Chamber of Tax Consultants Mumbai

Webinar on Recent Judicial Pronouncements Date 31 January 2022

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INDEX OF SELECT JUDICIAL PRONOUNCEMENTS TO BE DISCUSSED IN WEBINAR (FULL TEXT)

	(on interpretation of sec. 40 of income tax act and role of purposive interpretation etc)	
7.	Supreme court in case of Bank of Baroda vs MBL infrastructure (in Civil appeal no. 8411/2019) order dated 18.01.2022 (on role of heydon rule of interpretation – comprehensive order on interpretation)	259 to 298
8.	Delhi high court in case of PCIT vs Agson Global pvt ltd order dated 19.01.2022 (ITA68/2021) on host of issues on a) Scope of adverse inference u/s 68 b) Cross examination principle c) Dictated assessment d) Bogus purchases e) Cash sales f) Sec 260A scope	299 to 351
9.	Delhi high court in case of PCIT vs Ishwar Chand Mittal in ITA 7/2022 order dated 12.01.2022 (on issue of interplay of sec 153A vs Sec 148)	352 to 353
10	Orissa high court in case of Laxmi Narayan Agency vs ITO in WP C No 16139/2016 order dated 03.01.2022 (on host of proposition on sec. 148- reopening based in investigation wing information- right of assessee to seek documents /report referred in reasons recorded)	354 to 358
11.	Bombay high court Yashoda Shivappa vs ITO WP 3640/2019 order dated 05.01.2022 (on issue of scope of expl. 3 to sec 147 vis a vis incorrect reasons/reopening)	359 to 365
12.	Bombay high court Parinee Realty vs ACIT WP 3638/2021 order dated 19.01.2022 (on issue of incorrect facts in reasons recorded and hypothetical income made as basis to reopen the case u/s 148)	366 to 374

23.	Gujarat high court in Harsh Dipak Shah vs UOI in SCA 19804/2021 order dated 04.01.2022 (entire conspectus of law on sec 220(6) demand stay powers of AO and sec 251 CITA power of demand stay-approach -discretion and high pitched asst)	504 to 562
24.	Telnganna high court Sirpur Paper Mills vs UOI in WP 25827/2019 order dated 18.01.2022 case on income tax scrutiny notice u/s 143(2) after resolution plan approved under IBC laws	563 to 596
25.	Kolkata/Gauhati bench ITAT in Goldstone stone cements ltd ITA 121 to 131/GAU/2020 order dated 10.12.2021 (extended period of limitation – asset word -jurisdictional fact importance-entire law analysed)	597 to 692

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1

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8592-8593 OF 2010

THE INCOME TAX OFFICER, CIRCLE I (2), KUMBAKONAM & ANR. ...APPELLANTS

VERSUS

V. MOHAN & ANR. ...RESPONDENTS

J U D G M E N T

A.M. KHANWILKAR, J.

1. The conundrum in these appeals is: when the Competent Authority claims that the subject property (to be forfeited) is that of the convict (V.P. Selvarajan) and ostensibly held by the relatives of the convict (respondents herein), whether it is mandatory to serve a primary notice under Section 6(1) of the 1976 Act upon such convict with copy thereof to his relatives under Section 6(2) of the

2

. under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short, "1976 Act")

2

1976 Act, and non-service of such primary notice upon the convict would vitiate the entire proceedings initiated only against his relatives?

2. The High Court of Judicature at Madras vide impugned judgment held that Section 6 of the 1976 Act leaves no room for doubt that the primary notice must be served on the convict, wherein the convict is required to indicate the sources of his income, earnings or assets, out of which or by means of which he had acquired the properties sought to be forfeited; and non-service of such notice upon the convict would vitiate the action initiated against his relatives, even if the forfeited properties are ostensibly held by or in the name of the relatives. The High Court rejected the argument of the appellants herein (Competent Authority) that only the person in whose name the property is held is required to be called upon to offer explanation regarding the sources of his income, earnings or assets, out of which or by means of which he had acquired such property including the evidence on which he

. for short, "Madras High Court"

. in Writ Petition Nos. 1149 & 1150 of 2001 decided on 24.3.2008 reported in 2008 SCC OnLine Mad 244

would rely and other relevant information and particulars. If the property in question is ostensibly held by the relatives in his name or through any other person on his behalf, the convict or detenu is not expected to nor can offer any explanation in that regard. The High Court also rejected the argument of the appellants herein that no prejudice is likely to be caused to the noticees (respondents herein) being the relatives of the convict, who had held the forfeited properties in their name. The High Court opined that the action against the respondents initiated by the Competent Authority was vitiated for lack of notice to the convict and it was, thus, pleased to set aside the entire action initiated against the respondents by the Competent Authority.

3. A contra view has been taken by at least two other High Courts. The first is of the High Court of Kerala in ***Sajitha & Ors. vs. Competent Authority & Ors:*** wherein after analysing the relevant provisions, it held as follows:

> "**11.** Section 2(c) refers to every person who is a relative of a person referred to in clause (a) or clause (b). Section 2(e) refers to any holder of any property which was at

. 2005 SCC OnLine Ker 101

4

any time previously held by a person referred to in clause (a) or clause (b). **When we read Section 6(1) and 6 (2) along with Section 2 (2)(e) it is evident that notice contemplated under Section 6(2) is to any other person if the property does not stand in the name of the detenu. So far as this case is concerned, property stands in the name of wife and brothers. Admittedly notices have been issued to them as contemplated under Section 6(1). We are of the view, non issue of notice to the detenu will not vitiate the proceedings as against their relatives.**

12. Petitioners also have raised a contention that more than six years have elapsed and the proceedings have not been initiated within a reasonable period. **No time limit has been prescribed under the Act**. The Apex Court in *Attorney General for India* v. *Amratlal Prajivandas* has dealt with the scope and ambit of the Act which requires no reiteration. However we may refer to the recent decision of the apex court in *Kesar Devi* v. *Union of India*. **The apex court while dealing with Section 2(2)(c) of the Act has categorically held that the burden of proving that such property is not illegally acquired property will be upon the person to whom notice has been issued**. On facts petitioners could not establish that the properties were legally acquired. Competent authority and the Tribunal concurrently found so and this court in writ jurisdiction will not be justified in a taking a different view in the absence of any contra evidence. We therefore find no infirmity in the orders passed by the competent authority. The writ petition lacks merits and the same would stand dismissed."

(emphasis supplied)

. (1994) 5 SCC 54 : AIR 1994 SC 2179

. (2003) 7 SCC 427

5

The second decision is of the Calcutta High Court in ***The Competent Authority & Administrator & Anr. vs. Manilal Jalal & Anr.***[.]. Even in this case, notice was issued only to the wife of the detenu and not to the detenu. The question was specifically dealt with by the Calcutta High Court after analysing the relevant provisions in the following words:

> "…..
> **A bare perusal of Section 2 of the Act would show that the Act not only applies to the detenu but also to the relations and/or associates of such detenu. Nowhere the said provision of law mandates that a proceeding against a relative of a detenu can be initiated only if such detenu is proceeded against under SAFEMA. Such right to proceed against the relative/associate is independent of any action taken against the detenu under SAFEMA. It is wholly fallacious to argue that the detenu must be proceeded against under SAFEMA as a condition precedent for any action against a relative of such detenu. The properties and/or assets which were sought to be forfeited were standing in the name of Sarbani Devi Jalan herself and therefore respondent authorities rightly issued a notice under Section 6 of the Act upon her as "person affected" for the purpose of initiating a proceeding of forfeiture of such property. There is nothing in the law that the property standing in the name of a relation of a detenu which is sought to be proceeded against must require a notice to be issued upon the detenu**

[.] 2013 SCC OnLine Cal 12911

> **also. To infer such a requirement when the same is not provided in law would amount to rewriting the statutory provision which is unwarranted**. This submission of the appellants being unfounded must therefore fail.
>
> ....."
>
> (emphasis supplied)

4. In view of the above, these appeals not only involve question regarding interpretation of Section 6 read with other provisions of the 1976 Act, but also call upon us to expound the stated question authoritatively and resolve the conflicting view taken by different High Courts.

5. Reverting to the facts of the present case, one V.P. Selvarajan (convict) — brother-in-law of respondent No.2 and paternal uncle of respondent No.1, was convicted for an offence punishable under the Customs Act, 1962 on 23.11.1969. As a result of his conviction, he came within the ambit of the expression "person" or "such person" occurring in the 1976 Act — Section 2 in particular. Respondents being the relatives of the convict in terms of Section 2(2) read with *Explanation 2* also came within the ambit of

. for short, "1962 Act"

7

expression "person" defined in the 1976 Act to whom the Act applies.

6. The 1976 Act came into force with effect from 5.11.1975, pursuant to which the Competent Authority under the Act resorted to inquiry, investigation or survey under Section 18 of the Act and on the basis of the information collated had reason to believe that certain properties are illegally acquired properties having nexus to the unlawful activities of the convict. As a result, a notice under Section 6(1) of the 1976 Act was issued to the convict on 2.2.1980. In the present appeals, we are not concerned with the said notice or for that matter illegally acquired properties of the convict referred to therein.

7. The Competent Authority, however, on the basis of information gathered had reason to believe that some of the properties were held by the respondents herein by themselves, which were illegally acquired properties within the meaning of Section 3(1)(c) of the 1976 Act. Accordingly, notice under Section 6(1) of the 1976 Act dated 19.1.1994 was issued to V. Mohan, respondent No.1 herein being nephew of the convict, calling upon

8

him to disclose the sources of his income, earnings or assets, out of which or by means of which he had acquired the properties referred to in the stated notice by himself. The description of the properties had been given in the Schedule, which reads thus:

"**SCHEDULE**

S. No.	**Description of the Property**	**Name of the present holder of property**
1	2	3
1.	Investment in the firm M/s V.P.V. Jewellery Mart, Kumbakonam	
2.	Investment in the Proprietary Concern M/s V.P.V. Gold Palace Kumbakonam	
3.	Residential Property in the form of house - being land and building at No.113, Sarangapani East Street, Kumbakonam	
4.	Agricultural Lands - 1 Acre & 8 cents at south pattam, Paganasam Taluk 1 Acre & 75 Cents at Thepperumal -nallur village."	

8. Similarly, a notice dated 28.2.1994 was issued to Smt. V. Padmavathy, respondent No.2 herein being the relative of the convict in respect of properties referred to in the said notice purportedly illegally acquired properties. The Schedule reads thus:

"**SCHEDULE**

S. No.	**Description of the Property**	**Name of the**

9

		present holder of property
1	2	3
1.	Residential house which includes land and building at No.123. Big Street, Kumbakonam.	V. Padmavathy
2.	Agricultural lands at Thepprumalnallur Village at Kumbakonam as specified below.	-do-
3.	Investment in the firm of M/s V.P.V. Prema Jewellery, Kumbakonam.	-do-
4.	Jewellery disclosed under Voluntary Disclosure Scheme (i.e.) 518 gms of gold and 28 ets. of diamond."	-do-

9. The Competent Authority after giving opportunity to the respondent(s) eventually passed separate forfeiture order(s) on 30.4.1998 against Smt. V. Padmavathy, respondent No.2 and on 28.5.1998 against V. Mohan, respondent No.1 in exercise of powers under Section 7(1) of the 1976 Act. It held that an order of forfeiture of the stated properties had become inevitable as the respondent(s) had failed to produce any credible evidence or explanation to discharge the burden of proving that the properties referred to in the impugned notice were legally acquired properties by them.

10. Being aggrieved, the respondents took the matter in appeal bearing Nos. F.P.A.No.31/MDS/98 (of respondent No.2) and F.P.A.No.32/MDS/98 (of respondent No.1) before the Appellate Tribunal for Forfeited Property, New Delhi-II, Camp: Bangalore. These appeals came to be dismissed by the Appellate Tribunal vide common order dated 15.11.2000. Resultantly, the order of forfeiture of subject properties passed by the Competent Authority was upheld.

11. The respondents then carried the matter before the Madras High Court by way of Writ Petition No.1149 of 2001 (of respondent No.1) and Writ Petition No.1150 of 2001 (of respondent No.2). Both these writ petitions came to be allowed by common judgment and order dated 24.3.2008 passed by the Division Bench of the Madras High Court taking the view that the action initiated against the respondents had vitiated owing to lack of notice to V.P. Selvarajan (convict), which in its view was mandatory requirement under Section 6 of the 1976 Act.

. for short, "Appellate Tribunal"

11

12. The appellants, being aggrieved by the said decision, have approached this Court by way of present appeals. According to the appellants, the view taken by the Madras High Court vide impugned judgment on the interpretation of Section 6 of the 1976 Act is untenable. Whereas, the issue has been rightly concluded in favour of the appellants by two other High Courts, namely, High Court of Kerala and Calcutta High Court.

13. It is urged that notice under Section 6 of the Act is required to be given to the person to whom the 1976 Act applies in respect of properties held by him, either by himself or through any other person on his behalf, being illegally acquired property within the meaning of the Act and proposed to be forfeited by the Central Government under the Act. It does not require issuing notice to the convict or detenu, as the case may be, if the properties are not held by him or in his name. Indeed, if the properties in question are held in the name of any other person on his behalf, the notice is required to be given to such person. To buttress this submission, reliance has been placed on Section 2 of the Act providing for application of the Act to the persons specified in

12

Section 2(2). The spouse of the brother of the convict as well as the son of the brother of the convict are plainly covered within the expression "relative" as clarified in *Explanation 2* of Section 2 of the 1976 Act and for which reason, the Act applies to the respondents as well. Emphasis is placed on the expression "held" occurring in Section 6 of the 1976 Act in particular which in terms of definition in P. Ramanatha Aiyar's The Major Law Lexicon would cover (i) those entitled to possession of property; and (ii) those in possession thereof.

14. It is urged that respondents were admittedly holding the properties in their name and thus, they were entitled to possession of such property and in fact they were in physical possession thereof. Therefore, they alone were expected to offer explanation and discharge the burden of proving that the properties are their legally acquired properties. They were, in fact, the persons directly affected by the proposed action of forfeiture and, hence, notice under Section 6 was required to be issued to the respondents alone. There is no mandate in Section 6 that a primary notice be

. 4th Edition, Vol. 3 at pages 3050-51

served on the convict to require him to indicate his sources of income as noted by the Madras High Court. More so, the convict is not expected to offer explanation with regard to the properties held by his relatives and not by him.

15. As regards the purport of Section 6(2) of the 1976 Act, it is urged that the plain and literal interpretation does not mandate issuing notice to the convict even if the property proposed to be forfeited is not held by him at the relevant time. It is a different matter that the convict can also be issued notice, but it is not a mandatory requirement when the properties proposed to be forfeited were held by the relatives of the convict at the relevant time when the action is initiated.

16. The appellants have placed reliance on the decisions of the High Court of Kerala and Calcutta High Court referred to earlier. In addition, reliance has also been placed on the *dictum* of the Constitution Bench of this Court in ***Amratlal Prajivandas***, which has decoded the intent of the legislation and all relevant provisions while rejecting the argument regarding constitutional validity of the

. Supra at Footnote No. 5

14

enactment. It held that the burden of establishing that the properties mentioned in Section 6 notice held on that date by a relative or an associate of the convict or detenu are not illegally acquired properties, lies upon such relative or associate. Further, the Act is intended to frustrate all attempts at screening properties irrespective of how the relatives/associates hold the property (whether benami or as name-lender or through transferee) and wherein the said relative/associate cannot disclose that the properties have not been acquired with the monies or assets belonging to a detenu/convict, but the failure to discharge the burden would justify their forfeiture there being a prohibition on any person to whom the Act applies from holding illegally acquired properties.

17. Reliance has also been placed on the *dictum* in ***Shobha Suresh Jumani vs. Appellate Tribunal, Forfeited Property & Anr.***, wherein a show-cause notice under Section 6 was issued to the detenu Suresh Manoharlal Jumani and his wife Shobha Suresh Jumani. Right to file appeal by Shobha Suresh Jumani

. (2001) 5 SCC 755

15

was questioned by the competent authority. Nevertheless, this Court upheld the action initiated against the relative (wife) of the detenu as the properties were held by her. It is submitted that the impugned judgment be set aside and the contra view taken by the High Court of Kerala and Calcutta High Court be affirmed.

18. Per contra, learned counsel for the respondents has supported the view taken by the Madras High Court in the impugned judgment and would urge that the appellants had all throughout proceeded against the respondents on the assumption that the respondents are only ostensible owners and the properties in question, in fact, belonged to the convict. Further, the respondents were holding the subject properties on behalf of the convict. In that context, the Madras High Court examined the purport of Section 6 and the interplay of two sub-sections therein to conclude that primary notice to the convict was a mandatory requirement, in such a fact situation. Now, in the present appeals, the appellants have taken a completely different position, namely, that the respondents are, in fact, the recorded owners of the

16

subject properties and, therefore, no notice is required to be given to the convict.

19. The respondents have invited our attention to the definition of "persons" and *Explanation 2* in Section 2 of the 1976 Act. It is also urged that the properties referred to in the impugned notices issued to the respondents were not made subject matter of notice under Section 6 issued to the convict on 2.2.1980. In other words, no notice had ever been given to the convict in respect of properties referred to in the impugned notices issued to the respondents as being his illegally acquired properties held through other person on his behalf.

20. As a matter of fact, it is urged by the respondents that Section 6(1) posits that when a notice is issued to a relative, it is imperative upon the Department to allege and establish a nexus between the properties of the relative sought to be forfeited and the convict or detenu. In that, the forfeited properties must be traceable to the illegal sources of income, earnings or assets of the convict or detenu. The personal properties of relative or associate of the

17

convict or detenu having no connection with the convict or detenu, cannot be made subject matter of forfeiture under the 1976 Act as held in ***Amratlal Prajivandas; Kesar Devi; Fatima Mohd. Amin (Dead) through LRs. vs. Union of India & Anr.;*** and ***Aslam Mohammad Merchant vs. Competent Authority & Ors.***.

21. It is then urged that the subject properties cannot be forfeited without substantiating the link or nexus between the properties of the relatives with the activity of the convict or detenu and more so when the relatives are not his immediate relatives such as parents or children or spouse. For lack of nexus between the properties sought to be forfeited being that of the convict, the statutory presumption is not attracted; and it must follow that Section 8 requiring burden of proof to be discharged by the noticee being the relative of the convict, would not come into play. Moreover, the notice contains a bald unreasoned averment — that the properties in question were acquired during the time when the convict was

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. supra at Footnote No. 5 (para 44)

. supra at Footnote No. 6 (paras 11 and 12)

. (2003) 7 SCC 436 (paras 7 to 9)

. (2008) 14 SCC 186 (para 45)

18

engaged in gold smuggling, the only inescapable conclusion is that the said properties were acquired by the funds of such convict. As a matter of fact, the respondents had furnished copious materials before the Authorities to establish that the properties in question are, in fact, personal properties purchased by them out of their business earnings, gifts, etc. The plea so taken by the respondents has been completely discarded.

22. It is urged that neither the Competent Authority nor the Appellate Tribunal took into account that no reasons have been recorded on the basis of which it was believed that the properties of the respondents were illegally acquired. Relying on the *dictum* in ***Nazir Ahmad vs. Emperor*** and ***Chandra Kishore Jha vs. Mahavir Prasad & Ors***:, it is urged that when a statute provides something to be done in a particular manner it ought to be done in that manner alone and in no other manner. Whereas, the Competent Authority failed to record proper reasons to believe as stipulated in Section 6 of the 1976 Act.

. AIR 1936 PC 253

. (1999) 8 SCC 266

19

23. It is then contended that on account of inordinate and undue delay, the proceedings suffer from the vice of arbitrariness and irrationality. In that, the convict was convicted on 23.11.1969 for an offence punishable under the 1962 Act. The properties in question belonging to the respondents were acquired between 1959 till 1980. Whereas, the impugned notices were issued on 19.1.1994 and 28.2.1994. Further, as aforesaid, the stated properties have not been referred to in the criminal proceedings against the convict nor in the notice issued to him on 2.2.1980. No explanation has been offered or forthcoming from the Competent Authority about the delay in issuing notice after 25 years, calling upon the respondents to explain and account for the sources of funds from which the properties in question have been acquired by them. This is not only unjustified, but also impractical and not meet the test of a reasonable period of time. Now, further period of 25 years has lapsed. Thus, to reopen and re-adjudicate the entire proceedings afresh at this distance of time would not only be iniquitous, but also result in serious irreparable harm and injury to the respondents and persons claiming through them.

20

24. It is urged that this Court may lean in favour of closure of the proceedings inasmuch as even the appellants succeed, the parties may have to be relegated to the High Court for consideration of all other aspects raised by the respondents in the writ petitions and not dealt with by the High Court being of the view that initiation of the action against the respondents without primary notice to the convict vitiated the entire proceedings. As a matter of fact, the High Court in paragraph 21 of the impugned judgment had left it open to the Authorities to initiate fresh proceedings in accordance with law, which the appellants have not chosen to initiate despite the fact that there was no interim stay given by this Court in that regard.

25. We have heard Mr. Aman Lekhi, learned Additional Solicitor General of India, Mr. A.K. Srivastava, learned senior counsel for the appellants and Mr. Atul Shankar Vinod, learned counsel for the respondents.

26. Before we proceed to examine the different viewpoints in reference to the provisions of the 1976 Act, it is essential to notice

21

the legislative intent for enacting the 1976 Act. That can be discerned from the Preamble of the Act and also exhaustively dealt with by the nine-Judges Constitution Bench of this Court, in ***Amratlal Prajivandas***.

27. The Preamble of the 1976 Act reads thus:

> "An Act to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto.
>
> WHEREAS for the effective prevention of smuggling activities and foreign exchange manipulations which are having a deleterious effect on the national economy it is necessary to deprive persons engaged in such activities and manipulations of their ill-gotten gains;
>
> AND WHEREAS such persons have been augmenting such gains by violations of wealth-tax, income-tax or other laws or by other means and have thereby been increasing their resources for operating in clandestine manner;
>
> **AND WHEREAS such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants**;"
>
> (emphasis supplied)

28. This Court dealt with the legislative intent in *extenso*. It also analysed the relevant provisions of the 1976 Act which would

. Supra at Footnote No. 5

22

reinforce the legislative intent. While dealing with the definition of "illegally acquired properties" (re: question No.4 in paragraph 43), it had noticed that the stated expression is quite expansive. It not only takes within its ambit the property acquired after the Act, but also the property acquired before the Act, "whatever be the length of time". Secondly, it takes in the property which may have been acquired partly from out of illegal activity — in which case, of course, the provision of Section 9 would be attracted. Further, illegal activity is not confined to violation of the laws mentioned in Section 2 of the 1976 Act but all laws which Parliament has power to make, such as if a smuggler has acquired some properties by evading tax laws or by committing theft, robbery, dacoity, misappropriation or any other illegal activity prohibited by the Indian Penal Code or any other law in force. All that would be liable to be forfeited.

29. The Constitution Bench negatived the challenge to the expansive definition of expression "illegally acquired property" on the grounds of unreasonableness, arbitrariness or for that matter

23

on any of the grounds relatable to Part III of the Constitution as not being available. The Constitution Bench then noted as follows:

> "Question No.4
>
> **43**. .....We can take note of the fact that persons engaged in smuggling and foreign exchange manipulations do not keep regular and proper accounts with respect to such activity or its income or of the assets acquired therefrom. If such person indulges in other illegal activity, the position would be no different. The violation of foreign exchange laws and laws relating to export and import necessarily involves violation of tax laws. **Indeed, it is a well-known fact that over the last few decades, smuggling, foreign exchange violations, tax evasion, drugs and crime have all got mixed-up. Evasion of taxes is integral to such activity. It would be difficult for any authority to say, in the absence of any accounts or other relevant material that among the properties acquired by a smuggler, which of them or which portions of them are attributable to smuggling and foreign exchange violations and which properties or which portions thereof are attributable to violation of other laws (which Parliament has the power to make). It is probably for this reason that the burden of proving that the properties specified in the show-cause notice are not illegally acquired properties is placed upon the person concerned. May be this is a case where a dangerous disease requires a radical treatment. Bitter medicine is not bad medicine**. In law it is not possible to say that the definition is arbitrary or is couched in unreasonably wide terms. Further, in view of clear and unambiguous language employed in clause (*c*) of Section 3, it is not possible or permissible to resort to the device of reading down. The said device is usually resorted to save a provision from being declared unconstitutional, incompetent and ultra vires. We are, therefore, of the opinion that neither the constitutional validity of the said definition can be

24

questioned nor is there any warrant for reading down the clear and unambiguous words in the clause. So far as justification of such a provision is concerned, there is enough and more. **After all, all these illegally acquired properties are earned and acquired in ways illegal and corrupt — at the cost of the people and the State. The State is deprived of its legitimate revenue to that extent. These properties must justly go back where they belong — to the State**. ....."

(emphasis supplied)

30. After having said that while dealing with the ambit of Section 2(2) of the Act, the Court observed thus:

"Question No. 5

44. It is contended by the counsel for the petitioners that extending the provisions of SAFEMA to the relatives, associates and other 'holders' is again a case of overreaching or of over-breadth, as it may be called — a case of excessive regulation. It is submitted that the relatives or associates of a person falling under clause (*a*) or clause (*b*) of Section 2(2) of SAFEMA may have acquired properties of their own, may be by illegal means but there is no reason why those properties be forfeited under SAFEMA just because they are related to or are associates of the detenu or convict, as the case may be. It is pointed out that the definition of 'relative' in Explanation (2) and of 'associates' in Explanation (3) are so wide as to bring in a person even distantly related or associated with the convict/detenu, within the net of SAFEMA, and once he comes within the net, all his illegally acquired properties can be forfeited under the Act. **In our opinion, the said contention is based upon a misconception. SAFEMA is directed towards forfeiture of "illegally acquired properties" of a person falling under clause (*a*) or clause (*b*) of Section 2(2). The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or**

25

detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu — whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu — whether in his own name or in the name of his relatives and associates. It is to counteract the several devices that are or may be adopted by persons mentioned in clauses (*a*) and (*b*) of Section 2(2) that their relatives and associates mentioned in clauses (*c*) and (*d*) of the said sub-section are also brought within the purview of the Act. The fact of their holding or possessing the properties of convict/detenu furnishes the link between the convict/detenu and his relatives and associates. Only the properties of the convict/detenu are sought to be forfeited, wherever they are. The idea is to reach his properties in whosoever's name they are kept or by whosoever they are held. The independent properties of relatives and friends, which are not traceable to the convict/detenu, are not sought to be forfeited nor are they within the purview of SAFEMA[*]. We may proceed to explain

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[**] **That this was the object of the Act is evident from para 4 of the preamble which states: "And whereas such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants." We are not saying that the preamble can be utilised for restricting the scope of the Act, we are only referring to it to ascertain the object of the enactment and to reassure ourselves that the construction placed by us accords with the**

26

what we say. Clause (*c*) speaks of a relative of a person referred to in clause (*a*) or clause (*b*) (which speak of a convict or a detenu). Similarly, clause (*d*) speaks of associates of such convict or detenu. If we look to Explanation (3) which specifies who the associates referred to in clause (*d*) are, the matter becomes clearer. 'Associates' means — (*i*) any individual who had been or is residing in the residential premises (including outhouses) of such person ['such person' refers to the convict or detenu, as the case may be, referred to in clause (*a*) or clause (*b*)]; (*ii*) any individual who had been or is managing the affairs or keeping the accounts of such convict/detenu; (*iii*) any association of persons, body of individuals, partnership firm or private company of which such convict/detenu had been or is a member, partner or director; (*iv*) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm or private company referred to in clause (*iii*) at any time when such person had been or is a member, partner or director of such association of persons, body of individuals, partnership firm or private company; (*v*) any person who had been or is managing the affairs or keeping the accounts of any association of persons, body of individuals, partnership firm or private company referred to in clause (*iii*); (*vi*) the trustee of any trust where (*a*) the trust has been created by such convict/detenu; or (*b*) the value of the assets contributed by such convict/detenu to the trust amounts, on the date of contribution not less than 20% of the value of the assets of the trust on that date; and (*vii*) where the competent authority, for reasons to be recorded in writing, considers that any properties of such convict/detenu are held on his behalf by any other person, such other person. It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. **Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to**

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said object.

