrual method of accounting and claimed deduction for the same does not give power to the AO to alter the method of accounting followed by the assessee. In this regard, reliance can be placed on the following decisions which have held that the loss of revenue to the Department cannot be the basis for rejecting the method of accounting followed by an assessee:*

Indo Commercial Bank Ltd. vs. CIT (44 ITR 22) (Mad.) (Para 1.1 & 2.1]

"It should be taken as well settled that person engaged in business, who adopts the mercantile system of accounting is bound to value his unsold stock at the end of this year of account to balance his books. But he has the option of valuing the closing stock either at cost or at market value, if the market value is lower than the cost price....

<u>That the option exercised by an assessee is detrimental to revenue can never be the basis for denying him that </u>option...*The valuation of the closing stock at cost* *instead of at market value was the method adopted by the assessee bank down to the end of 1950. It was a method of accounting within the meaning of section 13. The question is, whether section 13 or any other concept of revenue law bars an assessee from changing his method of accounting.* ***As has been repeatedly pointed out by courts, it is the assessee and not the department that has the choice of the method of accounting. The department is bound by the choice of the assessee...."***

Further, reliance is placed on the following decisions where the Department cannot reject a method followed by the assessee. The option to choose a method of accounting lies with the assessee and the department cannot compel the assessee to follow a particular method of accounting. A choice is provided to the assessee for following any of the method of accounting as long as it is consistently and regularly employed by the assessee. Reliance in this regard can be placed on the following judicial precedents.

Juggilal Kamlapat vs. CIT (101 ITR 40) (All.) (Para 4]

"....If an assessee chooses to adopt the cash system of accounting in respect of the income assessable under section 10 or section 12 of the Act, he cannot be assessed on accrual basis. ***The option is with the assessee and not with the department so that the department cannot compel an assessee to adopt the mercantile system of accounting, if the assessee chooses to adopt the cash system.*** *Income arising from the lease of a factory falls to be assessed under section 12 and can only be assessed in accordance with the option exercised by the assessee. In the instant case the assessee admittedly never offered its income to be assessed on accrual basis which means that the assessee followed the cash system of accounting in respect of this source of income. The department was not entitled under the law to assess it on accrual basis and the fact that it did so in the past was wholly immaterial. We are thus clearly of the opinion that the sum of Rs. 8,000 was not liable to be taxed in the assessment year in question..."*

CIT vs. Sumatibai M. Dhanwatey (212 ITR 492) (Born.) (Para 6]

"...we have held under the similar circumstances that the lease rent could not be taxed on accrual basis for the reasons that (i) the said income falls under the head 'Income from other sources', (ii) the assessee does not maintain regular accounts and does not follow mercantile system of accounting, and (iii) the assessee could not be compelled to adopt particular system of accounting...."

CIT vs. Vimla Sonawane (212 ITR 489) (Born.) (Para 4 & 5]

"...There was, thus, neither factual accrual nor deemed accrual. Income arising out of lease of plot falls in assets under the head 'Income from other sources'. Option regarding adoption of system of accounting is with the assessee and not with the Income-tax Department. The assessee is indeed free even to follow different methods of accounting for income from different sources in an appropriate case. The department cannot compel the assessee to adopt the mercantile system of accounting. As a matter of fact, it was not adopted. Under the circumstances, the income from lease rent could not be taxed on accrual basis.... it was open to the assessee to follow any system of accounting in respect of that source. It is further held that the assessee may follow even different system of accounting in respect of different sources...."

CIT vs. Pondicherry Industrial (254 ITR 748) (Mad.) (Para 3 & 4] CIT vs. Bikaner Trading Co. (180 ITR 286) (Raj.) (Para 5]

7. *The AO in his remand report has alleged that method of accounting followed by the assessee in the subsequent years cannot be taken as base to establish method of accounting in the impugned year. The said allegation has not been substantiated and has been made without considering the rulings referred to by the assessee in the CIT(A) submission wherein it has been held that even for the first year of accounting, the method would be deemed to be regularly employed if the same has been consistently followed by the assessee in the subsequent year. The said rulings are referred hereunder for ready reference.*

The Gujarat High Court in the case of CIT vs Advance Construction Co Pvt. Ltd. (275 ITR 30) (Guj) has upheld the finding of the tribunal that:

"In the present case, the Tribunal has categorically found that "the assessee has followed the standard accounting method as this being the first year of the business, it was the sole choice of the assessee to adopt a particular method of accounting contemplated under s. 145 of the Act." It is further admitted by the learned advocates appearing for the parties that the said method has been constantly followed by the assessee and in subsequent years, the Revenue has accepted the same." (Emphasis applied)

The Madras High Court in the case of Sundaram & Co Ltd vs CIT (36 ITR 162) has held as follows:

"Apparently the Tribunal accepted the contention of the assessee that though the accounts related to the first accounting period of its activities, it was a system of accounting "regularly employed" within the meaning of s. 13 of the Act, though there was no such express finding. In any event, considering it was the same system of accounting that the assessee adopted in the subsequent accounting periods also, the test of "regularly employed" must be held to have been satisfied in this case."

8. *It is humbly submitted by the assessee that as it follows cash method of accounting, no income accrued on mercantile basis of accounting is offered to tax in the currentyear. However, the same has been duly offered to tax in the subsequent year on receiptbasis which has been accepted by the AO in the assessment for AY 2014-15.*

9. *Further, the AO has alleged that as per AS-9 issued by ICAI, the receipt by way of brand license fee has to be accounted based on accrual system of accounting.*

10. *In this regard reference is made to the Compendium of Accounting standards issued by the ICAI in 2012 which specifically states that the AS 9 is not mandatory for a trust to follow. For your reference the same is reproduced as below:*

"Accounting Standards 1,7, 8, 9,10 and 11 should be mandatory in respect of accounts for periods beginning on or after 1.4.1991 for companies governed by the Companies Act, 1956 as well as for other enterprises except the following —

(a) *Sole proprietary concerns/individuals*
(b) *Partnership firms*
(c) *Societies registered under the Societies Registration Act*
(d) *Trusts*
(e) *Hindu undivided families*
(f) *Associations of persons." (Emphasis applied)*

11. *With regard to AO's observation regarding mandatory nature of AS-9 to record brand license fees on accrual method of accounting, it is humbly submitted that only AS-I relating to disclosure of accounting policies and AS-II relating to disclosure of Prior period and Extraordinary items and changes in accounting policies have been notified under section 145 of the Act for the year under consideration. The AS-9 issued by ICAI is not specifically notified for tax purposes. The same is not relevant for determining total income under the Act for the assessee following cash method of accounting. In this regard, reliance can be placed on the decision of the Mumbai tribunal in the case of* ***DCIT vs Stup Consultants P Ltd (13 ITR 468) (Mum tribunal).*** *The relevant extract of the same is as under:-*

"Even with regard to the AS-9 of the ICAI which was the reasons assigned by the AO for rejecting the books of account of the assessee in asst. yr. 2006-07, we find that those accounting standards are applicable only to the assesses, who follow mercantile system of accounting. Since the assessee, in the present case follows cash system of accounting, we are of the view that the rejection of books of accounts on this basis cannot be upheld."

12. *Hence, it is respectfully submitted that reliance placed on section 145(3) to reject the cash method of accounting by the AO is incorrect and unsustainable in law, especially considering the fact that in the subsequent year (i.e AY 2014-15), the AO has himself accepted the cash method of accounting and computed the tax liability accordingly.*

Without prejudice the expenses on the basis of mercantile system of accounting should be allowed

13. *Without prejudice to the above, it is submitted that on computation of income as per accrual method of accounting, principally the expenses accrued during the said period should be allowed as a deduction from the income accrued for the purpose of computing taxable income by the AO. However, the AO on disallowing the cash method of accounting followed by the assessee has principally erred in not allowing the deduction of expenses on accrual basis against the income recognized on accrual basis.*

Application under Rule 27 of the Appellate Tribunal Rules. 1963

The assessee submits that the addition made by the AO has been wholly deleted by the CIT(A) and, hence, the assessee has not preferred any appeal under section 253(1) of the Act. However, the assessee filed an application under rule 27 requesting the tribunal to allow the assessee to support the order of the CIT(A) on the merits of the case and consider the application while disposing off the department's appeal. The following grounds are raised in the present application:-

i) On facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that the ground raised by the Respondent, that settlement of "Essar" brand, trademark and copyrights did not take place in the AY under appeal is academic and infructuous. The CIT(A) ought to have held that the transaction in question did not take place in the AY 2013-14 at all.