(emphasis supplied)

27

hold any illegally acquired property either by himself or through any other person on his behalf". All such property is liable to be forfeited. The language of this section is indicative of the ambit of the Act. Clauses (*c*) and (*d*) in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties. By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate — it does not matter whether he intends such a person to be a mere name-lender or whether he really intends that such person shall be the real owner and/or possessor thereof — or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates — in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(*c*). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(*e*) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in

28

> good faith for consideration, his property — even though purchased from a convict/detenu — is not liable to be forfeited. **It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict**. We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu. **There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associate. In this view of the matter, the apprehension and contention of the petitioners in this behalf must be held to be based upon a mistaken premise**. The bringing in of the relatives and associates or of the persons mentioned in clause (*e*) of Section 2(2) is thus neither discriminatory nor incompetent apart from the protection of Article 31-B."
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> (emphasis supplied)

31. While examining the contention whether clauses (c) to (e) of Section 2(2) is a case of overreach or overbreadth, it held that this argument of excessive regulation was based on a misconception as the Act is only directed towards forfeiture of "illegally acquired properties of the person falling under clause (a) or clause (b) of Section 2(2)". The relative and associates are brought in only to

29

ensure that the 'illegally acquired properties' of the convict or the detenu, acquired or kept in the names of relatives or associates do not escape the net of the Act. There could be cases where the persons mentioned in clauses (a) and (b) could transfer 'illegally acquired properties' to their relatives and associates "and even further", with the intent to transfer the ownership and title. Therefore, it is immaterial how such relative or associate holds the illegally acquired property of the convict/detenu – whether as a benami, or as a mere name-lender or through transferee or in any other manner. The objective and purpose of the Act is to counteract devices that are or may be adopted by persons mentioned in clauses (a) or (b) of Section 2(2), hence, their relatives or associates mentioned in clauses (c) or (d) of the said sub-section are also brought within the purview of the Act. The relatives or associates holding or possessing the illegally acquired property of the convict/detenu is the link between the convict/detenu. The idea is to forfeit the properties of the convict/detenu wherever they are, and to reach properties in whosoever's name they are kept or held.

30

32. In the backdrop of the *dictum* of the Constitution Bench and the subsequent decisions of this Court, we may hasten to add that pivot of the 1976 Act is to reach the "illegally acquired properties" of the specified convict/detenu in whosoever's name they are kept or by whosoever they are held, whatever be the length of time.

33. Concededly, the dispensation under the 1976 Act applies only to persons specified in Section 2(2).

. **2. Application.—** (1) The provisions of this Act shall apply only to the persons specified in sub-section (2).

(2) The persons referred to in sub-section (1) are the following, namely:—

(a) every person—

(i) who has been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), of an offence in relation to goods of a value exceeding one lakh of rupees; or

(ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or

(iii) who having been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those Acts; or

(iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts;

(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:

31

34. Broadly stated, Section 2(2)(a) refers to the category of persons who are convicted under the specified enactments. Whereas, Section 2(2)(b) refers to persons detained under the specified detention law. The expression "person" to whom the 1976

Provided that—

(i) such order of detention, being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or

(ii) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (3) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (2) of section 9, of the said Act; or

(iii) such order of detention, being an order to which the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (6) of section 12A, of that Act; or

(iv) such order of detention has not been set aside by a court of competent jurisdiction;

(c) every person who is a relative of a person referred to in clause (a) or clause (b);

(d) every associate of a person referred to in clause (a) or clause (b);

(e) any holder (hereafter in this clause referred to as the present holder) of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be,

32

Act applies, has been broadened by including every person who is a relative of a person referred to in clause (a) being convict under the specified laws or clause (b) being detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,

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any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration.

Explanation 1.— For the purposes of sub-clause (i) of clause (a), the value of any goods in relation to which a person has been convicted of an offence shall be the wholesale price of the goods in the ordinary course of trade in India as on the date of the commission of the offence.

Explanation 2.— For the purposes of clause (c), "relative" in relation to a person, means—

(i) spouse of the person;

(ii) brother or sister of the person;

(iii) brother or sister of the spouse of person;

(iv) any lineal ascendant or descendant of the person;

(v) any lineal ascendant or descendant of the spouse of the person;

(vi) spouse of a person referred to in clause (ii), clause (iii), clause (iv) or clause (v);

(vii) any lineal descendant of a person referred to in clause (ii) or clause (iii).

Explanation 3.—For the purposes of clause (d), "associate", in relation to a person, means—

(i) any individual who had been or is residing in the residential premises (including out houses) of such person;

(ii) any individual who had been or is managing the affairs or keeping the accounts of such person;

(iii) any association of persons, body of individuals, partnership firms, or private company within the meaning of the Companies Act, 1956, of which such person had been or is a member, partner or director;

33

1974. The expression "relative" has been further elaborated in *Explanation 2,* of Section 2, so as to expand the scope of taking corrective measures for reaching up to the illegally acquired properties of a convict or detenu, as the case may be.

(iv) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm, or private company referred to in clause (iii) at any time when such person had been or is a member, partner or director of such association, body, partnership firm or private company;

(v) any person who had been or is managing the affairs, or keeping the accounts, of any association of persons, body of individuals, partnership firm or private company referred to in clause (iii);

(vi) the trustee of any trust, where,—

(a) the trust has been created by such person; or

(b) the value of the assets contributed by such person (including the value of the assets, if any, contributed by him earlier) to the trust amounts, on the date on which the contribution is made, to not less than twenty per cent. of the value of the assets of the trust on that date;

(vii) where the competent authority, for reasons to be recorded in writing considers that any properties of such person are held on his behalf by any other person, such other person.

***Explanation 4.*— For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be determined with reference to any facts, circumstances or events (including any conviction or detention) which occurred or took place before the commencement of this Act.**

(emphasis supplied)

34

35. As regards the respondents herein, it is obvious that they are covered under the ambit of relative — being son and wife of the brother of the convict, to whom the 1976 Act applied.

36. Section 2(2)(d) further expands the sweep so as to include associate of a convict or detenu, as the case may be; and Section 2(2)(e) takes within its ambit any holder (the present holder) of any property, which was at any time previously held by a person referred to in clause (a) or clause (b), namely, convict or detenu, as the case may be.

37. The objective and purpose of the enactment is reinforced in the encircling *Explanation* 4 as reproduced hereinbefore. Obviously, the intent is to ensure that the convict/detenu cannot get away by adopting camouflage or screening, including legal transfer of properties in the name of his relative, associate or any other person covered under clause (e) to Section 2(2) of the Act.

38. This expanded ambit of clauses (c) to (e) is to be interpreted in the context of the object and purpose of the Act, but the scope of the Act does not extend to include every property held by a relative

35

or an associate unless the link and the connection with the illegal activities of the convict/detenu is established. For, the Act is only directed to forfeiture of 'illegally acquired properties' of a person falling under clause (a) or clause (b) of Section 2(2) including their specified properties held by third party. Independent properties of the relatives and friends which are not traceable to the illegal activities of the convict/detenu are neither sought to be forfeited nor are they within the purview of the Act.

39. Section 3 is the definition clause. The expression "illegally acquired property" has been expounded in clause (c) of sub-Section (1) thereof.

. **3. Definitions.—** (1) In this Act, unless the context otherwise requires,

(a) and (b)....

(c) "illegally acquired property", in relation to any person to whom this Act applies, means,—

(i) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or

(ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened; or

36

The other relevant definition clause is expression "property" in Section 3(1)(e).

40. As aforementioned, in ***Amratlal Prajivandas***, whilst interpreting the definition of "illegally acquired properties" in clause (c) of Section 3(1) of the Act, it was held that the definition is very wide as to include not only the property acquired after the

(iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or

(iv) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in sub-clauses (i) to (iii) or the income or earnings from such property;

and includes—

(A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it, unless such person or any other person who held the property at any time after such previous holder or, where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration;

(B) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefrom;

. (e) "property" includes any interest in property, movable or immovable;

. Supra at Footnote No. 5

37

enactment of the Act but also property acquired before the Act, whatever be the length of time, and further the illegal activity is not confined to the laws mentioned in Section 2 of the Act but also other laws which the Parliament is competent to make. At the same-time it is clarified that the definition of 'illegally acquired properties' does not include the properties of the relatives or associates covered under clauses (c) and (d) of Section 2(2) even if they have acquired the properties by illegal activities or in violation of the laws made by the Parliament. For, the Act applies only to 'illegally acquired properties' of the convict/detenu held by or in the name of the relative or associate or holder.

41. While answering Question No.5, the Constitution Bench held:

> "44...Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf". All such property is liable to be forfeited. The language of this section is indicative of the ambit of the Act. Clauses (*c*) and (*d*) in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any

38

> relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties..."

On the issue of the applicability of the Act to holders mentioned in Section 2(2)(e) of the Act, this Court held that they fall in a different class from relatives and associates who are dealt with on a separate footing. If a person covered under clause (e) to Section 2(2) proves that he is a transferee in good faith without notice, for adequate consideration, his property — even though purchased from a convict/detenu — is not liable to be forfeited.

42. In the present judgment, it is not necessary for us to dilate on the definition of "illegally acquired property" as the sole issue involved is: whether it is mandatory to issue a primary notice under Section 6 of the 1976 Act to the convict and not merely to the relatives of the convict who hold the properties proposed to be

39

forfeited? Nevertheless, it may be useful to advert to Section 4 of the 1976 Act which prohibits holding of illegally acquired property.

43. On the literal construction of this provision, it must follow that it shall not be lawful for any person (as defined in Section 2(2) of the 1976 Act) to whom the Act applies to hold any illegally acquired property (as defined in Section 3(1)(c) of the 1976 Act) either by himself or through any other person on his behalf. It is well settled that when penalty (such as forfeiture of such property) is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable. Such acts of commission and omission become void even without express declaration regarding its voidness, because such penalty implies a prohibition. Be it noted that

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. **4. Prohibition of holding illegally acquired property.—** (1) As from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf.

(2) Where any person holds any illegally acquired property in contravention of the provisions of sub-section (1), such property shall be liable to be forfeited to the Central Government in accordance with the provisions of this Act.

. see Mannalal Khetan & Ors. vs. Kedar Nath Khetan & Ors., (1977) 2 SCC 424 (paras 18 to 22) and Asha John Divianathan vs. Vikram Malhotra & Ors.,

40

Section 4 of the Act posits a clear mandate that the person to whom the Act applies shall not hold any illegally acquired property and there is a corresponding duty on the Competent Authority to initiate process after due inquiry under Section 18 of the 1976 Act for forfeiture of such property — whether acquired before the commencement of the Act or thereafter.

44. That process has to be initiated by the Competent Authority by issuing notice under Section 6 of the 1976 Act to such person who holds the properties proposed to be forfeited being illegally

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2021 SCC OnLine SC 147

. **6. Notice of forfeiture.—** (1) If, having regard to the value of the properties **held by any person to whom this Act applies**, either by **himself or through any other person on his behalf**, his known sources of income, earnings or assets, and any other information or material available to it as a result of action taken under **section 18** or otherwise, the competent authority has reason to believe (the reasons for such belief to be recorded in writing) that all or any of such properties are illegally acquired properties, it may serve a notice upon **such person (hereinafter referred to as the person affected)** calling upon him within such time as may be specified in the notice, which shall not be ordinarily less than thirty days, to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.

(2) Where a notice under sub-section (1) to **any person** specifies any property as being held on behalf of **such person** by any other person, a copy of the notice shall also be served upon **such other person**.

(emphasis supplied)

41

acquired properties. That person may hold the property either by himself or through any other person on his behalf. If the property is held by person concerned, the notice under Section 6(1) needs to be issued to such person to whom the Act applies calling upon him to disclose the sources of his income, earnings or assets out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars.

45. Before we proceed to analyse Section 6 of the 1976 Act, it would be apposite to reproduce Section 18 of the Act, which is referred to in Section 6(1), being the preceding procedural steps to

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. **18. Power of competent authority to require certain officers to exercise certain powers.—** (1) For the purposes of any proceedings under this Act or the initiation of any such proceedings, the competent authority shall have power to cause to be conducted any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account or any other relevant matters.

(2) For the purposes referred to in sub-section (1), the competent authority may, having regard to the nature of the inquiry, investigation or survey, require an officer of the Income-tax Department to conduct or cause to be conducted such inquiry, investigation or survey.

(3) Any officer of the Income-tax Department who is conducting or is causing to be conducted any inquiry, investigation or survey required to be conducted under sub-section (2) may, for the purpose of such inquiry, investigation or survey, exercise any power (including the power to authorise the exercise of any power) which may be exercised by him for any purpose under the Income-tax Act, 1961 (43 of 1961), and the provisions of the said Act shall, so far as may be, apply accordingly.

42

be taken by the Competent Authority before issuing notice under Section 6(1), upon having reason to believe that the concerned properties are illegally acquired properties held by the noticee, either by himself or through any other person on his behalf.

46. At this stage, we may also refer to the other relevant provision being Section 8 of the 1976 Act provisioning for burden of proving that the property referred to in the notice is legally acquired property of the noticee.

47. On plain as well as contextual reading of Section 6, it is crystal clear that the notice under Section 6(1) is required to be issued to any person to whom the Act applies. As is evident from Section 2(2) of the 1976 Act, the Act applies not only to convict or detenu, but also to their relative, associate including holder of any property being Section 2(2)(c), 2(2)(d) and 2(2)(e) respectively. The purpose of issuing notice is to enable the person concerned (noticee) to discharge the burden of proof as propounded in Section

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. **8. Burden of proof.—** In any proceedings under this Act, the burden of proving that any property specified in the notice served under section 6 is not illegally acquired property shall be on the person affected.

43

8 of the 1976 Act. It is then open to him to prove that the property referred to in the notice is his legally acquired property.

48. In a given case, however, if the property is held by a person owing to merely being in legal possession thereof, but the ownership of the property at the relevant time is that of the convict or detenu or his/her relative, as the case may be, it would become necessary for the Competent Authority to not only give notice to the person in possession of the property in question but also to the person shown as owner thereof in the relevant records. Similarly, in a case where the person shown as owner in the relevant records had purchased the subject property from the convict or detenu and is a subsequent purchaser, notice is required to be issued to both — the present owner and the erstwhile owner (convict or detenu), as the case may be. However, if the ownership of the property in the relevant records at the relevant time is that of the person in possession (as in these cases), and not being the convict or detenu, the question of issuing notice to the latter would serve no purpose. The convict or detenu cannot be heard to claim any right in such property including proprietary rights and for the same reason, he is

44

not expected to discharge the burden of proof under Section 8 of the 1976 Act as to whether it is his legally acquired property nor can he be said to be the person affected with the proposed action of forfeiture as such.

49. The expression "held" in Section 6 has to be understood to mean that the person is entitled to possession of property being owner of the property in the relevant record or even because he is in legal possession thereof. In other words, a person may be holding the property also when he (at the relevant time) is in legal possession of the stated property, even if he is not a recorded owner thereof. In either case, it would be a matter within the ambit of expression "held" occurring in Section 6 of the 1976 Act.

50. The third facet of Section 6(1) of the 1976 Act is the noticee may hold the property either by himself or through any other person on his behalf. As noted earlier, a primary notice under Section 6(1) can be issued only against person to whom the Act applies. If the relative of a convict or detenu has acquired property from the illegal sources of income, earnings or assets of the convict

45

or detenu, such person would be a person to whom the Act applies vide Section 2(2)(c) read with *Explanation 2.* Such person may be a recorded owner of the property — having acquired it wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to unlawful activity (whether indulged into before or after the commencement of the 1976 Act) of the convict or detenu which is prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws.

51. In other words, going by the definition of "illegally acquired property" in Section 3(1)(c) and of "person" in Section 2(2) to whom the Act applies, if the property is held in the name of the relative of the convict or detenu before or after the commencement of the Act, the notice under Section 6(1) needs to be issued to such person (recorded owner as well as in possession), who alone can and is expected to discharge the burden of proof in terms of Section 8 of the 1976 Act — so as to dissuade the Competent Authority from proceeding further against such property. Indeed, if the illegally acquired property is held in the name of the relative, but the *de*

46

facto possession thereof is with some other person, who is not covered by the expression "person" as given in Section 2(2), in such a case primary notice under Section 6 is required to be issued to the relative of the convict or detenu and copy thereof served upon "such other person" who is in *de facto* possession thereof (*albeit* for and on behalf of the relative of the convict or detenu). Even in this situation, notice to the convict or detenu may not be necessary much less mandatory. For, the 1976 Act applies even to the relative of the convict or detenu holding illegally acquired property either by himself or through any other person on his behalf.

52. Learned counsel appearing for the parties had commended us with the purport of Section 6(2) of the 1976 Act. Different interpretation has been given by both sides to the expressions occurring therein. Section 6(2) merely refers to the requirement of issuing notice to "such other person".

53. The expression "such person" is found not only in Section 6(1), but in other provisions of the Act including the definition clause i.e., Section 3(1)(c) of illegally acquired property. The

47

expression "such person" and "such other person" occurring in Section 6(2) may have to be understood in the context and the setting in which it has been employed in the concerned provision. A harmonious construction thereof is imperative.

54. In the first part of Section 6(2), the expression used is "any person". That is a person to whom primary notice under Section 6(1) is addressed. This person can be none other than person referred to in Section 2(2) of the 1976 Act. He can be a convict or detenu, his relative or associate including the person who is a holder of the property in question at the relevant time. Section 6(2) then refers to the subject property in the notice and the *factum* of the property being held by concerned person (such person) — either the primary noticee to whom the Act applies himself or through "any other person" on his behalf. The latter is described as "such other person", in the concluding part of that sub-Section [Section 6(2)]. That, "such other person", is also covered within the ambit of expression "any other person" mentioned earlier and holding the property in question on behalf of the primary noticee. In other words, "such other person" will be a person other than a

48

person to whom the Act applies being merely a holder of illegally acquired property on behalf of the person to whom Act applies. Thus, he may be a person other than a person referred to in Section 2(2) of the 1976 Act. The legislative intent is to cover "such other person" so as to reach up to "illegally acquired property" of the convict/detenu and unravel/lift the veil created by the person to whom the Act applies. We may usefully recapitulate the enunciation of the Constitution Bench, wherein it is held that the legislative intent is to reach to all illegally acquired properties in whosoever's name they are kept or by whosoever they are held irrespective of the time period of such acquisition. This is to ensure that the persons to whom the Act applies referred to in Section 2(2), do not use mechanism to shield illegally acquired properties from the proposed action of forfeiture.

55. Be it noted that the expression "such person" employed in Section 6(2) is referable to the primary noticee, who is a person to whom the Act applies. If, however, the notice mentions that the properties referred to in the notice are held by the noticee through any other person on his behalf, that may be a case of holding of

49

physical possession of the illegally acquired property by person other than the person to whom the Act applies. In such a case, sub-section (2) triggers in enabling the Competent Authority to issue notice even to "such other person" — not covered by the definition of Section 2(2) of the Act. If that person is merely in possession of the property and not its owner, he may not be able to explain or prove the fact that the property is not illegally acquired property of the primary noticee. Indeed, if "such other person" is claiming ownership of the property through the relative of the convict or detenu in relation to illegally acquired property, who was earlier owner thereof upon receipt of notice under Section 6(2) can certainly impress upon the Competent Authority that he is a purchaser in good faith for adequate consideration of the stated property. Such a plea can be considered by the Competent Authority on its own merits.

56. Section 4 of the Act, which in sub-section (1) uses similar expression – "any person to whom this Act applies to hold any

50

illegally acquired property either by himself or through any other person on his behalf" – which is similar to the wordings/expressions used in Section 6 of the Act, reinforces the above interpretation.

57. Notice under Section 6(1) cannot be issued in respect of properties for which the Competent Authority has no evidence or material to record "reasons to believe" that the properties were acquired from the assets or money provided by the convict/detenu. The expression 'reasons to believe' is a phrase used in several enactments and interpreted by this court to mean not 'mere subjective satisfaction' based on surmise and conjecture, but a belief that is 'honest and based upon reasonable grounds'.[1] The satisfaction should be based upon objective material and not mere feeling or inkling.[2] The requirement is deliberately legislated as a check against frivolous and rowing inquiries based upon mere suspicion and pretence.[3] The reasons to believe to be valid should refer to facts that have a rational connection or relevant bearing to

[1] Tata Chemicals Ltd. v. Commissioner of Customs (Preventive), Jamnagar, (2015) 11 SCC 628

[2] Kewal Krishan v. State of Punjab, AIR 1967 SC 737

[3] Bar Council of Maharashtra v. M. V. Dabholkar & Ors., (1976) 2 SCC 291

51

the formation of belief and should not be extraneous or irrelevant for the purpose of initiation of inquiry under Section 6 of the Act.

58. Recording of the reasons to believe and satisfaction of the aforesaid conditions is an important condition precedent – a *sine qua non* – and its violation would have legal consequences. It is a jurisdictional requirement, which, unlike a procedural requirement, would affect the proceedings if not complied with. Therefore, in such cases, the question of no prejudice is unavailable as the provision for issue of notice and satisfaction of the precondition for the issue of notice, i.e., "reasons to believe", is mandatory and not optional or directory.

59. G.P. Singh, in *Principles of Statutory Interpretation*, 14th Edition, at page 430, has laid down principles and rules for ascertaining the mandatory or directory nature of provisions, and has noted that this depends on the intent of the legislature and not necessarily on the language that the intent is clothed in. The nature and design of the statute, the effects which would follow

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. S. Narayanappa & Ors. v. Commissioner of Income-tax, Bangalore, AIR 1967 SC 523

52

from construing it one way or the other, and the severity or triviality of consequences that flow therefrom have to be considered. At times, the courts examine whether the statute provides for the contingency of non-compliance and whether non-compliance is visited with some penalty etc., but this is not a necessary or sufficient basis for determining whether the provision is mandatory or directory in nature. Lastly, if a provision is mandatory, it must be obeyed and followed. This is especially so in case of jurisdictional requirements, i.e., pre-conditions that have to be fulfilled before any action is taken.

60. In the context of the present enactment, it is unnecessary to underscore that when a notice under Section 6 of the Act is issued, the consequences entail forfeiture of property or fine in lieu of forfeiture as envisaged by Sections 7 and 9, respectively, of the Act. We have not quoted Section 11, but the said provision postulates that transfer of property referred to in a notice under Section 6 is null and void. Therefore, transactions after issuance of notice under Section 6 or 10 (which applies to the procedure in respect of certain trust properties) are void and are to be ignored.

53

61. Section 8 of the Act predicates that when proceedings in respect of a property are initiated by way of notice under Section 6, the burden of proving that the property is not illegally acquired shall be on the person affected. The enactment, therefore, reverses the burden of proof but only after the notice under Section 6 has been validly issued. By virtue of Section 6, the enactment requires the Competent Authority to form reasons to believe, which must be rational and based upon some material which would show that the conditions mentioned in Section 2(2) as explained and expounded by this Court in ***Amratlal Prajivandas*** are satisfied. Section 8 does not apply at the initial stage or when the Competent Authority decides whether or not notice under Section 6 should be issued. The Competent Authority cannot, simply by relying upon Section 8, reverse the burden of recording of reasons to believe and mechanically issue notice under Section 6. For, Section 8 does not apply at the stage when the Competent Authority forms and records its reasons to issue notice.

. **8. Burden of proof.** In any proceedings under this Act, the burden of proving that any property specified in the notice served under section 6 is not illegally acquired property shall be on the person affected.

. Supra at Footnote No. 5

54

62. Section 7[.] of the Act, which is titled '*Forfeiture of property in certain cases*', supports the above interpretation as it envisages that the Competent Authority shall consider the explanation, if any, to the show-cause notice issued under Section 6 and the material before it. After giving notice to the person affected, and in case the person affected holds any property specified in the notice through any other person, then to such other person, a reasonable opportunity of being heard would be afforded to them. Thereafter, the Competent Authority may pass an order, recording findings

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. **7. Forfeiture of property in certain cases**. (1) The competent authority may, after considering the explanation, if any, to the show- cause notice issued under section 6, and the materials available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are illegally acquired properties.

(2) Where the competent authority is satisfied that some of the properties referred to in the show-cause notice are illegally acquired properties but is not able to identify specifically such properties then, it shall be lawful for the competent authority to specify the properties which, to the best of its judgment, are illegally acquired properties and record a finding accordingly under sub-section (1).

(3) Where the competent authority records a finding under this section to the effect that any property is illegally acquired property, it shall declare that such property shall, subject to the provisions of this Act, stand forfeited to the Central Government free from all encumbrances.

(4) where any shares in a company stand forfeited to the Central Government under this Act, then, the company shall, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or the articles of association of the company, forthwith register the Central Government as the transferee of such shares.

55

whether or not the listed properties are illegally acquired properties.

63. In ***Kesar Devi***, this Court held that the language of Section 6(1) does not indicate any requirement of mentioning any link or nexus between the convict or the detenu and the property ostensibly standing in the name of the person covered under clauses (c), (d) and (e) to Section 2(2) and also referred to Section 8 which incorporates reverse burden of proof. However, the said observations must be read in light of the Constitution Bench judgment in the case of ***Amratlal Prajivandas***, which is the authoritative and binding precedent. Indeed, ***Kesar Devi's*** judgment observes that in some cases where the relationship is close and direct, an inference can easily be drawn and no link or nexus has to be indicated and may itself indicate some link or nexus, which can be duly taken notice of and the reasons to believe can be recorded in writing. That, however, may depend on facts of the case and not be true in all cases.

. Supra at Footnote No. 6

. Supra at Footnote No. 5

. Supra at Footnote No. 6

56

64. A *priori*, we are of the considered opinion that Section 6(1) of the 1976 Act nowhere provides that it is "mandatory" to serve the convict or detenu with a primary notice under that provision whilst initiating action against the relative of the convict. Indubitably, if the illegally acquired property is held by a person in his name and is also in possession thereof, being the relative of the convict and who is also a person to whom the Act applies, there is no need to issue notice to the convict or detenu much less primary notice as held by the High Court in the impugned judgment. For, Section 6(1) posits that notice must be given to the person who is holding the tainted property and is likely to be affected by the proposed forfeiture of the property. The person immediately and directly to be affected is the person who is the recorded owner of the property and in possession thereof himself or through some other person on his behalf. In the latter case, the burden of proof under Section 8 is not to be discharged by the convict or detenu, but by the person who holds the illegally acquired property either by himself or through any other person on his behalf.

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65. The expression "such other person" in Section 6(2) is, thus, referable to a person falling in class "through any other person on his behalf". That is the person to whom the Act applies, as noted in the opening part of Section 6(1) of the Act. In such a case, the convict or detenu is not expected to nor can be called upon to discharge the burden of proof under Section 8. Accordingly, we may lean in favour of the view taken by the High Court of Kerala and Calcutta High Court reproduced above, for independent reasons delineated hitherto. The view taken by the Madras High Court in the impugned judgment, therefore, does not commend to us and is reversed.

66. The parties had invited our attention to other judgments of this Court. However, those judgments have not dealt with the question that arise for consideration in the present appeals.

67. Having said this, we need to set aside the impugned judgment and relegate the parties before the High Court by restoring the writ petitions to the file to its original number for being heard afresh on all other issues and contentions as may be available to both sides

58

including the argument that there is an inordinate, undue and unexplained delay in initiating the action against the respondents (writ petitioners) and as a result of which it would be iniquitous to call upon the respondents to offer explanation by reopening the adjudication of the entire proceedings. We do not wish to dilate on any other plea in these appeals. Further, we may not be understood to have expressed any opinion either way on any other contention available to the parties. We say so because even the impugned judgment makes it amply clear that the writ petitions filed by the respondents were being allowed on the sole ground that the action against the respondents sans primary notice to the convict is vitiated. That view having been reversed, the matter needs to go back before the High Court for consideration of all other aspects on its own merits.