Based on this ground, without prejudice to the contentions raised above, the assessee submits that even assuming the value of the brand is taxable, it cannot be taxed in the AY 2013-14 as the assessee became the owner of the Brand on 29 March 2012 when the Brand was transferred by EIL to the assessee.

Further, the department's counsel in his written submissions at para 31 mentions that no cross objection has been filed by the assessee and hence the assessee cannot raise this issue now is *factually incorrect as an application under rule 27 has been made with regard to this specific ground. Further, the department's counsel stated that since no cross objection has been filed by the assessee, it is now settled that the year of taxability is AY 2013-14 is without any basis and factually incorrect. Without prejudice to the above, the assessee submits that the value of brand could have been subject matter of adjudication for taxation only in AY 2012-13 and not in AY 2013-14.*

ii)On facts and in circumstances of the case and in law, the CIT(A) erred in holding that the Respondent has to be treated and assessed as an 'individual' for the purpose of determining applicability of section 56(2)(vii) of the Act.

iii)On facts and in circumstances of the case and in law, the CIT(A) erred in not adjudicating the ground raised disputing the valuation of "Essar" brand, trademark and copyrights carried out by the AO.

The department's counsel in his written submissions at para 32 mentions that no cross objection has been filed by the assessee and hence the issue stands settled that the approach to compute the value of the brand by applying discounted cash flow is correct. This contention of the department's counsel is without any basis and factually incorrect as an application under rule 27 has been filed with regard to this specific ground.

Part II- Our submission before ITAT in relation to various allegations made by the Department's Counsel during the course of the hearing

1. *The Department's Counsel has referred to several circumstances in his paper book 5 wherein he has cast doubts about the genuineness of various transactions.*

2. *In this regard, it is submitted that if the transaction of settlement of the Brand from EIL to the assessee is not genuine as is alleged by the revenue, then, considering it is a contract between the two parties, it can be either void or voidable. If the transaction is void, there can be no transfer of the Brand by EIL to the assessee and, accordingly, the alleged value of the Brand cannot be taxed in the hands of the assessee. Accordingly, if the transaction is considered to be not a genuine transaction due to the various reasons cited by the department's counsel in his submissions, there is no gift of the Brand to the assessee and, consequently, the value thereof cannot be assessed in the assessee's hands. Assuming it is voidable the transaction can only be avoided by a party to the contract and in the present case neither EIL nor the assessee have in any manner sought to avoid the transaction under section 19 of the Indian Contract Act, 1872. It would never be open to the revenue to urge that the gift should be regarded as voidable.*

3. *Further, the department's counsel has questioned the existence of the Brand by stating that documentary evidence proving the ownership of the Brand by EIL and the assessee was not produced before the AO and also stated as the Brand was not recorded either by EIL or the assessee in their respective books of accounts it did not exist. The department's counsel has also raised several doubts regarding why no value was accorded to the Brand by EIL or the assessee.*

4. *In this regard it is submitted that the registration certificate issued under the Trademarks Act, 1999 and Copyrights Act, 1957 clearly show that EIL was the owner of the Brand. In this regard, reference is made to section 6 and section 18 of the Trademark Act, 1999 which reads as under:-*

*"**6. The Register of Trade Marks** —(1) For the purposes of this Act, a record called the Register of Trade Marks shall be kept at the head office of the Trade Marks Registry, wherein shall be entered all registered trade marks with the names,*

addresses and description of the ***proprietors****,notifications of assignment and transmissions, the names, addresses and descriptions of registered users, conditions, limitations and such other matter relating to registered trade marks as may be prescribed...*

18. Application for registration.—(1) *Any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it, shall apply in writing to the Registrar in the prescribed manner for the registration of his trade mark."*

Therefore, a person claiming to be the proprietor of the trademarks can only apply for the registration under the Trademarks Act, 1999 and once registration is granted, the trademarks are registered in the name of the proprietor. Thus, considering the trademarks are registered initially in the name of EIL and thereafter in the name of the assessee, both the assessee as well as EIL can be said to be the owner of the trademarks at the respective relevant periods. In this regard, reliance is placed on the following decisions wherein the courts have held that trademark registration is prima facie proof of ownership:

Exide Industries Ltd. vs. Exide Corporation USA (CS (OS) No. 812/1997 (Delhi HC) [Pg 431 of paperbook, para 6 & 9]

5. *Accordingly, the allegation by the AO and the department's counsel that the ownership and the existence of the brand has not been proved by the assessee is factually incorrect.*

6. *Further, the department's counsel has also alleged that there was no valuation of the brand being carried out. In this regard, it is submitted that the fact that no valuation is obtained is not relevant for the purpose of determining the issue raised in the appeal. It is not as if the assessee is claiming a deduction by way of depreciation on the Brand which may have necessitated its valuation. In the present case of a gift of the Brand by EIL to the assessee, the Act does not require the valuation of the Brand to be undertaken or the market value of the gift to be assessed in the hands of the assessee. Hence, such argument of the department's counsel is without merit and bad in law.*

7. *Further, as regards the department counsel's assertion that the Brand was neither reflected in the books of the assessee nor EIL, it is submitted that as per AS-26 (para 50) a self-generated intangible asset cannot be recorded in the books of accounts. This is because accounts are maintained both by EIL and the assessee on a historical cost concept. This is the reason, the Brand was not recorded in the books of accounts of EIL. AS-10 (para 16), AS-13 and AS-26 (para 23) mandate that assets are to be recorded at historical cost i.e. to say the amount of cash or cash equivalents paid or the fair value of any other consideration discharged at the time of their acquisition. Thus, considering that the Brand was transferred to the assessee free of cost, the assessee had paid no consideration for acquisition of the same and, hence, the same was not recorded in the books of accounts of the assessee.*

8. *The department's counsel has indicated that suicidal steps were taken by EIL in dealing with the Brand by Mrs. Manju S. Ruia. Accordingly, the department's counsel alleged that the transaction is not genuine, not bonafide and against human probabilities.*

9. *The allegations regarding suicidal steps taken by EIL or Mrs. Manju S. Ruia are not relevant to the assessment made in the hands of the assessee trust wherein the*

revenue is seeking to assess the value of an asset received which, it is submitted, is a capital receipt not chargeable to tax.

10. *Further, as stated earlier assuming the transaction between EIL and the assessee is not genuine and not bonafide as alleged, then, there is no gift of the Brand to the assessee. Accordingly, the assessee has not received the asset. Therefore, the AO cannot assess the assessee for the value of the Brand of which it is not an owner.*

11. *Hence, the arguments made by the department's counsel are without any merits.*

12. *The department's counsel has also alleged that the manner and the haste in which all the transactions were conducted are abnormal. The department's counsel has referred to the fact that both the board resolution and the shareholder's resolution were passed on the same day i.e. on 29 March 2012. Further, the transfer of the brand was also done on the same day. The department's counsel had also alleged that the date of notice convening the meeting of the shareholder's and the shareholder's meeting are on the same date. The department's counsel has also argued that the brand licensing agreements were signed in a casual manner, made retrospective and signed as if the parties were marking attendance.*

13. *As regards the department's counsel's arguments on the date of notice convening the shareholder's meeting and the shareholder's meeting was on the same date, it is submitted that section 169 of the Companies Act, 1956 empowers the board of directors of the company to call for an extraordinary general meeting. Further, section171(2) of the Companies Act, 1956 provides that an extra ordinary general meeting may be called for by giving a shorter notice (less than 21 days) in writing if consent is accorded by the members holding not less than 95% of paid-up capital of the company. In view of the above provisions, no breach was committed by EIL in holding the extra ordinary general meeting on the same day as the date of notice.*

14. *As regard the department's counsel's argument that the resolution for transfer of the Brand was filed with the Registrar of Companies on 29 June 2016 in Form 23. In this regard, it is submitted that the said allegation of the department's counsel is factually incorrect. As can be seen from page 3 of Form 23, the resolution, which was passed on 29 March 2012, was filed with the Registrar of the Companies on 28 April 2012. The date 29 September 2016 as mentioned on the first page of Form 23 is the date on which certified true copy of the Form 23 was obtained from the Registrar of the Companies as the same was requested by the CIT(A). Hence this allegation is incorrect and contrary to the facts on record.*

15. *The department's counsel has also argued that the brand licensing agreements were signed in a casual manner, made retrospective and signed like marking an attendance. In this regard it is submitted that such argument is without any merits as the department's counsel has not brought any material on record to prove that the agreements executed by the assessee with licensee companies are invalid in law and in any event, what would be the consequence if such an argument is to be accepted is already explained.*