68. During the course of the hearing, an issue arose whether the convict, i.e., V.P. Selvarajan had expired before the issuance of notice under Section 6 on 19th January 1994. The counsel, at the time of argument, were not aware of the factual position. However, in the written submissions, the appellant and the respondents

59

have accepted that the convict V.P. Selvarajan had expired before impugned notices under Section 6 dated 19th January 1994 were issued.

69. Be that as it may, in the present case, the properties in question and subject matter of notice under Section 6 are in the name of and held by the two respondents. No entitlement or right has been claimed in these properties by the heirs of the deceased convict V. P. Selvarajan. If the properties were in the name of the deceased detenu or convict, then different considerations may have applied. In the context of the present case as the convict V.P. Selvarajan had expired before the issuance of notice under Section 6 on 19th January 1994, therefore, the need and requirement to serve notice on him would not arise.

70. Accordingly, these appeals succeed. The common impugned judgment and order dated 24.3.2008 passed by the Madras High Court in Writ Petition Nos.1149 and 1150 of 2001 is set aside. Instead, the writ petitions are restored to the file to its original number for being considered afresh on its own merits in

60

accordance with law on all other issues and contentions available to both sides except the question answered in this judgment. Thus, all other contentions available to both parties are left open. We request the High Court to expeditiously dispose of the remanded writ petitions. No order as to costs.

Pending applications, if any, stand disposed of.

.....J.
(A.M. Khanwilkar)

.....J.
(Sanjiv Khanna)

New Delhi;
December 14, 2021.

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.6905 of 2021
(Arising out of SLP (C) No. 14623 of 2020)

Mohd. Mustafa .... Appellant(s)

Versus

Union of India & Ors. .... Respondent(s)

W I T H

Civil Appeal Nos. 6906-6909 of 2021
(Arising out of SLP (C) Nos. 14982-14985 of 2020)

J U D G M E N T

L. NAGESWARA RAO, J.

Leave granted.

1. Aggrieved by the order dated 07.02.2019 passed by the Governor of Punjab by which Mr. Dinkar Gupta was appointed as Director General of Police (Head of Police Force) (hereinafter referred to "*DGP (HoPF)"*), the Appellants filed original applications before the Central Administrative Tribunal, Chandigarh Bench, Chandigarh. By an order dated 17.01.2020, the Tribunal set aside the order dated 07.02.2019 on the ground

that preparation of the panel for selection of DGP (HoPF) for the State of Punjab was in contravention of a judgement of this Court in ***Prakash Singh v. Union of India***[1] apart from others. Further, a direction was given to the Union Public Service Commission (hereinafter referred to as "UPSC") and the State of Punjab to conduct selection for the post of DGP (HoPF), State of Punjab afresh. The judgement of the Central Administrative Tribunal was challenged in the High Court of Punjab and Haryana by the UPSC, the State of Punjab and Mr. Dinkar Gupta. Mr. Siddharth Chattopadhyaya, the Appellant in Civil Appeal arising out of SLP (Civil) No.14982-14985 of 2020, also filed a Writ Petition aggrieved by the rejection of the plea of bias. Writ Petitions filed by UPSC, the State of Punjab and Mr. Dinkar Gupta were allowed by the High Court and the judgement of the Tribunal was set aside. Writ Petition filed by Mr. Siddharth Chattopadhyaya (hereinafter referred to as "the Appellant") was dismissed. These appeals are filed assailing the legality and validity of the judgement of the High Court dated 06.11.2020.

2. Mohd. Mustafa, the Appellant in Civil Appeal arising out of SLP (C) No.14623 of 2020, retired on attaining the age of superannuation during the pendency of these appeals. As the

1 (2006) 8 SCC 1

contentions raised by Appellants in both the civil appeals are similar, we shall refer to the facts of Civil Appeal arising out of SLP (C) Nos. 14982-14985 of 2020. Mr. Siddharth Chattopadhyaya was inducted to Indian Police Service in 1986 and allocated to Punjab cadre. The post of DGP (HoPF), State of Punjab was required to be filled up due to the ensuing retirement of Mr. Suresh Arora. A letter was written by the Union of India on 19.01.2019 to Respondent No.1-UPSC to initiate the process for appointment to the post of DGP (HoPF) for the State of Punjab. A list of 12 officers who were working in the rank of DGP/additional DGP and who had completed thirty years of service was forwarded by the State of Punjab. The Appellant was included in the said list.

3. The Empanelment Committee constituted by the UPSC finalised a panel consisting of Mr. Dinkar Gupta-Respondent No. 4, Mr. M.K. Tiwari- Respondent No.6 and Mr. V.K. Bhawra Respondent No.7. The State Government selected and appointed Respondent No.4 as DGP (HoPF) from the said panel. Challenging the selection and appointment of Respondent No.4 as DGP (HoPF), the Appellant and Mohd. Mustafa filed Original Applications in the Central Administrative Tribunal. The

Tribunal, by its order dated 17.01.2020, allowed the Original Applications and set aside the panel prepared by the Empanelment Committee on 04.02.2019. Consequently, the selection and appointment of Respondent No.4 as DGP (HoPF) was set aside. The Tribunal directed preparation of a panel of three senior-most officers afresh strictly in accordance with the judgment of this Court in ***Prakash Singh's*** case (supra).

4. The Tribunal was of the opinion that this Court in ***Prakash Singh's*** case settled the parameters to be followed for selection of the Director Generals of Police. UPSC deviated from the procedure prescribed by this Court, rendering the selection invalid. The Tribunal held that this Court specified three factors which have to be followed for selection of DGP. Seniority, being one of the factors, along with good record of service and range of experience to head a police force was not given due importance by the Empanelment Committee in finalising the panel. Draft Guidelines 2009 framed by UPSC (hereinafter referred to as "Draft Guidelines") have no authenticity or legality, according to the Tribunal. Identification of five core policing areas from the domain of twenty policing areas is without any basis. In addition, the Tribunal held that the

identification of the core policing areas was to suit the selected candidate. Preparation of the panel consisting three persons was also found fault with due to no reasons being assigned.

5. Aggrieved by the judgment of the Tribunal, Writ Petitions were filed in the High Court of Punjab and Haryana. The High Court framed the following questions for determination:

1) *What is the scope of judicial review/interference by the High Court under Article 226 of the Constitution of India, 1950 against the decision of the Administrative Tribunal (in short "Tribunal"}?*

2) *(a) Whether the Draft Guidelines 2009 issued by the UPSC detailing the procedure and modalities for selection of panel for DGP (HoPF} are patently opposed and violative of the directions issued in Prakash Singh's case (supra} and the findings of the Tribunal contrary to the same are sustainable?*

   (b) Whether the Core Policing Areas being adopted by the Empanelment Committee for assessment on the aspect of 'range of experience' State wise on cases to case basis are in contravention of the Supreme Court directions in Prakash Singh's case (supra} and whether the 5 Core Policing Areas chosen in the present case are is legal and valid? |

(c) Whether in view of the findings of this Court to the issues at (a} and (b} above, the findings of the Tribunal are sustainable?

3) *(a) What is the scope of judicial review in matter of the empanelment and selection by the Selection/Empanelment Committee?*

(b) Whether the Tribunal exceeded the said power of judicial review in selection of DGP (HoPF} by the UPSC in February 2019?

4) *Whether the impugned order dated 17.01.2020 of the Tribunal is liable to be set aside and the consequential relief?*

6. The High Court held that this Court in ***Prakash Singh's*** case has laid down broad guidelines for selection to the post of DGP on the basis of assessment of officers by considering length of service, very good record and range of experience for heading the police force. The Draft Guidelines were framed by UPSC for implementation of directions issued by this Court in ***Prakash Singh's*** case. The conclusion of the Tribunal that the Draft Guidelines have no authenticity was set aside by the High Court on the ground that the Draft Guidelines have been approved by this Court. The jurisdiction of UPSC in formulating Draft Guidelines and giving discretion to the Empanelment

Committee to follow its own procedure was upheld by the High Court. Selection of five core policing areas for assessment of the officers from the State of Punjab was approved by the High Court. Relying upon judgments of this Court, the High Court observed that there was no requirement for recording reasons while finalising the selection of DGPs. The High Court held that the Tribunal encroached into the domain of the experts in setting aside the selection made by UPSC. The High Court was in agreement with the Tribunal that the Appellant failed to make out a case of bias. Finally, the High Court set aside the judgment of the Tribunal and upheld the selection and appointment of Respondent No.4 as DGP (HoPF).

7. We have heard Mr. Krishnan Venugopal, learned Senior Counsel for the Appellant in Civil Appeal arising out of SLP (C) Nos. 14982-14985 of 2020, Mr. P.S. Patwalia, learned Senior Counsel for the Appellant in Civil Appeal arising out of SLP (C) No.14623 of 2020, Mr. Aman Lekhi, learned Additional Solicitor General for the Respondent No.1-UPSC, Mr. Mukul Rohatgi, learned Senior Counsel for the State of Punjab, Mr. Maninder Singh, learned Senior Counsel for Respondent No.4 and Mr. Shyam Divan, learned Senior Counsel for Respondent No.5.

8. Mr. Krishnan Venugopal, learned Senior Counsel appearing for the Appellant in Civil Appeal arising out of SLP (C) Nos. 14982-14985 of 2020, argued that the empanelment and appointment of Respondent No. 4 as DGP (HoPF) is vitiated by bias. Respondent No.5 who was a member of the Empanelment Committee was prejudiced against the Appellant due to the report filed by the Appellant before the Punjab and Haryana High Court in Civil Writ Petition No. 20359 of 2013 titled as '***Court on its own motion v. State of Punjab and Another'*** in which Respondent No.5 was found to be involved in criminal activities. On earlier occasions Respondent No. 5 recused himself in matters relating to the Appellant and, therefore, Respondent No.5 ought not to have participated in the selection process. Accordingly, the decision of the Empanelment Committee of which Respondent No.5 was a member is not *bona fide* and is liable to be set aside. The Appellant contended that the Draft Guidelines have no legal sanctity. The criteria laid down by the Draft Guidelines is contrary to the judgement of this Court in ***Prakash Singh's*** case. The Draft Guidelines cannot be considered as statutory rules or regulations. It was further submitted on behalf of the

Appellant that the five core policing areas that were identified by the Empanelment Committee out of twenty policing areas as criteria for assessment of officers' range of experience to head a police force were tailor-made to suit Respondent No. 4. Due weightage has not been accorded to seniority as laid down by this Court in ***Prakash Singh's*** case. Admittedly, the Appellant is senior to Respondent No.4 and could not have been overlooked unless there are justifiable reasons for his supersession. According to the Appellant, the list of 12 officers working as additional DGP/DGP could not have been forwarded by the State of Punjab for selection and appointment to one post of DGP. Mr. P. S. Patwalia, learned Senior Counsel appearing for the Appellant in Civil Appeal arising out of SLP (C) No.14623 of 2020, submitted that Mr. Mohd. Mustafa has maximum gallantry awards and has a meritorious record of service. He was not empanelled due to faulty selection procedure adopted by UPSC.

9. Mr. Aman Lekhi, learned Additional Solicitor General, countered the submissions made on behalf of the Appellants by arguing that the Draft Guidelines were approved by this Court. He submitted that the Draft Guidelines were framed by the UPSC to give effect to the judgement of this Court in ***Prakash***

Singh's case. The five core policing areas that were identified for empanelment out of twenty domain assignments usually allocated to police officers was done after taking into account the peculiar situation and requirement of the State of Punjab. The criteria laid down by this Court in ***Prakash Singh's*** case is part of the Draft Guidelines and the Tribunal committed an error in holding the Guidelines to be contrary to the said judgement. Respondent No.5, being the then DGP (HoPF), was included as a member of the Empanelment Committee and the Appellants did not raise any objection to his participation in the deliberations of the Empanelment Committee. It was contended that the assessment by the Empanelment Committee being strictly in accordance with the Draft Guidelines and the judgement of this Court in ***Prakash Singh's*** case, the selection and appointment of Respondent No.4 as DGP (HoPF) is valid. The Empanelment Committee is not required to record any reasons.

10. Mr. Mukul Rohatgi, learned Senior Counsel appearing for the State of Punjab, contended that the zone of consideration according to clause 2 of Draft Guidelines is restricted to the cadre of ADGP/DGP to officers who have completed 30 years of service. The Draft Guidelines contained three requirements,

namely (i) length of service (ii) very good record and (iii) range of experience. Identification of five core policing areas from amongst twenty policing areas for assessment of merit of officers was done by the Empanelment Committee by taking into account the special needs of the State of Punjab. Courts should show deference to the decision of experts in the matter of selections. The State raised serious objection to the allegation of bias made by the Appellants against Respondent No.4 and 5. Mr. Rohatgi stated that the Appellant abused his position as the head of a special investigation team by filing a report which was not signed by the other members of the team to tarnish the reputation of Respondent No. 4 and 5. Mr. Rohatgi stated that the report filed by the Appellant without the signatures of the other members of the Committee is still lying in a sealed cover before the High Court. It was submitted on behalf of the State that the Appellant was fully aware of initiation of the process for appointment of DGP and the presence of Respondent No.5 in the Committee but did not raise any objection to his continuance in the Empanelment Committee. The Appellant cannot be permitted to raise a bogey of bias at this late hour. In any event, Respondent No.5 was

required to continue in the Empanelment Committee as per the doctrine of necessity. The State Government refuted the contention of the Appellant that there was suppression of relevant record. It was argued that the relevant record was sent to the Public Service Commission. The State Government cannot be accused of favouring Respondent No.4 by not sending the said report to the Public Service Commission. Mr. Rohatgi submitted that the Draft Guidelines have been followed for empanelment and selection of a number of DGPs in several States. The Empanelment Committee comprises of senior officers of which Respondent No.5 is one member. The selection cannot be said to be biased when the allegation of prejudice is against one member of a multi-member Committee.

11. Mr. Maninder Singh, learned Senior Counsel, stated that Respondent No.4 has an exemplary record of service and is a highly decorated officer with more medals than the Appellant. Responding to submissions of the Appellant pertaining to the report filed in the High Court, Respondent No.4 contended that there is a sinister motive on the part of the Appellant in trying to mislead this Court that the said report was filed by the special investigation team. In fact, two reports were filed by the

special investigation team on 01.02.2018 and 15.03.2018. The said reports were signed by all the members of the Committee in which no allegations were made against Respondent No.4. Later, another report was filed by the Appellant alleging that Respondent No.4 was involved in certain criminal activities. The said report was given in a sealed cover to the Court. The other members of the Committee have gone on record to state that they were not consulted before the said report was filed before the Court nor do they have any knowledge about the contents of the report. The Appellant was facing a criminal charge in a case registered under Section 306 IPC and had engineered the report only for the purpose of maligning Respondent No.4 to steal a march over him for selection and appointment as DGP. Mr. Maninder Singh argued that the Draft Guidelines which are strictly in conformity with the directions issued by this Court in ***Prakash Singh's*** case have not been challenged in spite of which the Tribunal held them to be in contravention of the directions in ***Prakash Singh's*** case. He further submitted that Mr. Mustafa has retired on attaining the age of superannuation and the Appellant has service of less

than six months left and cannot be considered for appointment as DGP even if he succeeds in this appeal.

12. Mr. Shyam Divan, learned Senior Counsel for Respondent No.5, submitted that the plea of bias as alleged by the Appellant was rejected by both the Tribunal and the High Court which does not warrant any interference by this Court. As the Director General of Police, Respondent No.5 was duty bound to be a member of the Empanelment Committee. The allegation of bias is baseless and created only for the purpose of succeeding in the challenge to the selection and appointment of Respondent No.4 as DGP (HoPF). Moreover, no objection was raised by the Appellants for the participation of Respondent No.5 in the Empanelment Committee.

13. Judicial review may be defined as a Court's power to review the actions of other branches or levels of government; especially the Court's power to invalidate legislative and executive actions as being unconstitutional[2]. Power of judicial review is within the domain of the judiciary to determine the legality of administrative action and the validity of legislations and it aims to protect citizens from abuse and misuse of power

2 Black's Law Dictionary

by any branch of the State[3]. The power of judicial review is a basic feature of the Constitution of India[4]. Judicial review has certain inherent limitations. However, it is suited more for adjudication of disputes other than for performing administrative functions. It is for the executive to administer law and the function of the judiciary is to ensure that the Government carries out its duties in accordance with the provisions of the Constitution[5].

14. The grounds on which administrative action is subject to judicial review are illegality, irrationality and procedural impropriety. The following observations made by Lord Diplock in ***Council of Civil Service Unions and others v. Minister for Civil Service***[6] are apt:

> *"By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those*

3 Minerva Mills Ltd. v. Union of India (1980) 3 SCC 625
4 Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225
5 S.R. Bommai v. Union of India (1994) 3 SCC 1
6 [1985] AC 374

persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Court's exercise of this role, resort I think is today no longer needed to Viscount Radcliff's ingenious explanation in Edwards (Inspector of Taxes) v. Bairstow, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision makers. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules

that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all".

15. The discretionary power vested in an administrative authority is not absolute and unfettered. In ***Wednesbury***, Lord Greene was of the opinion that discretion must be exercised reasonably. Explaining the concept of unreasonableness, Lord Greene stated that a person entrusted with discretion must direct himself properly in law and that he must call his own attention to the matter which he is bound to consider. He observed that the authority must exclude from his consideration matters which are irrelevant to the matter he is to consider. Lord Greene concluded that if an authority does not obey aforementioned rules, he may truly be said, and often is said, to be acting unreasonably.[7]

16. Conditions prompted by extraneous or irrelevant considerations are unreasonable and liable to be set aside by Courts in exercise of its power under judicial review[8]. (See:

7 Associated Provincial Picture Houses Ltd v. Wednesbury Corp. [1947] 2 All ER 680
8 Ram Avtar Sharma v. State of Haryana (1985) 3 SCC 189

State of U.P. v. Raja Ram Jaiswal[9], Sheonandan Paswan v. State of Bihar & Others[10], Sant Raj v. O.P. Singla[11], Padfield v. Minister of Agriculture[12]). A decision can be arrived at by an authority after considering all relevant factors[13]. If the discretionary power has been exercised in disregard of relevant consideration, the Court will normally hold the action bad in law[14]. Relevant, germane and valid considerations cannot be ignored or overlooked by an executive authority while taking a decision[15]. It is trite law that Courts in exercise of power under judicial review do not interfere with selections made by expert bodies by reassessing comparative merits of the candidates. Interference with selections is restricted to decisions vitiated by bias, *mala fides* and contrary to statutory provisions. (See: ***Dalpat Abasaheb Solunke v. Dr. B.S. Mahajan[16], Badrinath v. State of T.N.[17], National Institute of Mental Health and Neuro Sciences v. Dr. K. Kalyana Raman[18], Major General I. P. S Dewan v. Union of***

9 (1985) 3 SCC 131
10 (1983) 1 SCC 438
11 (1985) 2 SCC 349
12 [1968] 1 All ER 694
13 Sachidanand Pandey v. State of WB, (1987) 2 SCC 295
14 H.W.R. Wade & C.F. Forsyth in the 10th Edition of Administrative Law (2009)
15 C.K. Thakker Administrative Law, Second Edition page 801
16 (1990) 1 SCC 305
17 (2000) 8 SCC 395
18 1992 Supp (2) SCC 481

India[19]***, Union Public Service Commission v. Hiranyalal Dev***[20]***, M. V. Thimmaiah v. UPSC***[21] ***and UPSC v. Sathiyapriya***[22]).

17. Keeping in mind the aforestated principles of law, we proceed to examine whether the selection and appointment of Respondent No.4 as DGP (HoPF) on the basis of the Draft Guidelines is contrary to the judgment of this Court in ***Prakash Singh's*** case, suffers from the vice of irrationality and is vitiated due to malice and bias.

18. The Government of India appointed a National Police Commission on 15.11.1977 for reviewing the role and performance of the police as well as law enforcement agencies and as an institution to protect the rights of the citizens enshrined under the Constitution. Recommendations made by the Commission were not implemented giving rise to a writ petition under Article 32 of the Constitution of India filed by a retired Director General of Police, Prakash Singh in which directions were sought for framing a new Police Act on the lines of Model Act drafted by the Commission. The writ petition was

19 (1995) 3 SCC 383
20 (1988) 2 SCC 242
21 (2008) 2 SCC 119
22 (2018) 15 SCC 796

disposed of by this Court on 22.09.2006 by its judgment in ***Prakash Singh's*** case in which several directions pertaining to the State Security Commission, selection and minimum tenure of the Director General of Police, minimum tenure of the Inspector General of Police and other officers, separation of investigation, police establishment board, police complaining authority and National Security Commission were given. The said directions were issued under Article 32, read with Article 142, of the Constitution of India which were directed to be implemented till the legislature passes the appropriate legislations. In so far as the selection and minimum tenure of DGP is concerned, this Court directed that the UPSC shall empanel three senior-most officers of the Department for promotion to the rank of DGP on the basis of their length of service, very good record and range of experience for heading the police force. The State Government shall select the DGP from amongst the three senior-most officers empanelled by the UPSC. A minimum tenure of at least two years, irrespective of the date of superannuation, has been fixed by this Court.

19. By way of implementation of the directions issued by this Court in ***Prakash Singh's*** case, UPSC framed Draft Guidelines

for empanelling officers for appointment as DGP (Chief of Police). The composition of the Empanelment Committee is as under: -

a) Chairman, or in his absence, Member, UPSC – President.
b) Home Secretary to the Government of India or his nominee not below the rank of Special Secretary to the Government of India.
c) Chief Secretary of the State Government concerned.
d) Director General of Police of the State Government concerned.
e) An officer from amongst the head of CPOs/CPMFs not belonging to the cadre for which selection is being made, nominated by the Government of India, Ministry of Home Affairs.

20. Officers belonging to the Indian Police Service of the concerned cadre, not below the rank of ADG, and who have completed at least 30 years of service as on the date of occurrence of vacancy for which the panel is prepared, are eligible for being considered for selection and appointment as DGP. Selection, according to the Guidelines, shall be merit-based and inclusion in the panel shall be adjudged on the basis

81

of ‘very good’ record and range of experience for heading the police force. The Draft Guidelines empowered the Committee to adopt its own methods and procedure for objective assessment of the suitability of officers to the zone of consideration. The Committee was obligated to make assessment of the annual confidential reports of the officers with reference to the last ten years preceding the date of meeting of the Committee. Only those officers assessed by the Committee as at least ‘very good’ for each of the preceding 10 years shall be considered for inclusion in the panel. According to the Guidelines, the Committee shall also take into account the range of experience, relevant for heading the police force as reflected in the bio-data of the officers for determining their suitability for inclusion in the panel. The Guidelines stipulated that the State Government shall appoint DGP from amongst the three senior-most officers included in the panel.

21. On 03.07.2018, this Court disposed of an application filed for modification of the judgment in ***Prakash Singh’s*** case by giving the following directions: -

> *6.1. All the States shall send their proposals in anticipation of the vacancies to the Union Public Service Commission, well in*

time at least three months prior to the date of retirement of the incumbent on the post of Director General of Police;

6.2 The Union Public Service Commission shall prepare the panel as per the directions of this Court in the judgment in Prakash Singh's case(supra) and intimate to the States;

6.3 The State shall immediately appoint one of the persons from the panel prepared by the Union Public Service Commission;

6.4 None of the States shall ever conceive of the idea of appointing any person on the post of Director General of Police on acting basis for there is no concept of acting Director General of Police as per the decision in Prakash Singh's case(supra);

6.5 An endeavour has to be made by all concerned to see that the person who was selected and appointed as the Director General of Police continues despite his date of superannuation. However, the extended term beyond the date of superannuation should be a reasonable period. We say so as it has been brought to our notice that some of the States have adopted a practice to appoint the Director General of Police on the last date of retirement as a consequence of which the person continues for two years after his date of

superannuation. Such a practice will not be in conformity with the spirit of the direction.

6.6 Our direction No.(c) should be considered by the Union Public Service Commission to mean that the persons are to be empanelled, as far as practicable, from amongst the people within the zone of consideration who have got clear two years of service. Merit and seniority should be given due weightage.

6.7 Any legislation/rule framed by any of the States or the Central Government running counter to the direction shall remain in abeyance to the aforesaid extent.

22. It is relevant to note that the State of Punjab enacted Punjab Police Act, 2007, subsequent to the decision of this Court in ***Prakash Singh's*** case. According to Section 6 of the said Act, the DGP shall be selected by the State Government from amongst the Indian Police Service officers and on appointment, the DGP shall have a tenure of not less than two years. The validity of the said Act was challenged in Writ Petition No.286 of 2013. The State of Punjab filed I.A. No. 144172 of 2018 for modification of the order dated 03.07.2018, seeking liberty to appoint DGP in accordance with the Punjab Police Act, 2007. While examining the contention of the State of Punjab, this Court summoned Mr. Rakesh Kumar Gupta, Secretary, UPSC to

appear on 15.01.2019. Mr. Gupta submitted before this Court that committees have been constituted by the UPSC for selection of DGPs and panels have been drawn by the Committees in respect of 12 States. This Court refused to modify the order dated 03.07.2018 after being satisfied with the procedure adopted by UPSC to carry out the directions of this Court. As some State Governments were appointing DGP on the last date of service of the incumbent to enable the officer to get an extendable term of two years, this Court by an order dated 13.03.2019 clarified that empanelment of an officer for consideration for appointment to the post of DGP should be only in case of a minimum residual tenure of six months. In other words, only those officers who have at least six months of service prior to their retirement shall be considered for appointment to the post of DGP.

23. The contention of the Appellant is that the criteria fixed by this Court in ***Prakash Singh's*** case was not followed in letter and spirit by the Empanelment Committee of UPSC while conducting selection to the post of DGP (HoPF). The Draft Guidelines are contrary to the directions given by this Court in ***Prakash Singh***'s case and therefore, the selection of

Respondent No.4 is liable to be set aside. Selection of five core policing areas for evaluation of merit of the officers in respect of range of experience is arbitrary and is tailor-made to suit Respondent No.4. Admittedly, appellant is senior to respondent No.4 and could not have been superseded by the Empanelment Committee of the UPSC.

24. According to UPSC, the Draft Guidelines were made to give effect to the directions issued by this Court in ***Prakash Singh's*** case. The Draft Guidelines were placed before this Court when the interlocutory application filed by the Government of India for modification of the judgment dated 22.09.2006 in ***Prakash Singh's*** case was being considered. This Court expressed its satisfaction regarding the procedure and practice followed by UPSC in the matter of selection to the post of DGP. The Draft Guidelines referred to the factors to be taken into consideration by the Empanelment Committee for selection of DGP as per the directions issued by this Court in ***Prakash Singh's*** case. Length of service, very good record and range of experience for heading the police force are factors to be considered by the Empanelment Committee. According to UPSC, the range of experience is a constituent part of the component of merit. In

respect of selection to the post of DGP (HoPF) for the State of Punjab, five core policing areas have been identified to assess the range of experience of the officers concerned for the last 10 years, which are:-

A. Intelligence
B. Law and order
C. Administration
D. Investigation
E. Security

The selection based on the Draft Guidelines was defended by UPSC on the ground that the Guidelines are in conformity with the directions issued by this Court in ***Prakash Singh's*** case.

25. This Court in ***Prakash Singh's*** case directed empanelment of officers for appointment to the post of DGP by UPSC by laying down broad criteria. The implementation of the directions issued by this Court has to be on objective basis for which reason the UPSC has framed Draft Guidelines, which are being followed uniformly since 2009 for selection of DGPs in several States. Keeping in mind, the seniority of the officers under consideration, selection is conducted on the basis of very good record and range of experience for heading the police force. Assessment of very good record of service is on the basis of annual confidential reports for the last 10 years. Range of

experience for heading the police force assessed by the empanelment committee is done by assessing the performance of officers in five core police areas out of 20 policing areas. Discretion was given to the empanelment committees to select the core policing areas by taking into account the prevailing situation in the States. Considering the peculiar situation of the State of Punjab, intelligence, law and order, administration, investigation and security were identified as the core policing areas to ascertain range of experience of an officer to head the police force.

26. The Draft Guidelines cannot be said to be contrary to the criteria laid down by this Court in ***Prakash Singh's*** case. The Guidelines carry forward the directions given by this Court by stipulating the objective criteria for guidance of the empanelment committees. The preparation of a panel on the basis of the Draft Guidelines after taking into account the core policing areas cannot be said to be arbitrary. We are not impressed with the submission of the Appellant that the core policing areas were identified only to suit Respondent No. 4. Assessment of relative merit of the officers under consideration is within the domain of the Empanelment Committee, which is

given liberty to adopt its own procedure. Merit of the officers in the zone of consideration is evaluated on the basis of their record of service and range of experience. A panel of three officers has been prepared in the order of seniority. The Appellant was found to be inadequate for inclusion in the panel in the range of experience for core policing areas. The Tribunal committed an error in recording the finding that the Empanelment Committee deviated from the procedure prescribed by this Court in ***Prakash Singh's*** case. There is no basis for the conclusion of the Tribunal that the Draft Guidelines are contrary to the directions given by this Court in ***Prakash Singh's*** case. The broad criteria mentioned in the said case are seniority, very good record of service and range of experience to head a police force. The Draft Guidelines which have to be scrupulously followed by empanelment committees stipulate that a selection should be on the same criteria. In the instant case, Empanelment Committee decided to assess the range of experience of officers to head the police force in the State of Punjab after considering the peculiarities of the State. Identification of five core policing areas out of a domain of twenty policing areas cannot be said to be an arbitrary exercise

of power. The Tribunal committed an error in accepting the submission of the Appellant that the core policing areas, identified by the Empanelment Committee was only to favour Respondent No.4 on the basis of unsubstantiated allegations. Empanelment was directed to be done by UPSC on the basis of length of service, very good record and range of experience for heading the police force in ***Prakash Singh's*** *case (supra).* Later, in the order dated 13.03.2019, this Court clarified its earlier order dated 03.07.2018 and directed UPSC to prepare the panel purely on the basis of merit. Be that as it may, the recommendation of the names of 12 officers for consideration is on the basis of completion of thirty years' service in the cadre of ADGP. Length of service as mentioned in ***Prakash Singh's*** case (supra) is taken into account for determination of zone of consideration. The other two factors namely, good record of service and range of experience of all the 12 officers recommended on the basis of length of service are assessed by the Empanelment Committee. *Inter se* merit of the candidates was evaluated according to the objective criteria followed by the Empanelment Committee. The preparation of panel for appointment as DGP (HoPF) for the State of Punjab, by the

Empanelment Committee is in compliance of the Draft Guidelines, which are in conformity with the directions issued by this Court in ***Prakash Singh's*** case as the panel was prepared after taking into account the relevant considerations as directed by this Court in ***Prakash Singh's*** case and stipulated in the Draft Guidelines. As no irrelevant consideration prompted the decision, the preparation of the panel by the Empanelment Committee cannot be said to be irrational. Having regard to the nature of the function and the power confided to the Selection Committee, it is not a legal requirement that reasons should be recorded for its conclusion [See: ***UPSC*** v. ***K. Rajaiah & Ors.***[23], ***Union Public Service Commission*** v. ***Arun Kumar Sharma & Ors.*** [24] and ***Baidyanath Yadav*** v. ***Aditya Narayan Roy & Ors***[25]]. The Tribunal committed an error in holding the decision of the Committee as arbitrary in the absence of reasons. Therefore, the preparation of the panel by the Empanelment Committee cannot be said to be suffering from unreasonableness.

27. The Appellant contended that Respondent No. 5 ought to have recused himself from the Empanelment Committee as he is

23 (2005) 10 SCC 15
24 (2015) 12 SCC 600
25 2020 (16) SCC 799

inimically disposed of towards him. The Appellant argued that he was appointed to head a special investigation team by the High Court of Punjab and Haryana to investigate the involvement of law enforcement authorities in drug trafficking and he unearthed material against senior police officers. He was falsely implicated in a criminal case involving the suicide of Inderpreet Singh Chadha. It is the case of the Appellant that he submitted a status report to the High Court on 18.05.2018 in a sealed cover in which he has mentioned about the involvement of Respondent No.4 and Respondent No.5 in drug trafficking. The Appellant referred to the recusal of Respondent No.5 earlier when he was asked to write his performance appraisal report. Finally, the Appellant submitted that the preparation of panel is vitiated due to bias of the Respondent No.5. On the other hand, it was submitted by the Respondents that the Appellant was involved in the suicide of Inderpreet Singh Chadha. The special investigation team headed by the Appellant submitted two reports on 01.02.2018 and 15.03.2018 before the High Court in which there is no mention of either Respondent No.4 or Respondent No. 5. The sealed cover submitted by the Appellant before the High Court was without consulting the other two

members of the special investigation team. It was further submitted that Respondent No. 5, being the DGP of a State, could not have recused himself from being a member of the Empanelment Committee. It is also argued that the Appellant has not raised any objection regarding the participation of Respondent No.5 in the selection proceedings. Doctrine of necessity was pressed into service by the Respondents to submit that Respondent No.5 could not have recused himself from the Empanelment Committee.

28. It is relevant to note that the plea of bias did not find favour with the Tribunal or the High Court. Before us, the learned counsel for the Appellant, relying upon ***Badrinath*** (supra), has submitted that even if one person of the multi-member committee is biased, the decision of the committee shall be rendered invalid. Further, this decision holds that doctrine of necessity applies only in case a committee is constituted by a statute or a statutory rule. In other words, if the committee is constituted under an administrative order there can be no difficulty in an officer recusing himself and requesting another officer to be substituted in his place. Even if a plea of bias is not raised earlier, it can be raised during the proceedings in judicial

review. Further, even if bias is not a direct cause of the decision, the test is one of mere likelihood of bias, which means a substantial possibility of bias.[26]

29. In exercise of its power under Articles 32 and 142 of the Constitution of India, this Court directed UPSC to constitute an empanelment committee to recommend three senior-most officers with good record of service and range of experience, and meeting other parameters, from whom the DGP shall be selected and appointed by the State Government. The incumbent DGP of the State is a member of the empanelment committee according to the Draft Guidelines issued by the UPSC. These Guidelines issued in compliance with the directions given by this Court under Article 142 of the Constitution of India, we would accept, are well-known and in public domain. Therefore, the position that Respondent No.5, being the DGP, would be a member of the Empanelment Committee was within the knowledge of the Appellant. Ignorance of this factum when pretended must be rejected as a mere pretence. The two Appellants are not laymen, but senior police officers aspiring for the appointment to the top police position in the State. In

26 Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School and Others, (1993) 4 SCC 10

endorsement of our reasoning, we have on record a news article published in the Hindustan Times, dated 30th January 2019, titled *"DGP's appointment – All eyes on UPSC's February 4 meet"*. The article states that as per the information gathered from officials privy to the development, the UPSC meeting will be held in Delhi and would be attended by the Punjab Chief Secretary Mr. Karan Avtar Singh and the incumbent DGP Mr. Suresh Arora, i.e., Respondent No.5. In the given facts and considering the position and status of the Appellant, we would not accept the plea that participation of Respondent No.5 in the Empanelment Committee was unknown or a secret for the Appellants.

30. It is in this context, we have to examine whether the Appellants are estopped from challenging the recommendations made by the Empanelment Committee, given the fact that they had taken a calculated chance, and not protested till the selection panel was made public. In our opinion, the ratio in ***Madan Lal and Others*** v. ***State of Jammu and Kashmir and Others***,[27] would apply in the present case as when a person takes a chance and participates, thereafter he cannot, because the result is unpalatable, turn around to contend that the process was unfair or the selection committee was not properly

27 (1995) 3 SCC 486

constituted. This decision, no doubt, pertains to a case where the petitioner had appeared at an open interview, however, the ratio would apply to the present case as the Appellant too had taken a calculated chance in spite of the stakes, that too without protest, and then has belatedly raised the plea of bias and prejudice only when he was not recommended. The judgment in ***Madanlal*** (supra) refers to an earlier decision of this Court in ***Om Prakash Shukla*** v. ***Akhilesh Kumar Shukla and Others***,[28] wherein the petitioner who had appeared at an examination without protest was not granted any relief, as he had filed the petition when he could not succeed afterwards in the examination. This principle has been reiterated in ***Manish Kumar Shahi*** v. ***State of Bihar and Others***,[29] and ***Ramesh Chandra Shah and Others*** v. ***Anil Joshi and Others***.[30]

31. More appropriate for our case would be an earlier decision in **Dr. *G. Sarana*** v. ***University of Lucknow and Others,***[31] wherein a similar question had come up for consideration before a three-judge bench of this Court as the petitioner, after having appeared before the selection committee and on his failure to

28 (1986) Supp. SCC 285
29 (2010) 12 SCC 576
30 (2013) 11 SCC 309
31 (1976) 3 SCC 585

get appointed, had challenged the selection result pleading bias against him by three out of five members of the selection committee. He also challenged constitution of the committee. Rejecting the challenge, this Court had held:

> *"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in* ***Manak Lal's*** *case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar*

of waiver against him. The following observations made therein are worth quoting:

"It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.""

32. The aforesaid judgment in ***Dr. G. Sarana*** (supra) was referred in ***Madras Institute of Development Studies and Another*** v. ***K. Sivasubramaniyan and Others***,[32] in which selection to the post of Assistant Professor was challenged on the ground that shortlisting of candidates was contrary to the Faculty Recruitment Rules. The challenge was declined on the ground of estoppel as the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, had submitted his application and participated in the selection process by appearing before the committee of experts.

32 (2016) 1 SCC 454

33. Equally appropriate would be a reference to the decision of this Court in ***P.D. Dinakaran (1)*** v. ***Judges Inquiry Committee and Others***,[33] in which the allegation was that one of the members of the committee constituted by the Chairman of the Council of States (Rajya Sabha) under Section 3(2) of the Judges (Inquiry) Act, 1968 was biased. This judgment extensively recites and assimilates from both domestic and foreign judgments on the question of bias and prejudice and quotes the following observations in ***Dr. G. Sarana's*** (supra) case:

> *"11... the real question is not whether a member of an administrative board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to probe the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration."*

33 (2011) 8 SCC 380

34. Thereafter, reference is made to ***Ashok Kumar Yadav and Others*** v. ***State of Haryana and Others***,[34] which refers to the Constitutional Bench judgment in ***A.K. Kraipak and Others*** v. ***Union of India and Others***.[35] ***Ashok Kumar Yadav*** (supra) was a case of selection by UPSC and following extract from this judgment is of some significance:

> *"18. We must straightaway point out that A.K. Kraipak case is a landmark in the development of administrative law and it has contributed in a large measure to the strengthening of the rule of law in this country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has nourished the roots of the rule of law and injected justice and fair play into legality. There can be no doubt that if a Selection Committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the*

34 (1985) 4 SCC 417
35 (1969) 2 SCC 262

interview of the candidate related to him but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the Selection Committee, because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. But the situation here is a little different because the selection of candidates to the Haryana Civil Service (Executive) and Allied Services is being made not by any Selection Committee constituted for that purpose but it is being done by the Haryana Public Service Commission which is a Commission set up under Article 316 of the Constitution. It is a Commission which consists of a Chairman and a specified number of members and is a constitutional authority. We do not think that the principle which requires that a member of a Selection Committee whose close relative is appearing for selection should decline to become a member of the Selection Committee or withdraw from it leaving it to the appointing authority to nominate another person in

his place, need be applied in case of a constitutional authority like the Public Service Commission, whether Central or State. If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection, no other person save a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may be affected. When two or more members of a Public Service Commission are holding a viva voce examination, they are functioning not as individuals but as the Public Service Commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him."

35. 'Real likelihood test' applied in ***Ranjit Thakur*** v. ***Union of India and Others***,[36] is elucidated in the following words:

> *"15...The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether Respondent 4 was likely to be disposed to decide the matter only in a particular way.*
>
> *16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial 'coram non judice'.*
>
> *17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind*

36 (1987) 4 SCC 611

and ask himself, however, honestly, 'Am I biased?'; but to look at the mind of the party before him."

36. In ***P.D. Dinakaran (1)*** (supra), this Court held that the member in question had during a seminar spoken against the proposed elevation of the petitioner as a Judge of the Supreme Court and, therefore, the apprehension of likelihood of bias is reasonable and not fanciful, though in fact, the member may not be biased. Nevertheless, the writ petition was dismissed on the ground that the petitioner was not a lay person and being well-versed in law should have objected to the constitution of committee when notified in the Official Gazette, which factum was highly publicised in almost all newspapers. Notwithstanding the awareness and knowledge, the petitioner did not object, which indicates that he was satisfied that the member had nothing against him. Therefore, belated plea taken by the petitioner did not merit acceptance and mitigates against *bona fides* of the objection to the appointment of the person as a member of the committee. In its support, reference was made to several decisions of this Court, including ***Shri Lachoo Mal*** v. ***Shri Radhey Shyam***,[37] which acknowledges the general

37 (1971) 1 SCC 619

principle that everyone has a right to waive and agree to waive the advantage of a law or rule made solely for his benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. In ***Manak Lal (Shri), Advocate*** v. ***Prem Chand Singhvi and Others***,[38] this Court had declined to nullify an action made on the recommendation of the Tribunal though the chairman of the Tribunal had appeared before the appellant in the case. The reason was that the appellant had never raised a point before the Tribunal, which with the other factors reflected waiver. In conclusion, the Court in ***P.D. Dinakaran (1)*** (supra) held:

> *"86. In conclusion, we hold that the belated raising of objection against the inclusion of Respondent 3 in the Committee under Section 3(2) appears to be a calculated move on the petitioner's part. He is an intelligent person and knows that in terms of Rule 9(2)(c) of the Judges (Inquiry) Rules, 1969, the Presiding Officer of the Committee is required to forward the report to the Chairman within a period of three months from the date the charges framed under Section 3(3)*

38 AIR 1957 SC 425

of the Act were served upon him. Therefore, he wants to adopt every possible tactic to delay the submission of report which may in all probability compel the Committee to make a request to the Chairman to extend the time in terms of the proviso to Rule 9(2)(c). This Court or, for that reason, no court can render assistance to the petitioner in a petition filed with the sole object of delaying finalisation of the inquiry."

Nevertheless, the Court in ***P.D. Dinakaran (1)*** (supra) had requested the Chairman to nominate another distinguished jurist in place of the person in question, duly noticing that the proceedings initiated had progressed only to the stage of framing of charges and nomination of another jurist would not hamper the proceedings. The reconstituted committee would be entitled to proceed on the charges already framed.

37. In view of the above ratio, which is applicable, it is not necessary for this Court to delve further into the allegations and submissions based on assertion of bias and prejudice.

38. For the aforementioned reasons, we do not find any error committed by the High Court in setting aside the judgment of

the Tribunal and upholding the selection and appointment of Respondent No.4 as DGP (HoPF), State of Punjab.

39. The appeals are dismissed.

.....J.
[L. NAGESWARA RAO]

.....J.
[SANJIV KHANNA]

.....J.
[B.R. GAVAI]

New Delhi,
November 16, 2021.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8223 OF 2009

THE CHAIRMAN, STATE BANK OF INDIA
AND ANOTHER ..... APPELLANT(S)

VERSUS

M.J. JAMES ..... RESPONDENT(S)

J U D G M E N T

SANJIV KHANNA, J.

The Chairman, State Bank of India, Central Office, Mumbai, and the Chief General Manager, State Bank of India, Local Head Office, Chennai (the appellants) in this appeal assail the order and judgment dated 09.12.2008 of the High Court of Kerala at Ernakulam dismissing their intra-court writ appeal, W.A. No. 2052/2007. The Division Bench, thereby, affirmed the order of the Single Judge in O.P No. 5527 of 1999 dated 14.03.2007, quashing the disciplinary proceedings against Mr. M.J. James (the respondent) on the ground

of violation of Clause 22(ix)(a) of Chapter VIII of the Bank of Cochin Service Code ("the Service Code").

2. Before we proceed further, we need to allude to the factual background necessary for the disposal of the present appeal.

On 09.02.1984, a memorandum of charges was issued to the respondent that while working as the bank manager of the Quilon branch of the Bank of Cochin from February 1978 to September 1982, he had committed grave misconduct by sanctioning advances in violation of the Head Office instructions causing financial loss to the bank. The respondent by the reply dated 30.03.1984 denied the charges stating that there was substantial increase and growth in the business of the bank when he was the manager of the Quilon branch. The deposits had increased from Rs. 20 lakh in 1978 to Rs. 1 crore in 1982, and the advances had increased from Rs. 1.5 crore in 1978 to Rs. 6 crore in 1982. As the bank manager of the Quilon branch, the respondent was aware that the top management of the bank was contemplating a deep trust in advances in view of the comfortable loanable fund availability. He had been asked by Mr. E.K. Andrew, former Chairman of the bank, to grant advances without hesitation. He had got oral instructions from Mr. E.K.Andrew

to allow disbursement/drawings from most of the large accounts. Further, the then Director, Mr. C.B. Joseph from the Quilon branch, was personally involved as he had introduced the borrowers and most of the advances/disbursements/drawings were made on his recommendation/insistence. The respondent had claimed that the bank did not have a fool proof system of delegation of financial and other powers to the branches as powers were conferred on select managers. The respondent was given to understand by the then Chairman and Director that he was vested with adequate powers and the advances would be ratified by the Board in due course. The functioning of the branch and the advances were subjected to periodical inspections by the authorities, including the Reserve Bank of India. The respondent had never been cautioned on the pattern of business conducted by the branch. Subsequently, there were changes in the top management, and abrupt restrictions were introduced, affecting the recovery of the dues.

3. The aforesaid explanation of the respondent was not found to be satisfactory, and an inquiry was directed to be held. Mr. C.T. Joseph, a practising Advocate, was appointed as the inquiry officer. Mr.

Jimmy John was appointed as the presenting officer. The respondent claims that Mr. Jimmy John is a former advocate.

4. On 24.04.1984, the respondent wrote a letter to the Manager (Personnel Department), Bank of Cochin, that he may be permitted to engage services of Mr. F.B. Chrysostom (Syndicate Bank, Mattancherry, Cochin), the Organising Secretary of the All-India Confederation of Bank Officers Organisation, Kerala State Unit. The request was rejected. Thereafter, the respondent wrote another letter to the inquiry officer on 18.07.1984 protesting the denial of permission to be defended by Mr. F.B. Chrysostom stating that this was against all norms of natural justice and in clear violation of the Service Code. The inquiry officer, however, disagreed and passed a ruling holding that in terms of the Service Code, a charge-sheeted officer cannot be defended by an office-bearer of any association or a union except an office-bearer of an association or a union of the employees of the bank, that is, the Bank of Cochin Ltd. To enable the respondent to prepare for representation, the inquiry officer adjourned the proceedings to 06.07.1984 for the evidence of the management. On 05.09.1984, the respondent requested a long adjournment stating that he wanted to assail the order denying him

services of Mr. F.B. Chrysostom before the Board of Directors. While the request for long adjournment was declined, the inquiry officer gave the respondent two weeks to approach the Board and await their directions, making it clear that no further adjournment would be granted. On 20.09.1984, the respondent did not appear and sought postponement of proceedings for one week on medical grounds through his brother. This request was allowed, and the inquiry was posted to 28.09.1984.

5. On 28.09.1984, the respondent appeared and participated in the inquiry in which statement of witnesses of the management were recorded. The proceeding was adjourned to 06.10.1984 for the recording of defence evidence. On 06.10.1984, the respondent requested for directions to the management to produce documents as enumerated in the list. The presenting officer objected. After due consideration, the inquiry officer directed the respondent to specify the documents indicating their relevancy in the context of his defence. On 17.10.1984, the respondent again raised a request to furnish documents claiming that they were specific inasmuch as he had stated the years to which the returns relate. Further, the

respondent had his own reasons on how these documents were relevant for the inquiry.

6. The inquiry officer passed a detailed order considering each document and held that they were unnecessary and irrelevant. Thereupon, the respondent stated that he had no witnesses to examine, or any other evidence to be adduced, and abruptly stood up and walked out without signing the order sheet.

7. In his detailed report dated 14.01.1983, the inquiry officer referred to the irregularities committed and held that the respondent had made unauthorized advances beyond his discretionary powers without the sanction of the Head Office. In fact, the respondent had admitted violation of the Head Office instructions and the advances made were unauthorized. All the charges were held to be proved.

8. By an order dated 18.04.1985, the Chairman of the Bank of Cochin dismissed the respondent from service with effect from the close of working hours on that day itself. This termination letter refers to the inquiry report and states that the Chairman had carefully gone through the records of the inquiry, connected papers, documents and findings of the inquiry officer. Further, the Chairman had given the

respondent an opportunity for a personal hearing, which he did not avail of. Instead, the respondent had sent a representation on 25.02.1985, which had been already duly considered.

9. On 26.08.1985, the Bank of Cochin, a private bank, got amalgamated with the State Bank of India.

10. Nearly four years and five months after his dismissal, the respondent filed a memorandum of appeal on 20.09.1989 before the Chief General Manager, State Bank of India, Local Head Office, Chennai, which appeal remained unattended and was not listed for hearing for over nine years. The respondent did not represent or protest till 1998, when he filed O.P. NO. 19807/1998 G before the High Court of Kerala at Ernakulam, which was disposed of by a Single Judge on 14.10.1998, recording that the respondent who was a petitioner therein had made a limited prayer for quick disposal of his appeal. The second respondent therein, that is the Chief General Manager, was directed to consider the appeal and pass appropriate orders after rendering an opportunity of being heard to the respondent within ten weeks from the date of receipt of the copy of the order.

11. In terms of the directions above, a personal hearing was granted to the respondent on 22.12.1998. He was also permitted to submit written representation.

12. By the order dated 23.01.1999, the appeal was rejected by the Chief General Manager recording, *inter alia,* that the inquiry officer's report was clear, categorical, and based upon evidence, and concluded that the respondent had exceeded his authorization in grant of credit facilities, flouted head office instructions and had not obtained head office ratification for several guarantees and documentary bills. The charges as proved were grave, and hence the respondent's dismissal from service was justified. The Chief General Manager specifically observed that the defence of the respondent was not of denial, but that of following the instructions of the Director or Chairman. Therefore, malefactions were not factually and legally disputed. The contention that the respondent was not allowed to be defended by an outsider was held to be without substance as the inquiry officer had permitted the respondent to be defended by an officer of the Bank of Cochin of his choice. The respondent had refused to avail of the same. Hence, the respondent could not raise plea of failure of natural justice.

13. The respondent had, thereupon, preferred O.P. No. 5527 of 1999 before the High Court of Kerala at Ernakulam challenging the order of the Chief General Manager dated 23.01.1999 and had *inter alia* prayed to be reinstated in service with back wages. Other prayers made included direction to the opposite party to consider the quantum of punishment, grant of gratuity and other benefits, and an opportunity of inquiry as per the service rules.

14. By an order dated 14.03.2007, the writ petition was allowed primarily on the ground that the inquiry officer had wrongly rejected the request of the respondent to be defended/represented by the organizing secretary of the All-India Confederation of Bank Organizations, Kerala Unit. This amounted to a denial of reasonable opportunity, notwithstanding the respondent's participation in the inquiry. Therefore, what weighed with the Single Judge was a wrongful rejection of the respondent's request to be represented by an office-bearer of the organization of his choice as per the Service Code, and violation of the right to be represented purportedly flowing from the principles of natural justice. Significantly, the judgment rejects the argument of the respondent that the charges held to be proved in the inquiry report would at best constitute 'minor

misconduct'. The Single Judge, referring to the allegations of unauthorized advances beyond discretionary powers or without the sanction of head office, held them to be 'gross misconduct'. Further, the Court observed that the charges were specific, and the allegations mentioned in the charge sheet were detailed, though relevant provisions of the Service Code were not mentioned. Therefore, the allegations detailed in the charge sheet constituted 'gross misconduct', governed by Clause 22(iv)(a) of the Service Code. Accordingly, the Single Judge had commended that "if this misconduct is proved in a validly conducted inquiry, I see no reason to find fault with the bank if dismissal is the punishment that is considered appropriate by them".

15. The intra-court appeal, W.A. No. 2052 of 2007, by the appellants was dismissed by the Division Bench of the High Court of Kerala at Ernakulam vide judgment dated 09.12.2008. They agreed with the Single Judge that Clause 22(ix)(a) of Chapter VIII was violated as the respondent was not allowed to be defended by a representative of a registered bank employees' union/association. Interpreting the clause, the Division Bench observed that the article "the" was missing before the bank employees in the said clause, which

indicates that the union/association referred to therein was not only regarding employees of the bank itself, namely 'the Bank of Cochin', and would, therefore, include employees' union/association of other banks also. As the respondent was entitled to be represented by a representative of a union or association of bank employees, his prayer to be represented by Mr. F.B. Chrysostom should have been accepted. The Bench rejected the contention of no prejudice by observing that this was only an assertion by the bank's counsel. Further, the principles of natural justice were incorporated in the Service Code itself, which the authorities were bound to follow strictly. As the authorities had not followed the procedure prescribed, it would be for the appellants to prove that by violating the procedure, no prejudice was in fact caused. That apart, the Division Bench, upon perusal of the proceedings and findings of the inquiry officer, felt that prejudice was caused to the respondent. They observed that an experienced lawyer had conducted the inquiry, and the presenting officer was also a lawyer conversant with the procedure. Noticing that the respondent had retired, it was observed that if the rules permit, the bank would be at liberty to continue the disciplinary proceedings from the stage it had been invalidated. However, if the

rules do not permit such inquiry, the respondent will be entitled to all benefits consequent to his illegal termination.

16. We begin our discussion by reproducing Clause 22(ix)(a) of the Service Code, which reads:

> "ix. The procedure in such cases shall be as follows:
>
> (a) An employee against whom disciplinary action is proposed or likely to be taken shall be given a charge sheet clearly setting forth the circumstances appearing against him and a date shall be fixed for an enquiry, sufficient time being given to him to prepare and give his explanation as also to produce any evidence that he may wish to tender in his defence. He shall be permitted to appear before the officer conducting the enquiry, to cross examine any witness and produce other evidence in his defence. He shall also be permitted to be defended by a representative of a registered Union/Association of bank employees or with the Bank's permission, by a lawyer. He shall also be given a hearing as regards the nature of the proposed punishment in case any charge is established against him."

17. In order to interpret, we would like to allude to clause 2(e) of the definition clause in the Service Code, wherein the expression 'bank' has been defined to mean the Bank of Cochin Ltd. and not any other bank. Clause 2(e) of the Service Code reads:

> ""Bank" means the Bank of Cochin Limited."

18. The judgment under challenge seems to have overlooked the implications of clause 2(e) of the Service Code. The objective of definition clauses is to avoid frequent repetition in describing the subject matter to which the word or expression is intended to apply.[1] This is useful when the same word or expression is used more than once in the same enactment.[2] The *raison d'etre* behind the definition clause is that while interpreting a provision, the defined word or expression would carry the same meaning as the defined words or expression are employed and used by the maker in the sense appropriate to the definition. The definition can be with the intent to attract a meaning already established by law; expand the meaning by adding a meaning; or narrow the meaning by exclusion.[3] This general rule of construction laid down by the enactment is subject to the context. *Albeit*, the interpreter, to deviate from the defined meaning, should record reasons to show that the word/expression in that particular provision carries a different meaning. Contrary context is not to be assumed or accepted easily, in the absence of indication and reason to differ from the defined meaning. The repugnancy will

[1] *Nahalchand Laloochand Private Ltd.* v. *Panchali Coop. Housing Society Ltd.*, (2010) 9 SCC 536
[2] *Bhagwati Developers Pvt. Ltd.* v. *Peerless General Finance and Investment Co. Ltd. & Anr.*, (2013) 9 SCC 584
[3] Part XII, Rules of Construction Laid Down by Statute, Sections 199 and 200 at page 517, Bennion on Statutory Interpretation, Indian Reprint, Sixth Edition.

arise when the definition meaning does not agree with the subject in the context. Repugnancy is not indicated and does not arise in the context of Clause 22(ix)(a) of Chapter VIII of the Service Code by mere absence of article 'the' in Clause 22(ix)(a) before the word 'bank', as held in the impugned judgment. This is too weak and feeble a reason to discard and over-ride the defined meaning which is the general norm, and not an exception that has to be justified. Deficiency of 'the' does not disclose abandonment of the express definition of 'bank' vide clause 2(e) of the Service Code. Absurdity or even ambiguity is not obvious or even palpable. The word 'bank' in Clause 22(ix)(a) can be validly and effectively interpreted as per the definition clause as referring to the Bank of Cochin Ltd., and not any or other bank(s).