16. *Further, the department's counsel has also alleged that only one of the licensees has passed a resolution for payment of license fees to the assessee. In this regard, without going into the correctness of the statement, it is submitted that the signatories to the brand licensing agreements had acted well within their powers to enter into such agreement. Further, it is submitted that as a result of such agreements the licensees have paid brand license fees to the assessee. In this regard, the department is seeking to tax the capital amount in the hands of the assessee as a consequence of the resolutions*

not being passed by the licensees/ on account of agreements alleged to be signed in a casual manner by the licensees, which is clearly impermissible and beyond the scope of assessment in the case of the assessee. The assessee has duly offered to tax the amount of brand license fees that it receives from these licensees as a result of the brand license agreements as per the method of accounting being regularly employed by the assessee.

17. *The department's counsel has further argued that the registration of the trademarks in the name of the assessee was approved in March 2014, but the license agreements were entered into by the assessee much earlier that is on 6 February 2013, with effect from 1 April 2012. In this regard it is submitted that as stated above, under the Trademarks Act, 1999 a person who owns the mark is entitled to get it registered in its name. There is a registration process that is involved as per the Trademarks Act, 1999as provided in section 18 which requires an application to be made, section 20 requires the application so made to be advertised, section 21 requires opposition to the registration to be filed and, thereafter, it is registered in terms of section23. Thus, a lengthy procedure is stipulated under the Trademarks Act, 1999 for a registration to be granted for a trademark, Accordingly, ultimately in March 2014 the registration of the trademarks in the assessee' s name was granted. However, that does not mean that the assessee became the owner of the trademark with effect from such date. Considering the Brand was transferred to the assessee on 29 March 2012, the assessee can be said to be the owner of such Brand from such date and the registration would relate back to such date. Accordingly, the assessee was right in charging thebrand license fees as per the brand license agreements with effect from 1 April 2012, considering it was the rightful owner of the Brand which was transferred to the assessee in March 2012 itself. Assuming what the revenue alleges is correct, the consequence would be that the brand license fees for the period upto the date of registration cannot be assessed.*

18. *The department's counsel has also argued that the resolution passed by the board of directors of EIL does not mention the value of the Brand being transferred. In this regard it is submitted that there is no provision in the Companies Act, 1956 which requires the resolution to indicate the value of the asset being transferred. The resolution passed by Board of Directors of EIL was in line with the requirements of the Companies Act 1956 wherein the said transfer of the Brand to the assessee was indicated and necessary approval of the shareholders was sought and appropriate authorization of the director and the company secretary of EIL was given. Accordingly, the resolution passed by EIL was a valid resolution under the provisions of the Companies Act, 1956. Further, there is also no requirement in law to notify the department of transfer of such asset by EIL to the assessee. Therefore, the argument put forth by the learned department's counsel does not hold good.*

19. *The department's counsel arguments under sub-head "N. Motive" of his paperbook no. 5 has alleged that the motive of all the transactions was removal/extraction of funds from the companies for the benefit of the Ruia family.*

20. *It is submitted that if the alleged motive is held to be true, it is not a ground on the basis of which the AO assumes jurisdiction to tax the value of the capital asset received by the assessee through which the assessee is receiving income. But the so called funds extracted from the companies by way of brand license fees suffers tax in the hands of the assessee and so the same is not without a tax cost.*

21. *Without prejudice to the above it is submitted that there is no tax benefit derived by the assessee as result of entering into such brand licensing agreements with the licensees. The licensees have claimed such amount as an expense however, the assessee has duly offered such income to tax at the maximum marginal rate applicable to the assessee and hence, no tax benefit is derived by the assessee.*

22. *The various arguments made by the department's counsel under this section is not relevant to the assessment of the income of the assessee in the current case.*

23. *The department's counsel has argued that all the apparent arrangements are unreal and fake. In this regard it is submitted that if this holds true the assessee cannot be said to be the owner of the brand and the entire assessment made by the AO is liable to be quashed. Further considering the department's counsel has stated that ignoring the past the starting point would be the date of the brand license agreement, this argument is contrary to his own stand that EIL is not the owner of Brand.*