19. Therefore, the reasoning solely predicated on non-existence of article 'the' before 'bank' in Clause 22(ix)(a) of the Service Code does not justify inference of repugnancy in the context of the subject-matter, including the intent behind Clause 22(ix)(a) of the Service Code.

20. Now, we need to advert our attention on the aspect of the choice of representation in domestic inquiry. Both sides rely on the dictum of

this Court in ***Crescent Dyes and Chemicals Ltd.*** v. ***Ram Naresh Tripathi***[4] and ***National Seeds Corporation Ltd.*** v. ***K.V. Rama Reddy,***[5] which hold that the right to be represented by a third person in domestic inquiries/tribunals is based upon the precept that it is not desirable to restrict right of representation by a counsel or agent of one's choice. The ratio does not tantamount to acceptance of the proposition that such a right is an element of principles of natural justice, and its denial would immediately invalidate the inquiry. Representations are often restricted by a law, such as under Section 36 of the Industrial Disputes Act, 1947, as also by certified Standing Orders. The aforementioned two decisions ascribe to catena of decisions, including English case law on this subject, which accept that the right to be legally represented depends on how the rules govern such representation. Further, if the rules are silent, the party has no absolute right to be legally represented. However, the entitlement of a fair hearing is not to be dispensed with. What fairness requires would depend upon the nature of the investigation and the consequences it may have on the persons affected by it.

[4] (1993) 2 SCC 115
[5] (2006) 11 SCC 645

This Court in ***Crescent Dyes and Chemicals Ltd.*** (supra), observed as follows:

> "17. It is, therefore, clear from the above case-law that the right to be represented through counsel or agent can be restricted, controlled or regulated by statute, rules, regulations or Standing Orders. A delinquent has no right to be represented through counsel or agent unless the law specifically confers such a right. The requirement of the rule of natural justice insofar as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent…"

Thus, the right to be represented by a counsel or agent of one's choice is not an absolute right but one which can be controlled, restricted, or regulated by law, rules, or regulations. However, if the charge is of severe and complex nature, then the request to be represented through a counsel or agent should be considered. The above proposition flows from the entitlement of fair hearing, which is applicable in judicial as well as quasi-judicial decisions.

21. In ***Dharampal Satyapal Ltd.*** v. ***Deputy Commissioner of Central Excise, Gauhati and Others***,[6] this Court has highlighted that procedural fairness is essential for arriving at correct decisions, by observing:

[6] (2015) 8 SCC 519

> "27. It, thus, cannot be denied that the principles of natural justice are grounded in procedural fairness which ensures taking of correct decisions and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms."

22. Traditional English Law recognized and valued the rule against bias that no man shall be a judge in his own cause, i.e. *nemo debet esse judex in propria causa*; and the obligation to hear the other or both sides as no person should be condemned unheard, i.e. *audi alteram partem*. To these, new facets sometimes described as subsidiary rules have developed, including a duty to give reasons in support of the decision. Nevertheless, time and again the courts have emphasized that the rules of natural justice are flexible and their application depends on facts of each case as well as the statutory provision, if applicable, nature of right affected and the consequences. In ***A.K. Kraipak and others*** v. ***Union of India and Others***,[7] the Constitutional Bench, dwelling on the role of the principles of natural justice under our Constitution, observed that as every organ of the State is controlled and regulated by the rule of law, there is a requirement to act justly and fairly and not arbitrarily or

[7] (1969) 2 SCC 262

capriciously. The procedures which are considered inherent in the exercise of a quasi-judicial or administrative power are those which facilitate if not ensure a just and fair decision. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame work of law under which the enquiry is held and the constitution of the body of persons or tribunal appointed for that purpose. When a complaint is made that a principle of natural justice has been contravened, the court must decide whether the observance of that rule was necessary for a just decision in the facts of the case.

23. Legal position on the importance to show prejudice to get relief is also required to be stated. In ***State Bank of Patiala and Others*** v. ***S.K. Sharma***,[8] a Division Bench of this Court distinguished between 'adequate opportunity' and 'no opportunity at all' and held that the prejudice exception operates more specifically in the latter case. This judgment also speaks of procedural and substantive provisions of law embodying the principles of natural justice which, when infracted, must lead to prejudice being caused to the litigant in order to afford him relief. The principle was expressed in the following words:

[8] (1996) 3 SCC 364

> "32. Now, coming back to the illustration given by us in the preceding para, would setting aside the punishment and the entire enquiry on the ground of aforesaid violation of sub-clause (*iii*) be in the interests of justice *or* would it be its negation? In our respectful opinion, it would be the latter. Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise."

24. Earlier decision in ***M.C. Mehta*** v. ***Union of India and Others***,[9] examined the expression 'admitted and undisputable facts', as also divergence of legal opinion on whether it is necessary to show 'slight proof' or 'real likelihood of prejudice'; or legal effect of 'an open and shut case', with reference to the observations in ***S.L. Kapoor*** v. ***Jagmohan and Others***,[10] and elucidates in the following words:

> "22. Before we go into the final aspects of this contention, we would like to state that cases relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of "real substance" or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed. See *Malloch* v. *Aberdeen Corpn*. (per Lord Reid and Lord Wilberforce), *Glynn* v. *Keele University*, *Cinnamond* v. *British Airports*

[9] (1999) 6 SCC 237
[10] (1980) 4 SCC 379

Authority and other cases where such a view has been held. The latest addition to this view is *R.* v. *Ealing Magistrates' court, ex p Fannaran* (Admn LR at p. 358) (see de Smith, Suppl. p. 89) (1998) where Straughton, L.J. held that there must be "*demonstrable beyond doubt*" that the result would have been different. Lord Woolf in *Lloyd* v. *McMahon* (WLR at p. 862) has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in *McCarthy* v. *Grant* however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is "real likelihood — not certainty — of prejudice". On the other hand, *Garner Administrative Law* (8th Edn., 1996, pp. 271-72) says that slight proof that the result would have been different is sufficient. *On the other side* of the argument, we have apart from *Ridge* v. *Baldwin*, Megarry, J. in *John* v. *Rees* stating that there are always "open and shut cases" and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J. has said that the "useless formality theory" is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that "convenience and justice are often not on speaking terms". More recently Lord Bingham has deprecated the "useless formality" theory in *R.* v. *Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990 IRLR 344] by giving six reasons. (See also his article "Should Public Law Remedies be Discretionary?" 1991 PL, p. 64.) A detailed and emphatic criticism of the "useless formality theory" has been made much earlier in "Natural Justice, Substance or Shadow" by Prof. D.H. Clark of Canada (see 1975 PL, pp. 27-63) contending that *Malloch* and *Glynn* were wrongly decided. Foulkes (*Administrative Law*, 8th Edn., 1996, p. 323), Craig (*Administrative Law*, 3rd Edn., p. 596) and others say that the court cannot prejudge what is to be decided by the decision-making authority de Smith (5th Edn., 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (*Administrative Law*, 5th Edn., 1994, pp. 526-30) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those

> relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a "real likelihood" of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are *not* all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their "*discretion*", refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in *State Bank of Patiala* v. *S.K. Sharma*, *Rajendra Singh* v. *State of M.P.* that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.
>
> 23. We do not propose to express any opinion on the correctness or otherwise of the "useless formality" theory and leave the matter for decision in an appropriate case, inasmuch as, in the case before us, "*admitted and indisputable*" facts show that grant of a writ will be in vain as pointed out by Chinnappa Reddy, J."

25. In ***State of U.P.*** v. ***Sudhir Kumar Singh and Others***,[11] referring to the aforesaid cases and several other decisions of this Court, the law was crystallized as under:

> "39. An analysis of the aforesaid judgments thus reveals:
>
> (1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the *audi alteram partem* rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

[11] (2020) SCC Online SC 847

> (2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction *per se* does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.
>
> (3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.
>
> (4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.
>
> (5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

26. In the light of the aforesaid legal position, we have examined the facts of the present case and have referred to the inquiry proceedings in some detail. The respondent was aware that his request to be represented by a representative of his own choice had been rejected. Even then he took time and decided not to file an

appeal before the Board of Directors against the order of the inquiry officer rejecting his request. He allowed the inquiry proceedings to continue and then filed an application for production of documents. When asked about relevancy, his stance was he had his own reasons on how the documents were relevant. In spite of ample opportunity, the respondent did not adduce evidence or examine witnesses, and abruptly stood up and walked out. Observations and findings in the disciplinary proceedings on the aspect of irregularities regarding exceeding his authority in the grant of advances, acceptance of discovery bills and the issue of bank guarantees etc. are clear and remain uncontroverted. The respondent's defence in the form of *alibi* that he had followed the oral instructions of the then Chairman and the Director, which is of questionable merit, is to be rejected as unproven. On this aspect somewhat reflecting on merits, the Single Judge had observed that the allegations if proven constitute gross misconduct, warranting punishment of dismissal. The Division Bench has not commented on this aspect, but has made observations assuming prejudice was caused, which reasoning in the light of the ratio elucidated in paragraph nos. 23 to 25 (supra) cannot be sustained. The judgments under challenge do not consider the effect of the defence pleaded by the respondent and

whether there was no effective denial. Conduct of the respondent, including the opportunities granted during the departmental proceedings, have gone unnoticed. On the *alibi*, the respondent did not furnish any details or particulars of cases or instances and had refused to lead evidence. Clause 22(ix)(a), as worded, envisages that an employee against whom disciplinary action is proposed will be served with memorandum of charges, be given sufficient time to prepare and present his explanation and produce evidence which he may wish to render in his defence. He is permitted to appear before the officer conducting the inquiry, cross-examine the witnesses and produce other evidence in his defence. Further, the officer can also be permitted to be defended by a representative, who must be a representative of a registered union/association of 'bank' employees, which, as held above, means an union/association of the employees of the Bank of Cochin and not association of employees of any or other banks. Notably, the provision does not stipulate that the employee requires permission from any authority or the inquiry officer for representation by a representative of a registered union or association of the Bank of Cochin. Such permission is required if an employee wants a lawyer to represent him/her in the disciplinary proceedings. In this case, contrary to the observations in the

impugned judgment by the Division Bench, the respondent had never prayed or sought permission to be represented by a lawyer. This is despite the respondent being aware of the professional status of the inquiry officer and the presenting officer.

27. Further, the dismissal order passed on 18.04.1985 remained unchallenged for more than four years, as the appeal to the Chief General Manager of the State Bank of India was filed on 20.09.1989. The respondent, however, relies on Clause 22(x) of the Service Code relating to appeals, which reads thus:

> "An aggrieved employee in all such cases may appeal to the Board of Directors whose decision shall be final."

Undoubtedly, the Service Code does not stipulate any time period within which the appeal may be preferred to the Board of Directors whose decision is to be final, but it is well settled that no time does not mean any time. The assumption is that the appeal would be filed at the earliest possible opportunity. However, we would hold that the appeal should be filed within a reasonable time. What is a reasonable time is not to be put in a straitjacket formula or judicially codified in the form of days etc. as it depends upon the facts and circumstances of each case. A right not exercised for a

long time is non-existent. Doctrine of delay and laches as well as acquiescence are applied to non-suit the litigants who approach the court/appellate authorities belatedly without any justifiable explanation for bringing action after unreasonable delay. In the present case, challenge to the order of dismissal from service by way of appeal was after four years and five months, which is certainly highly belated and beyond justifiable time. Without satisfactory explanation justifying the delay, it is difficult to hold that the appeal was preferred within a reasonable time. Pertinently, the challenge was primarily on the ground that the respondent was not allowed to be represented by a representative of his choice. The respondent knew that even if he were to succeed on this ground, as has happened in the writ proceedings, fresh inquiry would not be prohibited as finality is not attached unless there is a legal or statutory bar, an aspect which has been also noticed in the impugned judgment. This is highlighted to show the prejudice caused to the appellants by the delayed challenge. We would, subsequently, examine the question of acquiescence and its judicial effect in the context of the present case.

28. The appeal preferred by the respondent with the Chief General Manager of the State Bank of India on 20.09.1989 had remained unattended for almost nine years. The appellants, it is apparent, simply lost track and forgot that the service appeal was filed or pending. The respondent was never an employee of the appellant's bank as his services were terminated on 18.04.1985, nearly four months before the Bank of Cochin, a private Bank, got amalgamated with the State Bank of India. The appellants being at fault must bear the burden and adverse consequences. In ***Ram Chand and Others*** v. ***Union of India and Others***[12] and ***State of U.P. and Others*** v. ***Manohar***,[13] this Court observed that if the statutory authority has not performed its duty within a reasonable time, it cannot justify the same by taking the plea that the person who has been deprived of his rights has not approached the appropriate forum for relief. If a statutory authority does not pass any orders and thereby fails to comply with the statutory mandate within reasonable time, they normally should not be permitted to take the defence of laches and delay. If at all, in such cases, the delay furnishes a cause of action, which in some cases as elucidated in ***Union of India and Others*** v.

[12] (1994) 1 SCC 44
[13] (2005) 2 SCC 126

Tarsem Singh,[14] may be continuing cause of action. The State being a virtuous litigant should meet the genuine claims and not deny them for want of action on their part. However, this general principle would not apply when, on consideration of the facts, the court concludes that the respondent had abandoned his rights, which may be either express or implied from his conduct. Abandonment implies intentional act to acknowledge, as has been held in paragraph 6 of ***Motilal Padampat Sugar Mills Co. Ltd.*** v. ***State of Uttar Pradesh and Others.***[15] Applying this principle of acquiescence to the precept of delay and laches, this Court in ***U.P. Jal Nigam and Another*** v. ***Jaswant Singh and Another***,[16] after referring to several judgments, has accepted the following elucidation in Halsbury's Laws of England:

> "12. The statement of law has also been summarised in *Halsbury's Laws of England*, para 911, p. 395 as follows:
>
> > "In determining whether there has been such delay as to amount to laches, the chief points to be considered are:
> >
> > (*i*) acquiescence on the claimant's part; and
> >
> > (*ii*) any change of position that has occurred on the defendant's part.

[14] (2008) 8 SCC 648
[15] (1979) 2 SCC 409
[16] (2006) 11 SCC 464

> Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"

29. Before proceeding further, it is important to clarify distinction between 'acquiescence' and 'delay and laches'. Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain.[17] In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance,[18] which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention.[19] Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and inspite of the infringement takes no action mirroring acceptance.[20] However, acquiescence will not apply if lapse of time is of no importance or consequence.

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[17] See *Prabhakar* v. *Joint Director, Sericulture Department and Another*, (2015) 15 SCC 1. Also, see *Gobinda Ramanuj Das Mohanta v. Ram Charan Das and Suyamal Das,* AIR 1925 Cal 1107

[18] See *M/S Vidyavathi Kapoor Trust* v. *Chief Commissioner Tax* (1992) 194 ITR 584

[19] See *Krishan Dev* v. *Smt. Ram Piari* AIR 1964 HP 34

[20] See "Introduction", UN Mitra, Tagore Law Lectures – Law of Limitation and Prescription, Volume I, 14TH Edition, 2016.

30. Laches unlike limitation is flexible. However, both limitation and laches destroy the remedy but not the right. Laches like acquiescence is based upon equitable considerations, but laches unlike acquiescence imports even simple passivity. On the other hand, acquiescence implies active assent and is based upon the rule of estoppel *in pais.* As a form of estoppel, it bars a party afterwards from complaining of the violation of the right. Even indirect acquiescence implies almost active consent, which is not to be inferred by mere silence or inaction which is involved in laches. Acquiescence in this manner is quite distinct from delay. Acquiescence virtually destroys the right of the person.[21] Given the aforesaid legal position, inactive acquiescence on the part of the respondent can be inferred till the filing of the appeal, and not for the period post filing of the appeal. Nevertheless, this acquiescence being in the nature of estoppel bars the respondent from claiming violation of the right of fair representation.

31. The questions of prejudice, change of position, creation of third-party rights or interests on the part of the party seeking relief are important and relevant aspects as delay may obscure facts, encourage

[21] Refer Footnote 18

dubious claims, and may prevent fair and just adjudication. Often, relevant and material evidence go missing or are not traceable causing prejudice to the opposite party. It is, therefore, necessary for the court to consciously examine whether a party has chosen to sit over the matter and has woken up to gain any advantage and benefit, which aspects have been noticed in ***M/s Dehri Rohtas Light Rly. Co. Ltd.*** v. ***District Board, Bhojpur and Others***[22] and ***State of Maharashtra*** v. ***Digambar***.[23] These facets, when proven, must be factored and balanced, even when there is delay and laches on the part of the authorities. These have bearing on grant and withholding of relief. Therefore, we have factored in the aspect of prejudice to the appellants in view of the relief granted in the impugned judgment.

32. The relief as granted certainly has serious financial repercussions and would also prevent the appellants from taking further action, which aspect has been noticed, though not finally determined in the impugned judgment. The studied silence of the respondent, who did not correspond or make any representation for nine years, was with an ulterior motive as he wanted to take benefit of the slipup though he had suffered dismissal. The courts can always refuse to grant

[22] (1992) 2 SCC 598
[23] (1995) 4 SCC 683

relief to a litigant if it considers that grant of relief sought is likely to cause substantial hardship or substantial prejudice to the opposite side or would be detrimental to good administration.[24] This principle of good administration is independent of hardship, or prejudice to the rights of the third parties and does not require specific evidence that this has in fact occurred, though in relation to withholding relief some evidence may be required. Relief should not be denied for mere inconvenience but when the difficulty caused to the decision maker approaches impracticability or when there is an overriding need for finality and certainty.[25]

33. Learned counsel for the respondent had submitted that the appeal was not dismissed on the ground of delay and laches by the Chief General Manager vide order dated 23.01.1999. This aspect has also appealed to the Single Judge and the Division Bench. We do not agree with the aforesaid views for several reasons. The respondent had approached the High Court through a writ petition in O.P. No. 19807/1998 G**,** whereby directions were issued vide order dated 14.10.1998 for consideration and disposal of the appeal, which, it is apparent, was interpreted as a direction that the appeal should be

[24] *R. (on the application of Parkyn)* v. *Restormel* BC [2001] EWCA Civ 330
[25] *R.* v. *Monopolies and Mergers Commission Ex p. Argyll Group* [1986] 1 W.L.R. 763.

decided on merits. One can appreciate the predicament of the Chief General Manager who had to adjudicate the appeal in terms of the direction of the Constitutional Court and, therefore, his reluctance to dismiss the appeal on the ground of delay and laches. The appeal was dismissed on merits. These aspects cannot be ignored as the exercise of writ jurisdiction is always discretionary which has to keep in view the conduct of the parties.

34. By the order dated 04.12.2009, the dues payable to the respondent in terms of the impugned judgment were released to him on furnishing security to the satisfaction of the Chief General Manager. During the course of hearing, it was stated that the amount released has been kept in a fixed deposit. The payment released is directed to be returned and restituted to the appellant bank without interest within a period of six weeks from the date of pronouncement of this judgment. However, in case payment is not made within the aforesaid period, the respondent would be liable to pay interest @ 8% per annum from the date of this judgment till actual payment is made. In addition, the appellants would be entitled to enforce the security furnished by the respondent.

35. In the light of the aforesaid discussion, the present appeal is allowed and the impugned judgment is set aside and quashed. We uphold the order of dismissal and consequently the writ petition filed by the respondent would be treated as dismissed. There would be no order as to costs.

.....J.
(L. NAGESWARA RAO)

.....J.
(SANJIV KHANNA)

NEW DELHI;
NOVEMBER 16, 2021.

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 6522 of 2021

Akshay N Patel **...Appellant**

Versus

Reserve Bank of India & Anr. **...Respondents**

J U D G M E N T

Dr Justice Dhananjaya Y Chandrachud, J

This judgment has been divided into sections to facilitate analysis. They are:

A Factual background

1 The appeal arises from a judgment and order dated 8 October 2020 of a Division Bench of the High Court of Madhya Pradesh at its Bench at Indore. The High Court upheld Clause 2(iii) of the Revised Guidelines on Merchanting Trade Transactions[1] dated 23 January 2020[2] issued by the first respondent, Reserve Bank of India[3], in the exercise of its power under Section 10(4) and 11(1) of the Foreign Exchange Management Act 1999[4].

2 The appellant is the managing director of a firm that manufactures and trades in pharmaceuticals; herbal and skincare products; and personnel protection equipment products such as masks, gloves, sanitisers, PPE overalls, and ventilators[5]. The genesis of the case lies in an international MTT contract which the appellant obtained to serve as an intermediary between the sale of PPE products by a supplier in China to a buyer in the United States. In accordance with the 2020 MTT Guidelines, the appellant wrote to his authorised bank on 1 May 2020 requesting documents (such as a letter of credit) that were required to execute the MTT contract. The bank informed the appellant on 4 May 2020 that RBI had denied permission for his MTT contract, on the basis of Clause 2(iii) of the 2020 MTT Guidelines. Clause 2(iii) is reproduced below:

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[1] "**MTT**"
[2] "**2020 MTT Guidelines**" - RBI/2019-20/152: A.P. (DIR Series) Circular No 20
[3] "**RBI**"
[4] "**FEMA**"
[5] Collectively, they are being referred to as "**PPE products**"

> "iii. The MTT shall be undertaken for the goods that are permitted for exports/imports under the prevailing Foreign Trade Policy (FTP) of India as on the date of shipment. All rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry) shall be complied with for the export leg and import leg respectively."

At the relevant time, the export of PPE products had been banned by the second respondent, the Union Ministry of Commerce and Industry and the Directorate General of Foreign Trade[6], through successive notifications dated 8 February 2020, 25 February 2020 and 19 March 2020, due to the ongoing COVID-19 pandemic. Therefore, MTT contracts concerning PPE products were considered impermissible under Clause 2(iii) of the 2020 MTT Guidelines.

3 Upon receiving the communication from his bank, the appellant wrote an email to the Ministry of Commerce and DGFT on 12 May 2020, stating that under his MTT contract, there was no actual export of PPE products from India. The appellant claimed that he was only serving as an intermediary in a trade between two other nations. Hence, he requested the Ministry of Commerce and DGFT to issue a notification/clarification/circular exempting MTT contracts in relation to PPE products from the requirements of Clause 2(iii). However, the appellant received no response. The appellant then filed a writ petition[7] under Article 226 before the Madhya Pradesh High Court. The writ petition set up a case that Clause 2(iii) of the 2020 MTT Guidelines is unconstitutional since it violates the appellant's right to carry on

[6] "**Ministry of Commerce and DGFT**"
[7] Writ Petition No 7902/2020

business under Article 19(1)(g) and the right to life and livelihood under Article 21 of the Constitution.

4 In its reply before the Madhya Pradesh High Court, the RBI stated that the Union of India[8] had prohibited the export of PPE products from India by issuing multiple notifications under Section 3 of the Foreign Trade (Development & Regulation) Act 1992[9], through which it amended the Foreign Trade Policy 2015-2020[10]. Hence, in accordance with Clause 2(iii) of the 2020 MTT Guidelines, MTT transactions concerning PPE products were also prohibited since they allowed Indian individuals to assist others in diverting PPE products away from India in the global market. Further, it was clarified that Clause 2(iii) was of a general nature, and the RBI had no jurisdiction to exempt products from its application, since only the UOI determined the nation's FTP.

5 By its judgment dated 8 October 2020, the High Court dismissed the writ petition. In upholding the constitutionality of Clause 2(iii) of the 2020 MTT Guidelines, the High Court held that: *(i)* Clause 2(iii) only prohibits MTTs for goods that cannot be imported/exported into India. The provision is general in its application and does not specifically prohibit MTT in PPE products; *(ii)* the decision to modify the FTP to prohibit import/export of goods is a policy decision of the Ministry of Commerce and DGFT under the Foreign Trade Act; *(iii)* the Ministry of Commerce and DGFT prohibited the export of PPE products due to the COVID-19

[8] "**UOI**"
[9] "**Foreign Trade Act**"
[10] "**FTP**"

pandemic, and consequently, MTTs are also prohibited under Clause 2(iii); and *(iv)* apart from the fact that the goods do not physically enter Indian territory, an MTT has all the trappings of an import/export transaction. Further, it involves India's foreign exchange. Hence, its regulation needs to be in conformity with the FTP set by the UOI.

B Submissions

6 Mr Aayush Agarwala, learned Counsel for the appellant submitted that:

(i) Clause 2(iii) of the 2020 MTT Guidelines prohibits MTTs for goods whose import/export is banned in India, which results in an absolute prohibition. This violates Articles 14, 19(1)(g) and 21 of the Constitution;

(ii) The RBI has provided no cogent reason why it has linked the ban on MTTs completely to India's FTP, instead of independently deciding it under FEMA, since the objective while prohibiting goods under the FTP may not be fulfilled by also prohibiting MTTs. This is true in the present case, where the export of PPE products was banned to preserve stocks in India during the COVID-19 pandemic; however, MTTs in PPE products do not affect domestic stocks because the goods traded are from outside of India. Therefore, Clause 2(iii) is manifestly arbitrary and violates Article 14;

(iii) There is no entry into or exit of goods from the borders of India in an MTT and the Indian entity only serves as an intermediary in a transaction between two foreign countries. Hence, the appellant's MTT in relation to

PPE products would not affect the quantity of PPE products in India during the pandemic, and is not a reasonable restriction. Pertinently, courts should consider the reasonableness of a policy more carefully when it results in an absolute prohibition;

(iv) Further, lesser intrusive policies are possible, such as the following:

a. The RBI can independently decide whether to prohibit an MTT for each product whose import/export has been banned under the FTP. This can be done by delinking the prohibition on MTT with the prohibition under the FTP;

b. The RBI can prohibit MTTs only for goods whose import has been prohibited since the lack of import into India highlights a policy concern in relation to that product. However, for goods whose export is prohibited, the MTT can be allowed because it does not reduce the stock of that product in India. It is submitted that this was also the intent of RBI's circular dated 24 August 2000 in relation to MTTs; and

c. Individuals should be allowed to approach the RBI to seek an exemption for conducting MTTs in relation to products whose import/export is prohibited under the FTP. The RBI can then consider each individual product and decide whether its MTT should be permitted, keeping in mind the reasons for its prohibition under the FTP.

7 Opposing the above submissions, Mr Ramesh Babu M R, learned Counsel for the RBI submitted that:

(i) The appellant cannot challenge Clause 2(iii) of the 2020 MTT Guidelines without challenging the notifications amending the FTP to prohibit the export of PPE products. Clause 2(iii) is general in its application and was introduced on 23 January 2020, while the first notification prohibiting the export of PPE products was issued by the UOI on 8 February 2020;

(ii) Clauses similar to Clause 2(iii) of the 2020 MTT Guidelines have existed in all previous circulars issued by the RBI to regulate MTTs. These clauses substantially stipulate that MTTs would only be allowed in respect of products whose import/export is allowed in India;

(iii) MTTs are analogous to import/export transactions, except for the fact that the goods never physically enter India. There is an outflow of foreign exchange during the import leg of the MTT and an inflow of foreign exchange during the export leg. Hence, MTTs affect India's foreign reserves, which the RBI has to manage and harmonise with the UOI's FTP. Therefore, the RBI cannot permit MTTs in respect of goods whose import/export has been prohibited by the UOI under the Foreign Trade Act;

(iv) Export of PPE products was prohibited by the UOI in order to ensure that adequate stocks are present in India during the COVID-19 pandemic. Hence, a prohibition of MTTs in respect of PPE products is also important because when an Indian entity facilitates the trade of these products to

another nation, it takes away from India's possible stock in the global market; and

(v) Courts should be wary of interfering in the economic policies of the State, which should be left to expert bodies. This proposition is supported by the decisions of this Court in **Shri Sitaram Sugar Co. Ltd.** v. **Union of India**[11], **Prag Ice & Oil Mills** v. **Union of India**[12] and **P.T.R. Exports (Madras) (P) Ltd.** v. **Union of India**[13].

8 Supporting the submissions of the RBI on behalf of the Ministry of Commerce and DGFT, Mr Vikramjit Banerjee, Additional Solicitor General[14] submitted that:

(i) The UOI has prohibited the export of PPE products through a series of notifications issued between 31 January 2020 to 16 May 2020, so as to ensure that there is adequate stock in India during the COVID-19 pandemic;

(ii) The appellant cannot be allowed to facilitate a transaction for PPE products between two foreign countries through MTTs since it would be against India's national interest. Given the COVID-19 pandemic, such a restriction is reasonable;

[11] (1990) 3 SCC 223
[12] (1978) 3 SCC 459
[13] (1996) 5 SCC 268
[14] "**ASG**"

(iii) There is no complete prohibition under Clause 2(iii) of the 2020 MTT Guidelines since the appellant is free to conduct MTTs in respect of goods whose import/export is not prohibited under India's FTP; and

(iv) By a notification dated 25 August 2020, the export of PPE Masks and N-95/FFP 2 Masks or equivalent has been categorized as "Restricted" (instead of "Prohibited") while medical coveralls of all classes/categories (including PPE overalls) are now under the "Free" category.

9 The rival submissions will now be analysed.

C A Proportionality Analysis

10 The appellant is a citizen of India. He is also the Managing Director of Anzalp Herbal Products Private Limited, a corporate body which *inter alia*, engages in MTTs. In **State Trading Corporation** v. **Commercial Tax Officer**[15], a nine-judge Bench of this Court has settled the question that corporations are not considered as "citizens" under the Constitution. A corporation cannot claim an infringement of rights under Article 19(1)(g), as this fundamental right is only available to citizens and not to juristic persons. Over the years, shareholders and business persons have filed petitions in their individual capacity, to allege infringement of their fundamental right to carry on business or a profession of their choice[16]. The appellant argues that the RBI and UOI's prohibition of MTTs in respect of PPE products infringes his

[15] AIR 1963 SC 1811
[16] M P Jain, *Citizenship*, *in* INDIAN CONSTITUTIONAL LAW (7th edn, Lexis Nexis, 2014)

fundamental rights and freedoms under Articles 14, 19(1)(g) and 21 of the Constitution.

11 The appellant has contended that this Court has been circumspect of legislative provisions or executive policies that impose a total prohibition on a citizen's right to conduct business. Since the appellant is engaged in MTTs which facilitate import and export between two different countries, he urges that a complete prohibition on MTTs in relation to PPE products, without a rational distinction of prohibiting their exports alone, is a constitutionally suspect infringement of his freedom to conduct his business. In order to test this claim, we will begin by analysing the precedents of this Court on the ambit of the freedom envisaged under Article 19(1)(g). The relevant freedoms and restrictions with respect to trade under the Indian Constitution are as follows:

> "19. Protection of certain rights regarding freedom of speech, etc.-(1) All citizens shall have the right –
>
> […]
>
> (g) to practise any profession, or to carry on any occupation, trade or business.
>
> […]
>
> (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

12 The text of the Constitution clarifies that the right to carry on trade or business is subject to reasonable restrictions which are imposed in the interests of the general public. This Court has propounded several tests for determining "reasonableness" for the purpose of Article 19(1)(g). These have ranged from testing restrictions for arbitrariness[17], excessiveness[18] and discerning their objective of compliance with the Directive Principles of State Policy[19]. In **Chintaman Rao** v. **State of Madhya Pradesh,**[20] a Constitution Bench noted the importance of striking the right balance between social control and individual freedom. Justice K C Das Gupta articulated the limitation under Article 19(6) in the following terms:

> "6. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in

[17] **Dwarka Pd.** v. **State of Uttar Pradesh**, AIR 1954 SC 224; **Shree Meenakshi Mills** v. **Union of India**, AIR 1974 SC 366
[18] **Chintaman Rao** v. **State of Madhya Pradesh**, AIR 1951 SC 118
[19] **Saghir Ahmad** v. **State of U.P.**, (1955) 1 SCR 707; **Jalan Trading Co.** v. **D M Aney**, AIR 1973 SC 233; **M R F Ltd.** v. **Inspector Kerala Government**, (1998) 8 SCC 227; **Indian Handicrafts Emporium** v. **Union of India**, (2003) 7 SCC 589
[20] AIR 1951 SC 118

> Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

13 In **M R F Ltd.** v. **Inspector Kerala Government,**[21] a two judge Bench of this Court consolidated the body of precedent of this Court on Article 19(1)(g). Justice S Saghir Ahmed noted the following principles that govern the restrictions under Article 19(6):

> "13. […]
>
> (1) While considering the reasonableness of the restrictions, the court has to keep in mind the Directive Principles of State Policy.
>
> (2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.
>
> (3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.
>
> (4) A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of Article 19.
>
> (5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind. (See: State of U.P. v. Kaushailiya [AIR 1964 SC 416 : (1964) 4 SCR 1002] .)
>
> (6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act

[21] (1998) 8 SCC 227

> will naturally arise. (See: Kavalappara Kottarathil Kochuni v. States of Madras and Kerala [AIR 1960 SC 1080 : (1960) 3 SCR 887] ; O.K. Ghosh v. E.X. Joseph [AIR 1963 SC 812 : 1963 Supp (1) SCR 789 : (1962) 2 LLJ 615] .)"

14 This Court has also consistently held that restrictions on the freedom to carry on trade and business can take the form of a complete prohibition[22]. However, in **B P Sharma** v. **Union of India,**[23] a two judge Bench of this Court has espoused a higher threshold for imposition of a prohibitive restriction. A legitimate object and prejudice to the general public by non-imposition of such prohibition has to be demonstrated by the State, to discharge its burden of demonstrating reasonableness under Article 19(6). Justice Brijesh Kumar held:

> "15. The freedom under Article 19(1)(g) can also be completely curtailed in certain circumstances e.g. where the profession chosen is so inherently pernicious that nobody can be considered to have a fundamental right to carry on such business, trade, calling or profession like gambling, betting or dealing in intoxicants or an activity injurious to public health and morals. It may be useful to refer to a few decisions of this Court on the point at this stage viz. in Saghir Ahmad v. State of U.P. [AIR 1954 SC 728 : (1955) 1 SCR 707] and J.K. Industries Ltd. v. Chief Inspector of Factories and Boilers [(1996) 6 SCC 665] . The main purpose of restricting the exercise of the right is to strike a balance between individual freedom and social control. The freedom, however, as guaranteed under Article 19(1)(g) is valuable and cannot be violated on grounds which are not established to be in public interest or just on the basis that it is permissible to do so. **For placing a complete prohibition on any professional activity, there must exist some strong reason for the same with a view to attain some legitimate object and in case of non-imposition of such prohibition, it may result in jeopardizing or seriously affecting the interest of the**

[22] **Narendra Kumar** v. **Union of India**, AIR 1960 SC 430
[23] (2003) 7 SCC 309

> **people in general. If it is not so, it would not be a reasonable restriction if placed on exercise of the right guaranteed under Article 19(1)(g).** The phrase "in the interest of the general public" has come to be considered in several decisions and it has been held that it would comprise within its ambit interests like public health and morals…."
>
> (**emphasis supplied**)

15 Various principles have been espoused by this Court to bring about a balance between the perceived interest of the state of social control over the economy, with the rights and freedoms of individuals. The appellant has cited various decisions to argue for heightened scrutiny of legislative or administrative action which places an absolute prohibition on an individual's right to conduct trade or business[24]. The judicial evolution of a four-pronged analysis of proportionality displaces the varying standards that were prescribed to determine "reasonableness" under Article 19(6). The qualitative nature of a right and the corresponding scrutiny of its violation cannot be a sole function of the degree of restriction. Every violation of rights, irrespective of the degree of the infraction, must be evaluated through a uniform principle that promotes a culture of justification. The decision of a nine-judge Bench of this Court in **K S Puttaswamy** v. **Union of India**[25] ("**K S Puttaswamy (9J)**") prescribed a proportionality analysis for determining violations of fundamental rights under Part III. A proportionality analysis can adequately consider the constitutionality of prohibitive measures on commercial activities. Therefore, we will

[24] **Mohd. Faruk** v. **State of Madhya Pradesh**, 1969 (1) SCC 853; **Cellular Operators Association of India** v. **Telecom Regulatory Authority of India**, (2016) 7 SCC 703; **Internet and Mobile Association of India** v**. Reserve Bank of India**, 2020 SCC OnLine SC 275
[25] (2017) 10 SCC 1, para 325

structure the judgment on an analysis of the proportionality of RBI's decision to prohibit MTTs in PPE products, in order to determine its constitutionality.

16 An analysis of legitimate social control for the purpose of Article 19(6) has been streamlined by this Court through the lens of proportionality. A two-judge Bench of this Court in **Om Kumar** v. **Union of India**[26] introduced the test of proportionality for determining the reasonableness of restrictions on freedoms guaranteed under Article 19(1). Justice M Jagannadha Rao traced the historical application of the principle in this Court's precedent and in a comparative context. The judgment defined the concept in the following terms:

> "28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality."

[26] (2001) 2 SCC 386

The test was made applicable to testing the validity of legislation as well as administrative action:

> "53. Now under Articles 19(2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the statute concerned permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of "proportionality", just as it is done in the case of the main legislation. This, in fact, is being done by our courts."

17 A Constitution Bench, in **Modern Dental College and Research Centre** v. **State of Madhya Pradesh**[27] ("**Modern Dental College**"), validated the test of proportionality for determining the reasonableness of a restriction under Article 19(6). Justice A K Sikri accepted the Canadian Supreme Court's analysis of the doctrine of proportionality and held it to be applicable to constitutional rights in India. The Court noted:

> "63. In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of "proportionality", which is a proper criterion. **To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to**

[27] (2016) 7 SCC 353

achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. This essence of doctrine of proportionality is beautifully captured by Dickson, C.J. of Canada in R. v. Oakes [R.v. Oakes, (1986) 1 SCR 103 (Can SC)] , in the following words (at p. 138):

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutional protected right or freedom … Second … the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test…" Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be … rationally connected to the objective. Second, the means … should impair "as little as possible" the right or freedom in question … Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

64. **The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.**"

(**emphasis supplied**)

PART C

18 The decision in **K S Puttaswamy (9J)**[28] (supra) introduced the proportionality standard in determining violations of fundamental rights, particularly the right to privacy. This doctrine was affirmed in the judgments of five out of the nine judges on the Bench. Subsequently, a Constitution Bench in **K S Puttaswamy** v. **Union of India**[29] ("**Aadhar (5J)**") fleshed out the contours of a proportionality analysis and applied it to determine the constitutionality of the Aadhar Scheme and the Aadhar Act 2016. Justice A K Sikri conducted a comparative analysis of the types of proportionality analysis globally and elucidated a four-pronged approach that could be suitable for the Indian Constitution. This test was laid down in the following terms:

> "319. …This discussion brings out that following four sub-components of proportionality need to be satisfied:
>
> 319.1. A measure restricting a right must have a legitimate goal (legitimate goal stage).
>
> 319.2. It must be a suitable means of furthering this goal (suitability or rational connection stage).
>
> 319.3. There must not be any less restrictive but equally effective alternative (necessity stage).
>
> 319.4. The measure must not have a disproportionate impact on the right holder (balancing stage)."

19 This Court has thus propounded a four-pronged test of proportionality. This can now be utilised to determine the constitutionality of Clause 2(iii) of the 2020 MTT Guidelines.

[28] Para 325
[29] (2019) 1 SCC 1

PART C

20 Before our analysis proceeds along the above direction, it is important to note that the appellant has challenged the constitutionality of Clause 2(iii) of the 2020 MTT Guidelines by alleging a violation of his rights under Articles 14, 19(1)(g) and 21. Hence, this Court has to determine if the RBI's restriction to prohibit MTTs in PPE products is restrictive of the appellant's right to equality under Article 14 on the ground that it is arbitrary, whether it is a reasonable restriction on the appellant's freedom to conduct trade under Articles 19(1)(g) read with Article 19(6), and if it violates the appellant's liberty and right to livelihood under Article 21.

21 Allegations involving a violation of each of these rights are often considered independently and within the framework of their own prescribed limitation by the precedents of this Court. However, the substance of the enquiry behind each of the limitations under these Articles is similar to a proportionality analysis. In essence, the rights' limitation is considered justified if it pursues a legitimate aim, has a rational nexus to the objective and there is a balance between the limitation of the right and the public interest which the rights-limitation aims to achieve. This analysis has been considered similar to a proportionality inquiry, with the "necessity" prong being considered missing[30].

22 Some academic commentators have suggested that the Courts can adopt the proportionality analysis, even when considering rights with different limitations. They state this for three reasons: *(i)* litigation of rights can often be open-ended, which

[30] Aparna Chandra, "Proportionality in India: A Bridge to Nowhere" (2020) 3(2) University of Oxford Human Rights Hub Journal 55

risks the analysis becoming inconsistent across different cases. Hence, a formal balancing procedure, such as the proportionality analysis, is useful in providing a structure to the arguments; *(ii)* in multiple jurisdictions, the provision of the right itself contains a limitation clause (such as Article 19 in the Indian Constitution) and even then, the courts have opted to use the proportionality analysis. In such circumstances, the courts use the proportionality analysis to test the application of the limitation clause; and *(iii)* the proportionality analysis is particularly helpful when the dispute between a right and its limitation is recast as one between a right and a measure which limits that right but only to promote a different right[31].

23 On the other hand, in an illuminating article in the Yale Law Journal, Professor Vicki Jackson has pointed out that there are structural differences between various rights, due to which a proportionality analysis may not be suitable for some of them. While Professor Jackson agrees with the principle of balancing that underlies proportionality as a principle, she issues a note of caution that the protection of certain rights may be better suited to categorical rules. Even so, Professor Jackson supports the use of proportionality analysis wherever possible and notes its benefits in the following passage[32]:

> "Using proportionality to define violations, of course, does not dictate remedies or exclude definitions of rights based on separate deontological or historical questions. However, greater use of proportionality, as a principle and as a structured form of review, has several potential benefits. It

[31] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008-2009) 47 Columbia Journal of Transnational Law 72

[32] Vicki C Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124(8) Yale Law Journal 3094

> could enhance judicial reasoning by clarifying justifications for limitations on freedoms. Proportionality might also improve the outcomes of adjudication by bringing…constitutional law closer to…conceptions of justice, in ways consistent with the demands of effective government. Finally, proportionality may be democracy-enhancing, both in providing a shared discourse of justification for action clamed to limit rights and in providing more sensitivity to serious process-deficiencies reflecting entrenched biases against particular groups."

24 Adopting the proportionality analysis not only provides a formal structure through which abstract rights litigations can be analysed, but it also (when applied properly) has the potential to improve the quality of judicial reasoning while protecting individual rights. As noted in **Aadhar (5J)** (supra), the use of proportionality analysis reflects the shift from a culture of authority to a culture of justification[33] where State action is best held accountable for its violation of fundamental rights. Justice Albie Sachs, a judge of the Constitutional Court of South Africa, in his memoir *The Strange Alchemy of Life and Law*[34], also described this shift from a culture of authority to a culture of justification in South Africa with the introduction of their Constitution:

> "The negotiated revolution which saw South Africa move from being an authoritarian, racist state to becoming a constitutional democracy led Professor Etienne Mureinik to make a memorable statement as far as the character of legal adjudication was concerned. **He pointed out that we were crossing a bridge from a culture of authority to a culture of justification**…The implications for the judicial function turned out to be enormous. And it was our Court that was made responsible for guiding the legal community to embrace and internalize the necessary changes. Much more was

[33] Para 1276
[34] Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2009)

> involved than simply making a technical shift from what the lawyers call a literalist to a purposive approach to interpretation. The Constitution brought about a seachange in the very nature of the judicial function**…[It] necessitated moving beyond an approach based on the application of purportedly inexorable rules towards accepting the duty in most matters for the judges to exercise constitutionally-controlled discretion. The transformation involved a journey from preoccupation with classification and strict adherence to formal rules to focussing on principled modes of weighing up the competing interests as triggered by the facts of the case and assessed in the light of the values of an open and democratic society**…"
>
> (**emphasis supplied**)

Therefore, this Court must unhesitatingly use the proportionality analysis while assessing the violation of the appellant's rights under Articles 14, 19(1)(g) and 21.

25 The present case poses another issue, which is whether an integrated proportionality analysis can be undertaken for assessing the violation of all three rights. It is a settled principle that fundamental rights in Part III are not understood in silos, but as an inter-related enunciation of rights and freedoms that uphold the basic rubric of human rights. An eleven-judge Bench of this Court in **Rustom Cavasji Cooper** v. **Union of India**[35], speaking through Justice J C Shah, had observed:

> "52…it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action − legislative or executive − Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and

[35] (1970) 1 SCC 248

> simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g. Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. **The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights**."
>
> (**emphasis supplied**)

26 Conceptualising constitutional rights is incomplete without analysing their corresponding limitations. This Court has also noticed that an underlying thread of reasonableness defines fundamental rights in Part III of the Constitution. A Constitution Bench in **Shayara Bano** v. **Union of India**[36] disavowed the view that challenges under every Article must strictly be considered in a disjoint, water-tight fashion. Justice Kurian Joseph had observed:

> 84. **The second reason given is that a challenge under Article 14 has to be viewed separately from a challenge under Article 19, which is a reiteration of the point of view of A.K. Gopalan v. State of Madras [A.K. Gopalan v. State of Madras, 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] that fundamental rights must be seen in watertight compartments. We have seen how this view was upset by an eleven-Judge Bench of this Court in Rustom Cavasjee Cooper v. Union of India**[Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248] and followed in Maneka Gandhi [Maneka

[36] (2017) 9 SCC 1

> Gandhi v. Union of India, (1978) 1 SCC 248] . Arbitrariness in legislation is very much a facet of unreasonableness in Articles 19(2) to (6), as has been laid down in several judgments of this Court, some of which are referred to in Om Kumar [Om Kumar v. Union of India, (2001) 2 SCC 386 : 2001 SCC (L&S) 1039] and, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under Article 14 as well.
>
> […]
>
> 87. **The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution**."
>
> (**emphasis supplied**)

27 The Constitution Bench in **Aadhar (5J)** (supra) also undertook an integrated proportionality analysis to determine the proportionality of the State's interference in the rights to privacy, dignity, choice and access to basic entitlements[37]. Hence, the Court can adopt an integrated proportionality analysis where the limitation on each of the rights is common and affects them in a similar way. In the present case, the

[37] Para 1277

limitation (*i.e.*, Clause 2(iii) of the 2020 MTT Guidelines) is what affects the appellant's rights under Articles 14, 19(1)(g) and 21. Further, the appellant has submitted that the limitation is arbitrary, not a reasonable restriction and violative of his liberty because the RBI has, without application of mind, linked the prohibition on import/export of a product to the prohibition of MTTs in relation to that product. It is thus clear that the appellant's submissions for challenging the constitutionality of Clause 2(iii) rest on similar grounds, and hence an integrated proportionality analysis can be adopted. However, this Court must issue a note of caution – while an integrated proportionality analysis has been adopted for assessing the limitation on rights (under Articles 14, 19(1)(g) and 21) in this case, it may not be true for all cases where such limitations occur because the alleged violation of rights may be characteristically different or the alleged limitation may affect the rights in different ways.

28 The appellant has submitted that the precedents of this Court indicate that once the citizen can demonstrate that the restriction directly or proximately interferes with the exercise of their freedom of trade or to carry on a business, it is the State's burden to demonstrate the reasonableness of the restriction and that it is in the interest of the general public[38]. The authority of the RBI in issuing the impugned notification is not in challenge. Additionally, the legitimacy of the aim – of ensuring adequate domestic supplies of PPE products – is also not in challenge. The appellant assails the suitability of the measure restricting MTTs in ensuring domestic

[38] **Sukhnandan Saran Dinesh Kumar** v. **Union of India**, AIR 1982 SC 902; **Laxmi Khandsari** v. **State of Uttar Pradesh**, AIR 1981 SC 860

supplies and for being overbroad in its ambit, since an Indian entity acting as an intermediary in an MTT between two different countries does not impact the availability of PPE products in India. Thus, this Court will be relying on the justification furnished by the RBI in determining the proportionality of the impugned measure (Clause 2(iii) of the 2020 MTT Guidelines). This analysis will be structured along with the following questions:

(i) Is the measure in furtherance of a legitimate aim?;

(ii) Is the measure suitable for achieving such an aim?;

(iii) Is the measure necessary for achieving the aim?; and

(iv) Is the measure adequately balanced with the right of the individual?

C.1 Legitimacy

29 This prong of the test entails an evaluation of the legitimacy of an aim that purportedly violates a fundamental right. The measure must be designated for a proper purpose, *i.e.*, a legitimate goal. Five of the judges in the nine-judge Bench decision in **K S Puttaswamy (9J)** (supra) adopted the threshold of a "legitimate state interest" as the first prong for assessing proportionality. This state interest must also be of sufficient importance to override a constitutional right or freedom[39]. In this case, the ban on exports, imports and MTTs of PPE products is to ensure the availability of adequate domestic supplies during a global health pandemic.

[39] **Aadhar (5J)** (supra), paras 321-322

Adequate stocks of PPE products are critical for the healthcare system to combat the COVID-19 pandemic. The State's aim of ensuring supplies is in furtherance of the right to life under Article 21 and the Directive Principles of State Policy mandating the State's improvement of public health as a primary duty under Article 47. The appellant has not challenged the legitimacy of this aim of ensuring adequate PPE in India. The RBI, at the time of filing its affidavit on 30 January 2021, had elaborated on the state of the pandemic in the country and the necessity of ensuring adequate stock of PPE products. The executive's aim to ensure sufficient availability of PPE products, considering the ongoing pandemic, is legitimate. Accordingly, we hold that the impugned measure is enacted in furtherance of a legitimate aim that is of sufficient importance to override a constitutional right of freedom to conduct business.

C.2 Suitability

30 In examining the aim of ensuring adequate supplies in India, we will now evaluate the suitability of the prohibition of MTTs in relation to PPE products. This would entail an analysis of whether the proposed measure can further the stated objective. To understand whether the prohibition of MTTs in relation to PPE products was suitable, we must first analyse the framework under which the RBI regulates MTTs in India.

31 MTTs are regulated by the RBI under FEMA, which came into force on 1 June 2000. Under FEMA, it is the duty of the RBI to manage, regulate and supervise the

foreign exchange in India. Section 3[40] of FEMA provides, *inter alia*, that no person can deal in foreign exchange without the permission of the RBI. In accordance with Section 10(1)[41], the RBI can grant permission to an entity to become an "authorized person" who can deal in foreign exchange. Further, Section 10(4) provides that such authorized persons shall comply with all directions issued by the RBI while dealing in foreign exchange. Section 10(4) reads as follows:

> "**10. Authorised person.**—… (4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section."

The RBI is granted the power to issue directions to authorized persons under Section 11(1). Section 11(1) provides:

> "**11. Reserve Bank's powers to issue directions to authorised person.**—(1) The Reserve Bank may, for the

[40] 3. Dealing in foreign exchange, etc.—Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall—
(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
(b) make any payment to or for the credit of any person resident outside India in any manner;
(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner;
Explanation.—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;
(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.
Explanation.—For the purpose of this clause, "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

[41] 10. Authorised person.—(1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

> purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security."

32 It is in the exercise of its powers under Section 10(4) read with Section 11(1), that the RBI issued a circular[42] dated 24 August 2000, which provided guidance to authorized dealers in relation to FEMA. The relevant part of the circular in relation to MTTs is extracted below:

> "Part B - Merchanting Trade
>
> **Authorised dealers may take necessary precautions in handling merchant trade transactions or intermediary trade transactions to ensure that (a) goods involved in the transaction are permitted to be imported into India**, (b) such transactions do not involve foreign exchange outlay for a period exceeding three months, and **(c) all Rules, Regulations and Directions applicable to export out of India are complied with by the export leg and all Rules, Regulations and Directions applicable to import are complied with by the import leg of merchanting trade transactions.** Authorised dealers are also required to ensure timely receipt of payment for the export leg of such transactions."
>
> (**emphasis supplied**)

From the above, it is clear that an MTT could only be in respect of goods whose import was permitted into India. A similar direction was retained in the circular[43] dated 19 June 2003.

[42] A.P. (DIR Series) Circular No 9
[43] A.P. (DIR Series) Circular No 106

33 Thereafter, the RBI issued a circular[44] dated 17 January 2014 titled "Merchanting Trade Transactions", which revised the MTT guidelines in light of the recommendations of the Technical Committee on Services/Facilities to Exporters. Clause 2(i) of the circular noted:

> "i) Goods involved in the merchanting or intermediary trade transactions would be the ones that are permitted for exports/imports under the prevailing Foreign Trade Policy (FTP) of India, at the time of entering into the contract and all the rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry) are complied with for the export leg and import leg respectively;"

Hence, the circular modified the earlier requirement and now clarified that MTTs could not be conducted in respect of goods whose import and export are prohibited under the FTP. It is important to note that this was based on a suggestion made by the Technical Committee on Services/Facilities to Exporters, which stated as follows:

> "Issues Associated with Merchanting Trade
>
> […]
>
> 4.9 Goods covered under Merchanting trade should be allowed to be exported/imported into the country as per the prevailing Foreign Trade Policy (FTP) at the time of entering into the contract with the overseas suppliers, in order to avoid entering into trading contracts that are not permitted to be imported/exported under the FTP. To safeguard the interest of the exporter, the export leg of the transaction can be recommended to be covered by Letter of Credit (or) through insurance from ECGC."

[44] A.P. (DIR Series) Circular No. 95

34 These guidelines were soon revised through a circular[45] dated 28 March 2014. However, there was no material change to the requirement that MTTs cannot be conducted in respect of goods whose import/export is prohibited under the FTP. The relevant clause of the circular is extracted as follows:

> "ii) Goods involved in the merchanting trade transactions would be the ones that are permitted for exports/imports under the prevailing Foreign Trade Policy (FTP) of India, as on the date of shipment and all the rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry), are complied with for the export leg and import leg respectively;"

35 Subsequently, this circular was modified by the 2020 MTT Guidelines which introduced the impugned Clause 2(iii). On an analysis of the above circulars, it is clear that the RBI has never attempted to permit/prohibit MTTs into specific goods. Rather, from the very first circular, it has relied upon the goods' position under India's FTP to regulate MTTs. Till 2013, MTTs were prohibited in relation to goods whose import was not allowed under the FTP. Since 2013, they have also been prohibited in relation to goods whose export is not allowed under the FTP.

36 The RBI is responsible for issuing guidelines to authorized persons under FEMA. FEMA was introduced as an "Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange

[45] A.P. (DIR Series) Circular No.115

market in India". Hence, the role of the RBI under FEMA is directed towards ensuring that India's foreign exchange market is regulated, with a view to preserving India's foreign exchange reserves. On a review of the guidelines which have been issued by the RBI in respect of MTTs since 2000, it is clear that most of them are technical in nature and seek to regulate the manner in which India's foreign reserves are traded. Consequently, the RBI has not made the policy decision to classify products for which MTTs are impermissible but has opted to rely on the decision made by the UOI under the FTP.

37 Such a decision, regarding the products in which import or export is prohibited in India, is made by the UOI under Section 3(2) of the Foreign Trade Act. Section 3(2) provides as follows:

> "**3. Powers to make provisions relating to imports and exports.—**… (2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology:
>
> Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies."