24. *Further, the department's counsel has indicated that the value of the Brand will be taxed in this year considering the provisions of sections 56(1), 56(2)(vii)(c), 28(iv) and the additional ground of section 69A of the Act. In this regard, the assessee has already made its submission on applicability of section 56(1), 56(2)(vii) and 28(iv) of the Act. The submission on applicability of section 69A is made in the subsequent paragraphs.*

25. *The department's counsel in his written submissions filed for the first time referred and relied on rule 11 UA contending that the definition of 'artistic work' in the rule is pari materia with the definition of artistic work under the Copyright Act and the definition of artistic work is not confined to 'work of art' only. The assessee submits that the definition of the term artistic work is not the same as contended by the department's counsel. Further, the assessee submits that the definition of 'artistic work' is different from 'work of art' as used by the Legislature in section 56(2)(vii). All 'works of art' are artistic works but all 'artistic works' are not 'work of art'. It is submitted that Rule 11 UA does not define the "artistic work" therefore, the contention of the Department Counsel that the definition of "artistic work" in Rule 11 UA is pari materia with the definition of "artistic work" under Copyrights Act is incorrect. Secondly, under the Copyrights Act, as per definition of "artistic work", a work is considered as artistic work even if it does not have any artistic quality. Therefore, it is submitted that the definition of "artistic work" under the Copyrights Act is not relevant to decide the issue at hand. it is also submitted that the provisions of section 56(2)(vii) use the words "work of art" which as explained by Madras High Court in M.A. Chidambaramam (supra) and Gujrat High Court in Shantadevi P. Gaekwad (supra) represents artistic innovation or something which is rare and/or exceptional aesthetic beauty with artistic input. Since the brand "ESSAR"is only a trademark created for the identifying the product and services which are marketed under the brand, it does not fall within the meaning of "work of art" consequently, the provisions of section 56(2)(vii) are not applicable.*

26. *The department's counsel has also alleged that the assessee has evaded tax by adopting cash method of accounting. Additionally, the department's counsel has also alleged that no system of accounting is followed by the assessee as the assessee has not shown any expenses during the year under consideration.*

27. *In this regard it is submitted that the assessee has an option to choose a method of accounting being the cash method or the mercantile method under section 145 of the Act which is binding on the AO. Therefore, the method of accounting is in line with the provisions of the Act. Further, there is no tax evasion as the amount paid by the licensee companies are offered to tax by the assessee at maximum marginal rate. The year-wise revenue income offered to tax by the assessee, and the corresponding receipts reflected in Form 26AS is tabulated below:*

A.Y	Brand License Income as per Return of Income	Brand License Incomeasper 26AS	Difference (26AS)
2013-14	29591725	295917237	266325512
2014-15	1074570749	1039208633	-35362116
2015-16	757650460	994822833	237172373
2016-17	781851421	1721716509	939865088
2017-18	3027033370	3065287196	38253826
2018-19	3181848370	2899119543	-282728827
2019-20	1177189817	2237104452	1059914635
	10029735912	**12253176403**	**2223440491**

28. *As your Honour's would note from the above table an income of approx. Rs. 222 crores is the total difference between the amount offered to tax by the assessee during the years vis a vis the amount reflected in Form 26AS of the assessee which is roughly equal to the license fee offered to tax in AY 2020-21.*

29. *Further, as submitted above section 145 specifically gives an option to the assessee to follow cash system of accounting, which is regularly followed by the assessee in the present case. Accordingly, no tax is sought to be evaded by the assessee by following cash method of accounting and the argument of the department's counsel is incorrect.*

30. *Further, it is submitted that since AY 2013-14 is effectively the first year when the assessee had carried out its operations and since the assessee followed cash system of accounting, no expense amount was debited in the books of accounts as actual payments were not made for any expenses incurred during the year. Attention is brought to assessment order for AY 2014-15 which is at page 209-232 of the assessee paper book no.1, wherein the assessee has claimed expenditure under several heads in its return of income and which have also been dealt with by the AO in his order for the AY 2014-15. Hence the argument of the department's counsel that no method of accounting is followed by the assessee as no expenditure is debited in the books of accounts is factually incorrect.*