38 While exercising its powers under Section 3(2), the UOI issued multiple notifications commencing from 8 February 2020, which prohibited the export of all PPE products due to the need to maintain their domestic stock during the COVID-19 pandemic. Mr Vikramjeet Banerjee, learned ASG appearing on behalf of the Ministry

of Commerce and DGFT, has pointed out that the notification[46] dated 25 August 2020 now categorizes the export of PPE Masks and N-95/FFP 2 Masks as "Restricted" (instead of "Prohibited") and limits their export to 50 lakh units per month, while medical coveralls of all classes/categories (including PPE overalls) are categorized under the "Free" category, *i.e.*, they are freely exportable.

39 The appellant has challenged the suitability of the RBI's decision to link the MTT of goods with their prohibition under India's FTP by arguing that the objectives behind the two are entirely different. To support their argument, the appellant has relied on the nature of an MTT, where the goods do not enter or leave Indian territory and the Indian entity acts as an intermediary in an exchange between two foreign countries.

40 In its affidavit, the RBI has explained the genesis of MTTs in the following terms:

> "7. It is submitted that under the Merchanting Trade Transactions (hereinafter referred to as "MTT") an Indian Citizen facilitates the export of good or material from a Company or individual of an exporting country (other than India) and then import/supply the said good or material to a Company or individual in another country, which is also other than India. In short, by MTT the Indian citizen while acting as intermediary, facilitates an international trade between two different countries. It is submitted that the MTTs are very closely analogous to, and have all the elements of, export as well as import except the fact that the goods are physically not located in India. The first leg of the transaction, known as import leg, requires outlay of foreign exchange by the entity located in India carrying on the transaction, for the purpose of making payment for the goods being purchased overseas.

[46] Notification No 29/2015-2020

> The payment is made by the Indian Entity by drawing foreign exchange or obtaining a letter of credit in India from its banker, authorised dealer of foreign exchange (i.e. authorised dealer bank) also located in India. Thus, there is a clear nexus of the first leg of the transaction to India and the involvement of its foreign exchange reserves. It is further submitted that in a successful trade, the Indian entity so purchasing the goods overseas recovers its money in the second leg of transaction, known as export leg, by selling the goods to its buyer, also located overseas, but the money is under the law to be repatriated to India to the credit of Indian entity, which is located in India, within a strict time frame."

From the above extract, the following salient features of MTTs emerge: *(i)* the original supplier and ultimate buyer of the goods are foreign entities, with the Indian entity acting as an intermediary between them; *(ii)* the goods do not enter the territory of India while shifting hands between the supplier and the buyer; *(iii)* Indian foreign reserves are implicated when payment is remitted outside India when the Indian entity initially pays the supplier for the goods; and *(iv)* foreign exchange is remitted to India when the Indian entity receives the payment from the buyer of the goods.

41 The respondents have argued that the above features make MTTs analogous to imports/exports, while the appellant has attempted to differentiate them by noting that the goods never enter India's territory during an MTT. To resolve this, we must understand how MTTs are considered internationally.

42 The International Monetary Fund[47] in its sixth edition of the Balance of Payments and International Investment Position Manual[48] defines MTT in the following terms:

> "10.41 Merchanting is defined as the purchase of goods by a resident (of the compiling economy) from a nonresident combined with the subsequent resale of the same goods to another nonresident without the goods being present in the compiling economy. Merchanting occurs for transactions involving goods where physical possession of the goods by the owner is unnecessary for the process to occur."

Thereafter, it considers how MTTs should be recorded by noting:

> "10.44 The treatment of merchanting is as follows:
>
> (a) The acquisition of goods by merchants is shown under goods as a negative export of the economy of the merchant;
>
> (b) The sale of goods is shown under goods sold under merchanting as a positive export of the economy of the merchant;
>
> (c) The difference between sales over purchases of goods for merchanting is shown as the item "net exports of goods under merchanting." This item includes merchants' margins, holding gains and losses, and changes in inventories of goods under merchanting. As a result of losses or increases in inventories, net exports of goods under merchanting may be negative in some cases; and
>
> (d) Merchanting entries are valued at transaction prices as agreed by the parties, not FOB."

[47] "**IMF**"

[48] Pages 157-159, available at <https://www.imf.org/external/pubs/ft/bop/2007/pdf/BPM6.pdf> accessed on 25 November 2021

This makes it clear that while the goods involved in an MTT never enter the territory of the intermediary, they are still recorded as negative and positive exports from the territory of intermediary during the import and export leg of the MTT, which is similar to how ordinary imports and exports would be recorded.

43 This conclusion is also supported by the IMF's accompanying Balance of Payments Compilation Guide[49], which notes:

> "Merchanting
>
> **11.29 Merchanting transactions—that is, the purchase of goods by a resident (of the compiling economy) from a nonresident combined with the subsequent resale of the same goods to another nonresident without the goods being present in the compiling economy—should be recorded in the balance of payments as transactions in goods. This a change from the BPM5, where merchanting was to be recorded as a service. The change in treatment is in line with the change of ownership rule that underpins the balance of payments conceptual framework.** If there is a change in the physical form of the goods during the period they are owned by the merchant, as a result of manufacturing services, then the transaction should be classified as general merchandise, and not as merchanting.
>
> 11.30 For the economy of the merchant, goods acquired under merchanting should be recorded as a negative credit in the balance of payments in the period the merchant acquires the goods, and when they are sold they should be recorded in that period as goods sold under merchanting as a positive credit…"
>
> (**emphasis supplied**)

[49] Page 184, available at <https://www.imf.org/external/pubs/ft/bop/2014/pdf/BPM6_11F.pdf> accessed on 25 November 2021

It is evident that the role of an intermediary in MTTs was earlier only considered as providing a service. However, this has now evolved, where the intermediary is considered to be the owner of the goods during their transit from the supplier to the buyer. Hence, goods under MTTs are recorded as negative and positive exports from the intermediary's resident country, even when they never physically enter their territory.

44 Therefore, the international opinion favours the position taken by the respondents that MTTs are analogous to traditional imports and exports. Therefore, it was suitable for the RBI to link the permissibility of MTT in goods to the permissibility of their import/export under the FTP. As noted earlier, the appellant has not challenged notifications prohibiting the export of PPE products under the FTP. Hence, the prohibition of their MTT under Clause 2(iii) of the 2020 MTT Guidelines is also considered suitable.

C.3 The necessity of the measure

45 The prong evaluating necessity is often conflated with the prong evaluating the suitability of a measure. The analysis of necessity is an extension of evaluating the suitability of a restriction, coupled with an analysis of whether the proposed measure is the least restrictive manner of arriving at the intended legitimate State

interest. This prong has traces of the "narrowly tailored" state interest[50] that has often been used by this Court in evaluating claims of infringement of fundamental rights under Part III.

46 The appellant has contended that a prohibition of exports in PPE products was sufficient to achieve the objective of ensuring adequate supplies, and it was not necessary to also prohibit MTTs. Further, it is argued that the appellant facilitating an MTT of PPE products between two countries does not impact their stock in India. In any event, the appellant has argued that a less-intrusive alternative would be to ban MTTs only for goods whose imports have been prohibited under the FTP or allow individuals to seek exemptions from the RBI in relation to goods whose import/export has been prohibited by the FTP where the RBI can assess, on a case-by-case basis, whether their MTT should also be prohibited. While these measures have been suggested on a general basis, the appellant has limited his challenge in the present case only to the prohibition of PPE products. Hence, we shall be limiting our analysis in relation to that.

47 Having considered the nature of MTTs in Section C.2, we reject the appellant's arguments for two reasons. *First*, while MTTs in PPE products may not directly reduce the stock of these products in India, it still does contribute to their trade between two foreign nations. In doing so, it directly reduces the available quantity of PPE products in the international market, which may have been bought by India, if so required. As such, MTTs contribute to reducing the available stock of

[50] **Aadhar (5J)** (supra), paras 420 and 424

PPE products in the international market that India could have acquired. *Second*, the UOI's policy to ban the export of PPE products reflects their stance on the product's non-tradability during the COVID-19 pandemic. It highlights a clear policy choice under which Indian entities shall not be allowed to export these products outside of India, in all probability to the highest buyers across the globe who may end up hoarding the global supply. Hence, banning MTTs in PPE products was critical in ensuring that Indian foreign exchange reserves are not utilized to facilitate the hoarding of PPE products with wealthier nations. A mere ban on exports would not regulate the utilisation of Indian foreign exchange. Hence, in order to keep India's policy position consistent across the board, the prohibition of MTTs in respect of PPE products was necessary and the only alternative of ensuring the realisation of legitimate State interest.

C.4 Balancing fundamental rights with State aims

48 The fourth and final prong of the proportionality analysis involves the crucial task of conducting a balancing exercise. The Court is called upon to legitimise the "social importance of the limitation on a constitutional right"[51]. A measure that fails to justify its existence on this prong is considered to have a disproportionate impact on the right-holder[52].

[51] **Aadhar (5J)** (supra), paras 335 and 369
[52] Ibid

49 Before we commence our analysis on the balancing of this right, we think it is critical for the Court to elaborate on the purpose and duties of the RBI, in order to better appreciate the objective behind its seemingly onerous restrictions and regulations.

C.4.1 Regulatory Role of the RBI

50 The RBI was established by the Reserve Bank of India Act 1934[53]. By way of an amendment in 2016[54], the preamble of the statute was amended to reflect the importance of a modern monetary policy framework in an increasingly complex economy. The RBI has been entrusted with the exclusive authority to operate the monetary policy framework of India[55].

51 A Constitution Bench in **Joseph Kuruvilla Vellukunnel** v. **Reserve Bank of India**[56] considered a challenge to certain statutory provisions introduced in the Banking Companies Act 1949 which vested the RBI with the powers to file an application for winding-up of any company. Before conducting an analysis of the constitutional challenge under Articles 14 and 19, the Constitution Bench prefaced its analysis with the *raison d'etre* and importance of the RBI as a regulatory body. Justice M Hidayatullah (as the learned Chief Justice then was) observed the following:

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[53] "**RBI Act**"
[54] Act 28 of 2016
[55] Sections 45Z to 45Zo of the **RBI Act**
[56] AIR 1962 SC 1371

"16. Before we consider the arguments of the two sides in detail, we wish to say a few words about the position of the Reserve Bank in the financial affairs of India and also about its place in the scheme of the law. The Reserve Bank of India was established on April 1, 1935 by the Reserve Bank of India Act, 1934. Even before the establishment of the Reserve Bank, suggestions were made that there should be a central bank in India, and the Royal Commission on Indian Currency and Finance had recommended in 1926 that the currency and credit of the country could only be put on a firm foundation, if a central bank was established. The first Bill introduced in 1927 by Sir Basil Blackett was dropped. The Indian Central Banking Inquiry Committee, however, reported in 1931 that there was a need for a central banking institution in India "for securing the development of the Indian banking and credit system on a sound and proper basis". The Committee pointed out that some of the Provincial Committees had also suggested the establishment of the Reserve Bank. The Committee ended by saying:

> "We accordingly consider it to be a matter of supreme importance from the point of view of the development of banking facilities in India, and of her economic advancement generally, that a Central or Reserve Bank should be created at the earliest possible date. **The establishment of such a bank would by mobilization of the banking and currency reserves of India in one hand tend to increase the Vol. of credit available for trade, industry and agriculture and to mitigate the evils of fluctuating and high charges for the use of such credit caused by seasonal stringency**." (Vol. I, Part I. Chap. XXII, para 605)

The White Paper on Indian Constitutional Reforms also recommended the establishment of a Reserve Bank "free from political influence". As a result of these findings, when a fresh Bill was introduced by Sir George Schuster on September 8, 1933 it was accepted and received the assent of the Governor-General on March 6, 1934.

17. **The functions of the Reserve Bank were generally indicated in the preamble as the regulation of the issue of the Bank notes and the keeping of the reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage. But to enable the Reserve Bank to**

> **function in this manner, it had to be given other powers, so that it may function effectively as a central bank.** To this end, the Reserve Bank was given the right to hold the cash balances of important commercial banks, a right to transact Government business in India which was also its obligation, and to enter into agreements with State Governments to transact their business.
>
> [……]
>
> 18. **But the most important function of the Reserve Bank is to regulate the banking system generally. The Reserve Bank has been described as a Bankers' Bank. Under the Reserve Bank of India Act, the scheduled banks maintain certain balances and the Reserve Bank can lend assistance to those banks "as a lender of the last resort". The Reserve Bank has also been given certain advisory and regulatory functions.** By its position as a central bank, it acts as an agency for collecting financial information and statistics. It advises Government and other banks on financial and banking matters, and for this purpose, it keeps itself informed of the activities and monetary position of scheduled and other banks, and inspects the books and accounts of scheduled banks and advises Government after inspection whether a particular bank should be included in the Second Schedule or not. […..]"
>
> (**emphasis supplied**)

52 A two-judge Bench of this Court in **Peerless General Finance and Investment Co. Limited** v. **Reserve Bank of India**[57] considered an alleged constitutional infringement of Article 19(1)(g) in the context of RBI's regulation of savings schemes run by Residuary Non-Banking Companies. The thrust of the impugned regulation was to regulate deposit investment schemes issued by Residuary Non-Banking Companies, in order to ensure the security of deposits made by consumers. Justice N M Kasliwal elaborated on the role of the Courts with

[57] (1992) 2 SCC 343

specific reference to the regulatory powers of the RBI. The decision highlighted the importance of judicial abstinence from matters of economic policy requiring expertise:

> "30. Before examining the scope and effect of the impugned paragraphs (6) and (12) of the directions of 1987, it is also important to note that Reserve Bank of India which is bankers' bank is a creature of statute. It has large contingent of expert advice relating to matters affecting the economy of the entire country and nobody can doubt the bona fides of the Reserve Bank in issuing the impugned directions of 1987. **The Reserve Bank plays an important role in the economy and financial affairs of India and one of its important functions is to regulate the banking system in the country. It is the duty of the Reserve Bank to safeguard the economy and financial stability of the country** [….]
>
> 31. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. **Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts**."
>
> (**emphasis supplied**)

In his concurring opinion, Justice V Ramaswamy noted the statutory importance of the RBI and held that directions validly issued by the RBI are in the nature of statutory regulations:

> "51. This Court in Joseph Kuruvilla Vellukunnel v. Reserve Bank of India [1962 Supp 3 SCR 632 : AIR 1962 SC 1371 : (1962) 32 Comp Cas 514] held that the RBI is "a bankers'

> bank and lender of the last resort". Its objective is to ensure monetary stability in India and to operate and regulate the credit system of the country. It has, therefore, to perform a delicate balance between the need to preserve and maintain the credit structure of the country by strengthening the rule as well as apparent creditworthiness of the banks operating in the country and the interest of the depositors. In underdeveloped country like ours, where majority population are illiterate and poor and are not conversant with banking operations and in underdeveloped money and capital market with mixed economy, the Constitution charges the State to prevent exploitation and so the RBI would play both promotional and regulatory roles. **Thus the RBI occupies place of "pre-eminence" to ensure monetary discipline and to regulate the economy or the credit system of the country as an expert body. It also advices the government in public finance and monetary regulations. The banks or non-banking institutions shall have to regulate their operations in accordance with, not only as per the provisions of the Act but also the rules and directions or instructions issued by the RBI in exercise of the power thereunder. Chapter 3-B expressly deals with regulations of deposit and finance received by the RNBCs. The directions, therefore, are statutory regulations**.
>
> […]
>
> 65. **No one can have fundamental right to do any unregulated business with the subscribers/depositors' money**. [….]Thus there is a reasonable nexus between the regulation and the public purpose, namely, security to the depositors' money and the right to repayment without any impediment, which undoubtedly is in the public interest.
>
> (**emphasis supplied**)

Justice V Ramaswamy further articulated the role of judicial review in matters of economic legislation and the democratic necessity of judicial abstinence:

> 68. **It is well settled that the court is not a tribunal from the crudities and inequities of complicated experimental economic legislation. The discretion in evolving economic measures, rests with the policy makers and**

> **not with the judiciary. Indian social order is beset with social and economic inequalities and of status, and in our socialist secular democratic Republic, inequality is an anathema to social and economic justice. The Constitution of India charges the State to reduce inequalities and ensure decent standard of life and economic equality. The Act assigns the power to the RBI to regulate monetary system and the experimentation of the economic legislation, can best be left to the executive unless it is found to be unrealistic or manifestly arbitrary. Even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibilities from those on whom a democratic society ultimately rests.** The Court has to see whether the scheme, measure or regulation adopted is relevant or appropriate to the power exercised by the authority. Prejudice to the interest of depositors is a relevant factor. Mismanagement or inability to pay the accrued liabilities are evils sought to be remedied. The directions are designed to preserve the right of the depositors and the ability of RNBC to pay back the contracted liability. It is also intended to prevent mismanagement of the deposits collected from vulnerable social segments who have no knowledge of banking operations or credit system and repose unfounded blind faith on the company with fond hope of its ability to pay back the contracted amount. Thus the directions maintain the thrift for saving and streamline and strengthen the monetary operations of RNBCs."
>
> (**emphasis supplied**)

53 A three-judge Bench of this Court in **Internet and Mobile Association of India** v. **Reserve Bank of India**[58] ("**Internet & Mobile Association**") recently considered a challenge to the RBI's ban of trading in cryptocurrencies. In examining this challenge, the Court detailed the regulatory importance of the RBI through a historical and textual analysis of the RBI Act. Justice V Ramasubramanian, speaking

[58] (2020) 10 SCC 274

on behalf of the Court, observed that the RBI assumes a special role, compared to other statutory bodies. Its decisions are reflective of its expertise and guide the monetary policy of the country. Hence, a policy decision of the RBI warrants deference from this Court. The Court held:

> "84. A careful scan of the RBI Act, 1934 in its entirety would show that the operation/regulation of the credit/financial system of the country to its advantage, is a thread that connects all the provisions which confer powers upon RBI, both to determine policy and to issue directions.
>
> […]
>
> 189. **It is contended by Shri Ashim Sood, learned Counsel for the petitioners that the impugned Circular does not have either the status of a legislation or the status of an executive action, but is only the exercise of a power conferred by statute upon a statutory body corporate. Therefore, it is his contention that the judicial rule of deference as articulated in R.K. Garg v. Union of India [R.K. Garg v. Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] , Balco Employees' Union v. Union of India [Balco Employees' Union v. Union of India, (2002) 2 SCC 333] and Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] will not apply to the decision taken by a statutory body like RBI.** If, a legislation relating to economic matters is placed at the highest pedestal, an executive decision with regard to similar matters will be placed only at a lower pedestal and the decision taken by a statutory body may not even be entitled to any such deference or reverence.
>
> 190. **But given the scheme of the RBI Act, 1934 and the Banking Regulation Act, 1949, the above argument appears only to belittle the role of RBI. RBI is not just like any other statutory body created by an Act of legislature. It is a creature, created with a mandate to get liberated even from its creator.** This is why it is given a mandate — (i) under the Preamble of the RBI Act, 1934, to operate the currency and credit system of the country to its advantage and to operate the monetary policy framework in the country; (ii) under Section 3(1), to take over the management of the currency from the Central Government; (iii) under Section 20,

to undertake to accept monies for account of the Central Government, to make payments up to the amount standing to the credit of its account and to carry out its exchange, remittance and other banking operations, including the management of the public debt of the Union; (iv) under Section 21(1), to have all the money, remittance, exchange and banking transactions in India of the Central Government entrusted with it; (v) under Section 22(1), to have the sole right to issue bank notes in India and (vi) under Section 38, to get rupees into circulation only through it, to the exclusion of the Central Government. **Therefore, RBI cannot be equated to any other statutory body that merely serves its master. It is specifically empowered to do certain things to the exclusion of even the Central Government. Therefore, to place its decisions at a pedestal lower than that of even an executive decision, would do violence to the scheme of the Act.**

[….]

192. But as we have pointed out above, RBI is not just any other statutory authority. It is not like a stream which cannot be greater than the source. The RBI Act, 1934 is a pre-constitutional legislation, which survived the Constitution by virtue of Article 372(1) of the Constitution. The difference between other statutory creatures and RBI is that what the statutory creatures can do, could as well be done by the executive. The power conferred upon the delegate in other statutes can be tinkered with, amended or even withdrawn. But the power conferred upon RBI under Section 3(1) of the RBI Act, 1934 to take over the management of the currency from the Central Government, cannot be taken away. The sole right to issue bank notes in India, conferred by Section 22(1) cannot also be taken away and conferred upon any other bank or authority. RBI by virtue of its authority, is a member of the Bank of International Settlements, which position cannot be taken over by the Central Government and conferred upon any other authority. **Therefore, to say that it is just like any other statutory authority whose decisions cannot invite due deference, is to do violence to the scheme of the Act.** In fact, all countries have Central banks/authorities, which, technically have independence from the Government of the country. To ensure such independence, a fixed tenure is granted to the Board of Governors, so that they are not bogged down by political expediencies. […..]**Therefore, we do not accept the**

> **argument that a policy decision taken by RBI does not warrant any deference.**
>
> (**emphasis supplied**)

In further analysing the wide-ranging powers entrusted with the RBI, the Court noted that its regulatory powers would be tested against the cornerstone of proportionality:

> "224. **It is no doubt true that RBI has very wide powers not only in view of the statutory scheme of the three enactments indicated earlier, but also in view of the special place and role that it has in the economy of the country. These powers can be exercised both in the form of preventive as well as curative measures. But the availability of power is different from the manner and extent to which it can be exercised. While we have recognised elsewhere in this order, the power of RBI to take a pre-emptive action, we are testing in this part of the order the proportionality of such measure**, for the determination of which RBI needs to show at least some semblance of any damage suffered by its regulated entities. But there is none. When the consistent stand of RBI is that they have not banned VCs and when the Government of India is unable to take a call despite several committees coming up with several proposals including two draft Bills, both of which advocated exactly opposite positions, it is not possible for us to hold that the impugned measure is proportionate."
>
> (**emphasis supplied**)

54 Thus, it is settled that the RBI is a special, expert regulatory body that is insulated from the political arena. Its decisions are reflective of its expertise in guiding the economic policy and financial stability of the nation. Adverting to the facts of this case, the RBI is empowered by FEMA to manage, regulate, and supervise the foreign exchange of India. It is trite law that courts do not interfere with

the economic[59] or regulatory[60] policy adopted by the government. This lack of interference is in deference to the democratically elected government's wisdom, reflecting the will of the people. As held by a three-judge Bench of this Court in **Internet & Mobile Association** (supra), the regulations introduced by RBI are in the nature of statutory regulation and demand a similar level of deference that is accorded to executive and Parliamentary policy.

55 This Court must be circumspect that the rights and freedoms guaranteed under the Constitution do not become a weapon in the arsenal of private businesses to disable regulation enacted in the public interest. The Constituent Assembly Debates had carefully curated restrictions on rights and freedoms, in order to retain democratic control over the economy. Regulation must of course be within the bounds of the statute and in conformity with executive policy. A regulated economy is a critical facet of ensuring a balance between private business interests and the State's role in ensuring a just polity for its citizens. The Constitution Bench in **Modern Dental College** (supra) had remarked on the role of regulatory mechanisms in liberalized economies. Speaking for the Bench, Justice A K Sikri had observed:

> "87. Regulatory mechanism, or what is called regulatory economics, is the order of the day. In the last 60-70 years, economic policy of this country has travelled from laissez faire to mixed economy to the present era of liberal economy with regulatory regime. With the advent of mixed economy, there

[59] **R K Garg** v. **Union of India**, (1981) 4 SCC 675; **Balco Employees Union** v. **Union of India**, (2002) 2 SCC 333
[60] **Swiss Ribbons (P) Ltd.** v. **Union of India**, (2019) 4 SCC 17; **Ebix Singapore** v. **Committee of Creditors of Educomp Solutions (P) Ltd.**, 2021 SCC OnLine SC 313

was mushrooming of the public sector and some of the key industries like aviation, insurance, railways, electricity/power, telecommunication, etc. were monopolised by the State. Licence/permit raj prevailed during this period with strict control of the Government even in respect of those industries where private sectors were allowed to operate. However, Indian economy experienced major policy changes in early 90s on LPG Model i.e. liberalisation, privatisation and globalisation. With the onset of reforms to liberalise the Indian economy, in July 1991, a new chapter has dawned for India. This period of economic transition has had a tremendous impact on the overall economic development of almost all major sectors of the economy.

88. When we have a liberal economy which is regulated by the market forces (that is why it is also termed as market economy), prices of goods and services in such an economy are determined in a free price system set up by supply and demand. This is often contrasted with a planned economy in which a Central Government determines the price of goods and services using a fixed price system. Market economies are also contrasted with mixed economy where the price system is not entirely free, but under some government control or heavily regulated, which is sometimes combined with State led economic planning that is not extensive enough to constitute a planned economy.

89. With the advent of globalisation and liberalisation, though the market economy is restored, at the same time, it is also felt that market economies should not exist in pure form. Some regulation of the various industries is required rather than allowing self-regulation by market forces. This intervention through regulatory bodies, particularly in pricing, is considered necessary for the welfare of the society and the economists point out that such regulatory economy does not rob the character of a market economy which still remains a market economy. Justification for regulatory bodies even in such industries managed by private sector lies in the welfare of people. Regulatory measures are felt necessary to promote basic well being for individuals in need. It is because of this reason that we find regulatory bodies in all vital industries like, insurance, electricity and power, telecommunications, etc.”

PART C

56 Regulating the economy is reflective of the compromise between the interests of private commercial actors and the democratic State that represents and protects the interests of the collective. Scholars across the world have warned against the judiciary constitutionalising an unregulated marketplace[61]. This Court must be bound by a similar obligation, in order to preserve its fidelity to the Constitution. With the transformation in the economy, the Courts must also be alive to the socio-economic milieu. The right to equality and the freedom to carry on one's trade cannot inhere a right to evade or avoid regulation. In liberalized economies, regulatory mechanisms represent democratic interests of setting the terms of operation for private economic actors. This Court does not espouse shunning of judicial review when actions of regulatory bodies are questioned. Rather, it implores intelligent care in probing the *bona fides* of such action and nuanced deference to their expertise in formulating regulations. A casual invalidation of regulatory action in the garb of upholding fundamental rights and freedoms, without a careful evaluation of its objective of social and economic control, would harm the general interests of the public.

57 In the instant case, the RBI has demonstrated a rational nexus in the prohibition of MTTs in respect of PPE products and the public health of Indian citizens. The critical links between FTP and MTTs have been established by the respondents. Facilitating MTTs in PPE products between two distinct nations may *prima facie* appear as having no bearing on the availability of domestic stocks. However, the RBI has carefully established the connection between the use of

[61] Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARVARD LAW REVIEW FORUM 165, 167 (2015), available at <https://harvardlawreview.org/2015/03/adam-smiths-first-amendment/>

Indian foreign exchange reserves, MTTs and the availability of domestic stocks (as noted in Sections C.2 and C.3). As a developing country with a sizeable population, RBI's policy to align MTT permissibility with the FTP restrictions on import and export of PPE products cannot be questioned. Thus, this Court is constrained to defer to the regulations imposed by RBI and the UOI, in the interests of preserving public health in a pandemic. This deference is by no means uncritical. In fact, one of us (Justice D Y Chandrachud), in a three-judge Bench of this Court in **Gujarat Mazdoor Sabha** v. **State of Gujarat**[62] had decried the State's tenuous claim of a public health emergency to dilute welfare conditions in labour laws. This Court had stressed that balancing individual rights against measures adopted to combat the public health crisis must continue to satisfy the test of proportionality. Justice D Y Chandrachud noted:

> "30. Even if we were to accept the respondent's argument at its highest, that the pandemic has resulted in an internal disturbance, we find that the economic slowdown created by the Covid-19 Pandemic does not qualify as an internal disturbance threatening the security of the State. The pandemic has put a severe burden on existing, particularly public health, infrastructure and has led to a sharp decline in economic activities. The Union Government has taken recourse to the provisions of the Disaster Management Act, 2005. [Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) dated 24-3-2020.] However, it has not affected the security of India, or of a part of its territory in a manner that disturbs the peace and integrity of the country. The economic hardships caused by Covid-19 certainly pose unprecedented challenges to governance. However, such challenges are to be resolved by the State Governments within the domain of their functioning under the law, in coordination with the Central Government. Unless the threshold of an economic

[62] (2020) 10 SCC 459

> hardship is so extreme that it leads to disruption of public order and threatens the security of India or of a part of its territory, recourse cannot be taken to such emergency powers which are to be used sparingly under the law. Recourse can be taken to them only when the conditions requisite for a valid exercise of statutory power exist under Section 5. That is absent in the present case.
>
> […]
>
> 40. The need for protecting labour welfare on one hand and combating a public health crisis occasioned by the pandemic on the other may require careful balances. But these balances must accord with the rule of law. A statutory provision which conditions the grant of an exemption on stipulated conditions must be scrupulously observed. It cannot be interpreted to provide a free reign for the State to eliminate provisions promoting dignity and equity in the workplace in the face of novel challenges to the State administration, unless they bear an immediate nexus to ensuring the security of the State against the gravest of threats."