31. *The department's counsel at para 24(x) of his written submission has relied on Section 145(3) of the Act, stating that the power is bestowed on the AO to reject the method of accounting. In this regard, as submitted above, considering the fact that cash method of accounting is regularly followed by the assessee and also the income has been computed in accordance with the standards notified (not being applicable in assessee's case as mentioned above), the AO does not have any power to reject the method of accounting followed by the assessee under Section 145(3) of the Act. Further, considering that assessment in the current case is completed under section 143(3) and detailed scrutiny of records duly provided by assessee time to time is undertaken, section 145(3) should not be applicable.*

32. *Further, the department's counsel in his arguments had heavily relied on the decision of Supreme Court in case of CIT vs. G.R. Karthikeyan (201 ITR 866).*

In this regard the facts of the case before the Apex court was that Mr. Karthikeyan had participated in a motor rally and won the first prize. Mr. Karthikeyan argued that the amount so received was not of an income nature on the contention that it is not 'winnings' as contemplated in section 2(24)(ix) because the use of the term 'winnings' connotes something that accrues by way of chance. However, participating in a motor rally and winning it is a matter of skill and a test of endurance. Accordingly, he argued that it was not an income chargeable to tax. This argument was accepted by the Madras High Court. On reference to the Supreme Court, the Court held:

"ix) If the monies which are not earned - in the true sense of the word -constitute income, why do monies earned by skill and toil not constitute income? Would it not look odd, if one is to say that monies received from games and races of gambling nature represent income but not those received from games and races of non-gambling nature? The rally in question was a contest, if not a race. The respondent-assessee entered the contest to win it and to win the first prize. What he got was a 'return' for his skill and endurance. Then why is it not income - which expression must be construed in its widest sense. Further, even if a receipt does not fall within sub-clause (ix), or for that matter, any of the sub-clauses in section 2(24), it may yet constitute income. To say otherwise, would mean reading the several clauses in section 2(24) as exhaustive of the meaning of 'income' when the statute expressly says that it is inclusive. It would be a wrong approach to try to place a given receipt under one or the other sub-clauses in section 2(24) and if it does not fall under any of the sub-clauses, to say that it does not constitute income. Even if a receipt does not fall within the ambit of any of the sub-clauses in section 2(24), it may still be income if it ***partakes*** *of the nature of the income." (emphasis added)*

33. *Thus, in the above case the prize money earned represents income in its normal connotation viz., a return for skill and endurance. Thus, the Supreme Court held that if the receipt is in the nature of income as generally understood, then even if it does not fall within one of the specific sub-clauses of section 2(24) of the Act, it shall still be chargeable to tax. The Supreme Court in no manner has held that everything that is received is income.*

34. *Thus, the decision of the Supreme Court was applicable to the specific facts of the case and the same has been distinguished by the various decisions of several courts as illustrated below* ***(Pg 1):***

35. *The decision of the Supreme Court in* ***Travancore Rubber vs. CIT (243 ITR 158) (SC)*** *which reversed the decision of the Kerala High Court wherein the High Court sought to tax the earnest money received by the assessee as advance towards sale of old rubber trees, after forfeiture of the agreements under section 2(24) relying on the decision of the Supreme Court in case CIT vs. G. R Karthikeyan (supra). The High Court held as under:*

"In section 2(24) an inclusive definition of income is available as observed by the Supreme Court in CIT v. G.R. Karthikeyan [1993] 201 ITR 866 that the definition is of inclusive character, the purpose is not to limit the meaning of the term but to widen its net and even if a receipt did not fall within the ambit of any of the clauses, it might still be income if it partook the nature of the income."

36. *The Supreme Court reversed the above decision and held that the amounts received by the assessee/appellant in respect of an abortive sale transaction of rubber trees were capital receipts.Thus, the Supreme Court has itself after considering its earlier decision in the case of G. R. Karthikeyan (supra) has held that a capital receipt cannot be charged to tax –* ***Aroon Purie vs. CIT (375 ITR 188) (Del.) (pars 10,11,12 & 44] V.C. Nannapaneni vs.***

CIT (407 ITR 505) (AP) [pare 20& 21] CIT vs. Tilak Raj Kalra (249 CTR 205) (P&H.) (pars 11]

37. *In view of the above, it is submitted that the reliance by the department's counsel on the decision of the Supreme Court in the case of G.R. Karthikeyan (supra) to tax the value of the brand, being a capital receipt, in the hands of the assessee is incorrect.*

38. *In view of the above, it is submitted that under section 56(1) of the Act the brand cannot be brought to tax as it is a receipt on capital account; under section 56(2)(vii) it cannot be brought to tax as the brand is not a 'work of art'; and under section 28(iv) it cannot be brought to tax as it is not a benefit or perquisite received during the course of carrying of a business. Hence, for all the above reasons, the order of the CIT(A) has to be sustained on these aspects.*

37. Considered the rival submissions and the material placed on record. We notice that the brand licensees i.e the group entities had credited the license fees of Rs. 29,59,17,233/- in the account of the assessee trust in their respective books of accounts income, on which they had deducted and remitted TDS aggregating to Rs. 2,95,91,725/-. It is also a fact borne from the record, that the assessee who during the year under consideration i.e the first year of its operations, and consistently thereafter in the subsequent years, was following the cash system of accounting for recognizing its revenue, had during the year under consideration not received any amount out of the aforesaid license fees from any of the group companies. However, in order to claim the TDS credit for the year, the assessee had offered for tax the aforesaid TDS amount as its income for this year, even though it had not received/collected any part of the aforesaid amount. As noticed by us hereinabove, it is the first year of the assessee's operation, and it was following cash method of accounting i.e one of the method prescribed u/s 145 of the Act. It is also a matter of fact borne from the record, that that the revenue is not disputing the fact that assessee had not collected any funds during this year from any of the group companies. Also, it is discernible from the record that the assessee had declared its license income based on the amounts that was received by it from its group companies in the subsequent years i.e as per the cash system of accounting that was consistently followed by it. The table submitted by the Ld D.R above clearly shows that the assessee had declared the income based on the cash method of accounting and the incomes had been offered to tax properly. Ld D.R stated that there is difference of amount

declared by the group companies as per the Form 26A, as against the income that was declared by the assessee in the subsequent years. We find that the aforesaid discrepancy is due to the variance in the method of accounting that was adopted by the group companies and the assessee trust. Be that as it may, the aforesaid difference is only due to timing difference and there is no tax avoidance in this case, as there will be difference every year due to settlement of payment between the parties.

37.1 Further, we notice, that the A.O had observed that as per Accounting Standard 9 (AS 9) it is mandatory to follow the mercantile method of accounting for accounting of royalty transaction. As it is rightly brought on record by the Ld A.R, the above said accounting standard, viz. AS 9 is not applicable to the assessees, a Trust.

37.2 Considering the facts on record and submissions of both parties, we are inclined to accept the finding of Ld CIT(A) on the aforesaid issue in hand, and based on our above observations as regards the method of accounting adopted by the assessee and non-applicability of the accounting standard 9 to its case, no infirmity emerges from the adoption of cash system of accounting by the assessee trust, which as observed by us hereinabove remained at a liberty to select the method of accounting specified under section 145 of the Act and, follow the same consistently. There may be certain difference in the method of accounting adopted by the service receiver and service provider, but then, the same cannot be a reason to conclude that there has been tax avoidance on the part of the assessee trust. In this case, the assessee had not received any funds, though, brand license fees had been credited by the brand licensees i.e the group entities in the account of the assessee as appearing in their respective books of accounts. Technically, the assessee during the year under consideration should not have declared any income, however, since the group companies that were following mercantile system of accounting had claimed the license fees as an expense in their respective books of accounts i.e on accrual basis, and consequently deducted tax at source on the same as per the mandate of law, therefore, the assessee in order to match the tax liability was forced to declare the income to the extent of TDS amount that was deducted and deposited by the group companies i.e as reflected in the Form 26A. We do not see any mistake or any infirmity in the method of accounting adopted by the assessee, which, thus, by no means can be considered as tax avoidance on its part. The difference highlighted by the Ld D.R is due to timing difference. Hence, the argument put forth by the department representative has no force. Accordingly, the **Ground of appeal No. 6** is dismissed.

37.3 We do not intend to address the other issues and allegations raised by both parties, and have considered only those submissions which are relevant for the adjudication of the issue raised before us.

38. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 25/11/2021

Sd/-	Sd/-
RAVISH SOOD	**S. RIFAUR RAHMAN**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Rahul Sharma, Sr. P.S.

MUMBAI,

DATED: 25/11/2021

<u>Copy of the order forwarded to</u>:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order

Assistant Registrar
ITAT, Mumbai.