Thus, it is not this Court's stance that judicial review is stowed in cold storage until a public health crisis tides over. This Court retains its role as the constitutional watchdog to protect against State excesses. It continues to exercise its role in determining the proportionality of a State measure, with adequate consideration of the nature and purpose of the extraordinary measures that are implemented to manage the pandemic. Democratic interests that secure the well-being of the masses cannot be judicially aborted to preserve the unfettered freedom to conduct business, of the few.

D Conclusion

58 Therefore, we find that the judgment dated 8 October 2020 of the Madhya Pradesh High Court was correct in holding that Clause 2(iii) of the 2020 MTT Guidelines was a proportionate measure in ensuring the availability of sufficient domestic stock of PPE products. The measure was validly enacted, in pursuance of legitimate state interest and did not disproportionately impact the fundamental rights of the appellant. Hence, Clause 2(iii) passes muster under Articles 14, 19(1)(g) and 21. For the reasons noted in this judgment, we see no need to interfere.

59 For the above reasons, we find no merit in the appeal. The appeal accordingly stands dismissed.

60 Pending application(s), if any, shall stand disposed of.

…….J.
[Dr Dhananjaya Y Chandrachud]

…….J.
[Vikram Nath]

…….J.
[B V Nagarathna]

New Delhi;
December 06, 2021

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2021
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO. 3913 OF 2020)

DAYLE DE'SOUZA ..... APPELLANT(S)

VERSUS

GOVERNMENT OF INDIA THROUGH
DEPUTY CHIEF LABOUR COMMISSIONER
(C) AND ANOTHER ..... RESPONDENT(S)

J U D G M E N T

SANJIV KHANNA, J.

Leave granted.

2. The appellant, Dayle De'Souza, is a director of M/s. Writer Safeguard Pvt. Ltd. (hereinafter referred to as 'the Company'). In 2009, the Company had entered into an agreement titled "Agreement for Servicing and Replenishment of Automated Teller Machines" with M/s. NCR Corporation India Private Ltd., the latter having earlier entered into an agreement with the State Bank of India for maintenance and upkeep of the State Bank of India's

ATMs. On 19th February 2014, the Labour Enforcement Officer (Central) had inspected the State Bank of India's ATM at AST, Komal Chand Petrol Pump, Civil Lines, Sagar, Madhya Pradesh (hereinafter referred to as 'the ATM'). On 06th March 2014, a notice was issued by the Labour Enforcement Officer (Central) to the appellant and one Vinod Singh, Madhya Pradesh head of M/s. Writer Safeguard Pvt. Ltd. alleging non-compliance with the provisions of the Minimum Wages Act, 1948 (for short, 'the Act') and Minimum Wages (Central) Rules, 1950 (for short, 'the Rules') at the ATM. On 02nd April 2014, the Company responded claiming that they neither manage nor work at the ATM. After more than four months, the Labour Enforcement Officer (Central), by letter dated 08th August 2014, informed the appellant and Vinod Singh that they were required to appear in the court on 14th August 2014. On 14th August 2014, the Labour Enforcement Officer (Central) filed a criminal complaint before the Court of the Chief Judicial Magistrate, Sagar, Madhya Pradesh, under Section 22A of the Act. We shall refer to the contents of the complaint later.

3. On the date of presentation of the complaint, that is, 14th August 2014, the Judicial Magistrate, First Class, Sagar, Madhya Pradesh took cognisance of the offence and issued a bailable warrant against the appellant and Vinod Singh in Criminal Case No.

3398/2014. On 01st August 2015, the Company submitted a detailed representation to the Deputy Chief Labour Commissioner (Central), Marhatal, Jabalpur, Madhya Pradesh denying the contents of the notice dated 06th March 2014.

4. Thereafter, on 01st August 2015, the appellant filed a petition M.Cr.C. No. 846/2016 under Section 482 of the Code of Criminal Procedure, 1973 ('the Code', for short) before the High Court of Madhya Pradesh at its Principal Seat at Jabalpur for quashing the complaint in Criminal Case No. 3398/2014. By the impugned order in M.Cr.C. No. 846/2016 dated 20th January 2020, the High Court dismissed the petition as *sans* merit. Hence, the present appeal.

5. Upon perusal of the complaint in question, which is placed on record, we note that two individuals have been enlisted as accused, namely: (i) Dayle De'Souza – the appellant before us, who as per the cause-title is stated to be a director of M/s. Writer Safeguard Pvt. Ltd. and resident of Writer House located in Mumbai, Maharashtra; and (ii) Vinod Singh, who it is stated is the Madhya Pradesh head of M/s. Writer Safeguard Pvt. Ltd. and a resident of Bhopal, Madhya Pradesh. The Company is not

enlisted as an accused in the complaint and has not been summoned to stand trial.

6. The complaint, with reference to the two accused, in paragraph 3 states:

> "(3) That the accused persons are Contractor who were getting work of cash loading and security of cash through labours and they are responsible for employment and payment of labours employed in said work under said Act, who is Employer under Part 2 (E) of the Minimum Wages Act, 1948."

It is also alleged in the complaint:

> "(4) That the work of said Employer is regulated under Notification No.- S.O. 1284 (E) dated 20.05.2009 of the Government of India and they are Scheduled Employer under Minimum Wages Act, 1948 and Minimum Wages (Central) Rules, 1950."

7. The complaint states that the inspection on 19th February 2014 had revealed violation of Rules 21(4), 22, 25(2), 26(1) and 26(5) on account of failure to keep and display, as the case may be, the Fine Register Form-1, Register Form-2, the notice of minimum wages, Rule, and abstract of the Act, name of Inspectors with address in Hindi and English at the worksite, overtime register, wages payment register and attendance register at the worksite or at any adjoining place(s).

8. Section 22A of the Act, the provision invoked, is a 'General provision for punishment of other offences' where "*any employer who contravenes any provision of this Act or of any rule or order made thereunder shall, if no other penalty is provided for such contravention by this Act, be punishable with fine which may extend to five hundred rupees"*. Clause (b) of sub-section (1) to Section 22B with the heading "Cognizance of offences" states that "*No court shall take cognisance of a complaint against any person for an offence - under clause (b) of section 22 or under section 22A, except on a complaint made by, or with the sanction of, an Inspector"*. Sub-section (2) to Section 22B, insofar as it relates to Section 22A, vide sub-clause (b) states that "*No Court shall take cognisance of an offence – under Section 22A, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed."*

9. However, in the context of the present appeal, it is Section 22C of the Act which is of more relevance which reads thus:

> "22C. Offences by companies. —
>
> (1) If the person committing any offence under this Act is a company, every person who at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be

> liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.
>
> (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> Explanation. — For the purposes of this section —
>
> (a) "company" means any body corporate and includes a firm or other association of individuals; and
> (b) "director" in relation to a firm means a partner in the firm."

10. Sub-section (1) to Section 22C states that where an offence is committed by a company, every person who at the time the offence was committed was in-charge of and was responsible to the company for the conduct of the business, as well as the company itself shall be deemed to be guilty of the offence. By necessary implication, it follows that a person who do not bear out the requirements is not vicariously liable under Section 22C(1) of the Act. The proviso, which is in the nature of an exception, states that a person who is liable under sub-section (1) shall not be

punished if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements to take benefit of the proviso is on the accused, but it does not displace or extricate the initial onus and burden on the prosecution to first establish the requirements of sub-section (1) to Section 22C of the Act. The proviso is to give immunity to a person who is vicariously liable under sub-section (1) to section 22C of the Act. In ***S.M.S. Pharmaceuticals Ltd.*** v. ***Neeta Bhalla and Another***,[1] in relation to *pari materia* proviso in Section 141 of the Negotiable Instruments Act, 1881, this Court observed:

> "4… A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. <u>The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.</u>
>
> xx xx xx
>
> 9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office

[1] (2005) 8 SCC 89.

> suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence."
>
> (Emphasis added)

In ***Aneeta Hada*** v. ***Godfather Travels and Tours Private Limited,***[2] this Court had reiterated that the proviso to general vicarious liability under Section 141 of the Negotiable Instruments Act, 1881, applies as an exception, by observing:

> "22. On a reading of the said provision, it is plain as day that if a person who commits the offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a "deemed" concept of criminal liability."
>
> (Emphasis added)

The proviso being an exception cannot be made a justification or a ground to launch and initiate prosecution without the satisfaction of conditions under sub-section (1) of Section 22C of the Act. The proviso that places the onus to prove the exception

[2] (2012) 5 SCC 661.

on the accused, does not reverse the onus under the main provision, namely Section 22C(1) of the Act, which remains on the prosecution and not on the person being prosecuted.

11. Sub-section (2) states that notwithstanding anything contained in sub-section (1), where any offence under the Act has been committed by a company, and it is proved that such offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, then such director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Without much ado, it is clear from a reading of sub-section (2) to Section 22C of the Act that a person cannot be prosecuted and punished merely because of their status or position as a director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 22C is on the prosecution and not on the person being prosecuted.

12. Unlike sub-section (2) to Section 22C, sub-section (1) conspicuously does not use the term ‘director, manager, secretary or other officer of the company’ to bring them within the ambit of the vicarious liability provision, *albeit* every person in-charge of and responsible to the company for the conduct of its business at the time of the commission of the offence in question is deemed to be additionally liable. The words ‘in-charge of the company’ and ‘responsible to the company’ are pivotal to sub-section (1). This requirement has to be satisfied for the deeming effect of sub-section (1) to apply and for rendering the person liable to be proceeded against and, on such position being proved, punished. Interpreting an identical expression used in Sections 23-C(1) and 23-C(2) of the Foreign Exchange Regulation Act, 1947, this Court in ***Girdhari Lal Gupta*** v. ***D.H. Mehta and Another,***[3] has held:

> “6. What then does the expression “a person in-charge and responsible for the conduct of the affairs of a company” mean? It will be noticed that the word “company” includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person “in-charge” must mean that the person should be in over-all control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but

[3] 1971 (3) SCC 189.

> not in over-all charge. Similarly, the other officers may be in-charge of only some part of business.
>
> xx xx xx
>
> 8. In R.K. Khandelwal v. State D.S. Mathur, J., in construing Section 27 of the Drugs Act, 1940, a provision similar to the one we are concerned with, observed:
>
> > "There can be directors who merely lay down the policy and are not concerned with the day to day working of the company. Consequently, the mere fact that the accused person is a partner or director of the Company, shall not make him criminally liable for the offence committed by the Company unless the other ingredients are established which make him criminally liable.""

Those not in overall control of the day to day business of the company or the firm are not deemed to be constructively liable under Section 23-C(1) of the Foreign Exchange Regulation Act, 1947.

13. This exposition on the meaning of the term 'in-charge and responsible for' was referred to with approval in ***State of Karnataka*** v. ***Pratap Chand and Others***.[4] This decision relates to the prosecution of the partner of a firm under the Drugs and Cosmetics Act, 1940. The judgment referred to the explanation to Section 34 in the said Act (which is *pari materia* with the explanation in Section 22C of the Minimum Wages Act, 1948) to observe that for the purpose of imposing liability on the company

[4] (1981) 2 SCC 335.

under the said Section, a company includes a body corporate, a firm or an association of individuals. A director in relation to a firm means a partner in that firm. Therefore, even in the case of partners, when a firm commits an offence, the requirement of either sub-section (1) or sub-section (2) to Section 22C must be satisfied. This means that in terms of sub-section (1), the partner should be "in-charge of" and "responsible to" the firm for the conduct of its business as per the dictum in ***Girdhari Lal Gupta*** (supra). Further, as per sub-section (2), a partner may also be liable, just as a director is liable for the conduct of the business of a company, if the offence is committed with the consent or connivance of, or is attributable to any neglect on the part of the partner concerned.

14. Way back in 1982, in ***Municipal Corporation of Delhi*** v. ***Ram Kishan Rohtagi and Others***,[5] this Court had quashed criminal proceedings under the Prevention of Food Adulteration Act, 1954 against the directors of a manufacturing company at the summoning stage, observing that the presumptive assertion made in the complaint that the directors of the accused company 'as such' were in-charge of and responsible for the conduct of the business of the company at the time of sampling was vague. The

[5] 1983 (1) SCC 1.

use of the words “as such” in the complaint indicated that the complainant had merely presumed that the directors must be guilty because they held the office of the director. The Court opined that such presumptive accusations against the directors without any specific averment or criminal attribution being made in the complaint would be insufficient. Thereafter, reference was made to Section 319 of the Code of Criminal Procedure, 1973 which empowers the Court to take cognisance of and proceed against a person who is not an accused before it and try him along with others. Upholding the reasoning of the High Court quashing the proceedings against the directors, it was highlighted:

> “12.....The main clause of the complaint which is the subject-matter of the dispute is clause 5 which may be extracted thus:
>
> > 5. That accused 3 is the Manager, of accused 2 and accused 4 to 7 are the Directors of accused 2 and as such they were incharge of and responsible for the conduct of business of accused 2 at the time of sampling.
>
> xx xx xx
>
> 14. Reliance has been placed on the words “as such” in order to argue that because (sic) the complaint does not attribute any criminal responsibility to Accused 4 to 7 except that they were incharge of and responsible for the conduct of the business of the Company. It is true that there is no clear averment of the fact that the Directors were really incharge of the manufacture and responsible for the conduct of business but the words “as such” indicate that the complainant has merely presumed that the Directors of the Company must be

> guilty because they are holding a particular office. This argument found favour with the High Court which quashed the proceedings against the Directors as also against the Manager, Respondent 1."

However, the initiation of a prosecution and the summoning order against the manager in the factual context was held to be proper.

15. In another decision by the same Bench titled ***Municipal Corporation of Delhi*** v. ***Purshotam Dass Jhunjunwala and Others,***[6] the assertions were that the individual accused, namely the chairman, managing director and directors of the company, were "in-charge of and responsible to it for the conduct of its business at the time of commission of the offence". The words "as such" were missing. This Court, therefore, concluded that the directors of the company were not being prosecuted merely because of their official position but because of the assertion that they were "in-charge of and responsible for the conduct of the business at the time of commission of the offence". There was a clear averment regarding the active role played by the accused and the extent of their liability. Accordingly, restoring the order passed by the Metropolitan Magistrate by which the directors etc. were summoned for trial in accordance with the law and setting

[6] (1983) 1 SCC 9

aside the order of the High Court quashing the prosecution against them, this Court has held:

> "3.....The relevant allegations against the accused-respondents are to be found in para 5 of the complaint which may be extracted thus:
>
> > 5. That accused Ram Kishan Bajaj is the Chairman, accused R.P. Neyatia is the Managing Director and Accused 7 to 12 are the Directors of the Hindustan Sugar Mills Ltd. and were incharge of and responsible to it for the conduct of its business at the time of commission of offence.
> >
> > xx xx xx
> >
> > 5. In the instant case, a clear averment has been made regarding the active role played by the respondents and the extent of their liability. In this view of the matter, it cannot be said that para 5 of the complaint is vague and does not implicate Respondents 1 to 11. As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to be proved at the trial. We have already held that for the purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing further."

16. The legal position has undergone further elucidation in a number of judgments.[7] However, for the present decision, we would refer to the summarisation in ***National Small Industries Corporation Limited*** v. ***Harmeet Singh Paintal and Another***,[8] to the following effect:

[7] See, *Pooja Ravinder Devidasani* v. *State of Maharashtra and another*, (2014) 16 SCC 1; *Gunmala Sales Private Ltd.* v. *Anu Mehta and Others*, (2015) 1 SCC 103; *Shailendra Swarup* v. *Deputy Director, Enforcement Directorate*, (2020) 16 SCC 561.
[8] (2010) 3 SCC 330.

"39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

> (vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

17. The necessities of sub-section (2) to Section 22C of the Act are different from sub-section (1) to Section 22C of the Act. Vicarious liability under sub-section (2) to Section 22C can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day to day business of the company when the offence was committed. Vicarious liability is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company.

18. In the factual context present before us it is crystal clear that the complaint does not satisfy the mandate of sub-section (1) to Section 22C of the Act as there are no assertions or averments that the appellant before this Court was in-charge of and responsible to the company M/s. Writer Safeguard Pvt. Ltd. in the manner as interpreted by this Court in the cases mentioned above. The proviso to sub-section (1) in the present case would not apply. It is an exception that would be applicable and come

into operation only when the conditions of sub-section (1) to Section 22C are satisfied. Notably, in the absence of any specific averment, the prosecution in the present case does not and cannot rely on Section 22C(2) of the Act.

19. There is yet another difficulty for the prosecution in the present case as the Company has not been made an accused or even summoned to be tried for the offence. The position of law as propounded in ***State of Madras*** v. ***C.V. Parekh and Another*****:**[9] , reads:

> "3. Learned Counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956), is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in charge of, and were responsible to, the Company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause (5) of the Iron and Steel Control Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company. In fact, the

[9] (1970) 3 SCC 491.

> Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Vallabhdas Thacker and any contravention by them would not fasten responsibility on the respondents. The acquittal of the respondents is, therefore, fully justified. The appeal fails and is dismissed."

20. However, this proposition was later deviated from in ***Sheoratan Agarwal and Another*** v. ***State of Madhya Pradesh***.[10] This case pertained to the *pari materia* provision under Section 10 of the Essential Commodities Act, 1955. The court held that anyone among: the company itself; every person in-charge of and responsible to the company for the conduct of the business; or any director, manager, secretary or other officer of the company with whose consent or connivance or because of whose neglect offence had been committed, could be prosecuted alone. However, the person-in-charge or an officer of the company could be held guilty in that capacity only after it has been established that there has been a contravention by the company as well. However, this will not mean that the person-in-charge or an officer of the company must be arraigned simultaneously along with the company if he is to be found guilty and punished.

[10] (1984) 4 SCC 352.

21. Relying upon the reasoning in ***Sheoratan Agarwal*** (supra) and limiting the interpretation of ***C.V. Parekh*** (supra), this Court in ***Anil Hada*** v. ***Indian Acrylic Ltd.***[11] had held that:

> "13. If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a finding that the offence was committed by the company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act."

22. However, subsequent decisions of this Court have emphasised that the provision imposes vicarious liability by way of deeming fiction which presupposes and requires the commission of the offence by the company itself as it is a separate juristic entity. Therefore, unless the company as a principal accused has committed the offence, the persons mentioned in sub-section (1) would not be liable and cannot be prosecuted. Section 141(1) of

[11] (2000) 1 SCC 1.

the Negotiable Instruments Act, extends vicarious criminal liability to the officers of a company by deeming fiction, which arises only when the offence is committed by the company itself and not otherwise. Overruling ***Sheoratan Agarwal*** and ***Anil Hada*****,** in ***Aneeta Hada*** v. ***Godfather Travels and Tours Private Limited***,[12] a 3-judge bench of this court expounding on the vicarious liability under Section 141 of the Negotiable Instruments Act, has held:

> "51. We have already opined that the decision in *Sheoratan Agarwal* runs counter to the ratio laid down in *C.V. Parekh* which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in *Anil Hada* has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.
>
> xx xx xx
>
> 59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in *C.V. Parekh* which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* is overruled with the qualifier as stated in para 51. The decision in *Modi*

[12] (2012) 5 SCC 661.

> *Distillery* has to be treated to be restricted to its own facts as has been explained by us hereinabove."

23. The proposition of law laid down in ***Aneeta Hada*** (supra) was relied upon by this Court in ***Anil Gupta*** v. ***Star India Private Limited and Another***:[13]

> "13. In the present case, the High Court by the impugned judgment dated 13-8-2007 [Visionaries Media Network v. Star India (P) Ltd., Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] held that the complaint against Respondent 2 Company was not maintainable and quashed the summons issued by the trial court against Respondent 2 Company. Thereby, the Company being not a party to the proceedings under Section 138 read with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in *Anil Hada* has been overruled by a three-Judge Bench of this Court in *Aneeta Hada*, we have no other option but to set aside the rest part of the impugned judgment [Visionaries Media Network v. Star India (P) Ltd., Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] whereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13-8-2007 [Visionaries Media Network v. Star India (P) Ltd., Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] passed by the High Court so far as it relates to the appellant and quash the summons and proceeding pursuant to Complaint Case No. 698 of 2001 qua the appellant."

24. In ***Sharad Kumar Sanghi*** v. ***Sangita Rane,***[14] this Court observed that:

> "11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the

[13] (2014) 10 SCC 373.
[14] (2015) 12 SCC 781.

> Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.* in the context of the Negotiable Instruments Act, 1881.
>
> xx xx xx
>
> 13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant."

25. This position was again clarified and reiterated by this Court in ***Himanshu*** v. ***B. Shivamurthy and Another*****.**[15] The relevant portion of the judgment reads thus:

> "6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the

[15] (2019) 3 SCC 797.

prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

7. The first submission on behalf of the appellant is no longer res integra. A decision of a three-Judge Bench of this Court in *Aneeta Hada* v. *Godfather Travels & Tours (P) Ltd.* governs the area of dispute. The issue which fell for consideration was whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three-Judge Bench held thus: (SCC p. 688, para 58)

> "58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

In similar terms, the Court further held: (SCC p. 688, para 59)

> "59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the

> same has been stipulated in the provision itself."
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> xx xx xx
>
> 12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.
>
> 13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."

26. Applying the same proposition of law as laid down in ***Aneeta Hada*** (supra)***,*** this Court in ***Hindustan Unilever Limited*** v. ***State of Madhya Pradesh***[16] applying *pari materia* provision in Prevention of Food Adulteration Act, 1954, held that:

> "23. Clause (a) of sub-section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the company as well as the nominated person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of

[16] (2020) 10 SCC 751.

> the company, the nominated person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant-nominated person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the nominated person as unsustainable."

27. In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.

28. There is also another aspect which requires our attention. We have noted in some detail the contents of the complaint, which refers to the violation as certain notices were not displayed and certain registers and forms were not kept at the 'worksite', namely, ATM of the SBI at AST, Komal Chand Petrol Pump, Civil Lines, Sagar, District Sagar. A response to the show-cause-cum-compliance notice in the form of a short reply by the authorised

signatory of M/s. Writer Safeguard Pvt. Ltd. on 02nd April, 2014, which factum though accepted, has not been adverted to in the complaint. This short reply states that the Company neither manages the ATM nor works at the ATM and that the ATM site was managed by the respective banks and, therefore, the volitional as alleged do not apply to them. The complaint does not state why the reply was deficient or indicate even briefly as to the nature of activity and involvement of the Company's workers at the ATM site of the State Bank of India mandating compliance at the site in question. We are not ruling on merits, *albeit* highlighting the complaint being bereft and silent on these aspects and whether the authorities considered the legal provisions in the context of the factual background before initiating prosecution.

29. The authorities bestowed with the duty to confirm compliance are often empowered to take stringent including penal action to ensure observance and check defiance. There cannot also be any quarrel on the need to enforce obedience of the rules as the beneficial legislation protects the worker’s basic right to receive minimum wages. The rulebook makes sure that the workers are made aware of their rights and paid their dues as per law without unnecessary disputes or allegations as to absence, overtime payment, deductions, etc.

30. At the same time, initiation of prosecution has adverse and harsh consequences for the persons named as accused. In ***Directorate of Revenue and Another*** v. ***Mohammed Nisar Holia,***[17] this Court explicitly recognises the right to not to be disturbed without sufficient grounds as one of the underlying mandates of Article 21 of the Constitution. Thus, the requirement and need to balance the law enforcement power and protection of citizens from injustice and harassment must be maintained. Earlier in ***M/s. Hindustan Steel Ltd.*** v. ***State of Orrisa***,[18] this Court threw light on the aspect of invocation of penalty provisions in a mechanical manner by authorities to observe:

> "8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where

[17] 2008 (2) SCC 370.
[18] 1969 (2) SCC 627.

> the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

Almost every statute confer operational power to enforce and penalise, which power is to be exercised consistently from case to case, but adapted to facts of an individual case[19]. The passage from ***Hindustan Steel Ltd.*** (supra) highlights the rule that the discretion that vests with the prosecuting agencies is paired with the duty to be thoughtful in cases of technical, venial breaches and genuine and honest belief, and be firmly unforgiving in cases of deceitful and mendacious conduct. Sometimes legal provisions are worded in great detail to give an expansive reach given the variables and complexities involved, and also to avoid omission and check subterfuges. However, legal meaning of the provision is not determined in abstract, but only when applied to the relevant facts of the case[20]. Therefore, it is necessary that the discretion conferred on the authorities is applied fairly and judiciously avoiding specious, unanticipated or unreasonable results. The intent, objective and purpose of the enactment should guide the exercise of discretion, as the presumption is that the

[19] *Secretary of State for Work and Pensions* v *B* [2005] EWCA Civ 929 at [43].
[20] See Bennion On Statutory Interpretation, Sixth Edition, Part VI at Page No. 371.

makers did not anticipate anomalous or unworkable consequences. The intention should not be to target and penalise an unintentional defaulter who is in essence law-abiding.

31. There are a number of decisions of this Court in which, with reference to the importance of the summoning order, it has been emphasised that the initiation of prosecution and summoning of an accused to stand trial has serious consequences[21]. They extend from monetary loss to humiliation and disrepute in society, sacrifice of time and effort to prepare defence and anxiety of uncertain times. Criminal law should not be set into motion as a matter of course or without adequate and necessary investigation of facts on mere suspicion, or when the violation of law is doubtful. It is the duty and responsibility of the public officer to proceed responsibly and ascertain the true and correct facts. Execution of law without appropriate acquaintance with legal provisions and comprehensive sense of their application may result in an innocent being prosecuted.

32. Equally, it is the court's duty not to issue summons in a mechanical and routine manner. If done so, the entire purpose of

[21] See – *Pepsi Foods Ltd. and Another* v. *Special Judicial Magistrate and Others*, (1998) 5 SCC 749; *GHCL Employees Stock Option Trust* v. *Indian Infoline Ltd. and Others*, (2013) 4 SCC 505; *Krishna Lal Chawla and Others* v. *State of Uttar Pradesh and Another*, (2021) 5 SCC 435.

laying down a detailed procedure under Chapter XV of the 1973 Code gets frustrated. Under the proviso (a) to Section 200 of the 1973 Code, there may lie an exemption from recording pre-summoning evidence when a private complaint is filed by a public servant in discharge of his official duties; however, it is the duty of the Magistrate to apply his mind to see whether on the basis of the allegations made and the evidence, a *prima facie* case for taking cognizance and summoning the accused is made out or not. This Court explained the reasoning behind this exemption in ***National Small Industries Corporation Limited*** v. ***State (NCT of Delhi) and Others***:[22]

> "12. The object of Section 200 of the Code requiring the complainant and the witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons arrayed as accused. (See *Nirmaljit Singh Hoon* v. *State of W.B.*) Where the complainant is a public servant or court, clause (a) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process."

[22] (2009) 1 SCC 407.

The issue of process resulting in summons is a judicial process that carries with it a sanctity and a promise of legal propriety.

33. Resultantly, and for the reasons stated above, we would allow the present appeal and quash the summoning order and the proceedings against the present appellant.

34. Accused No. 2, Vinod Singh, would also be entitled to the benefit of this order. Accordingly, the proceedings initiated against the accused no. 2, namely Vinod Singh, also stand quashed.

.....J.
(R. SUBHASH REDDY)

.....J.
(SANJIV KHANNA)

NEW DELHI;
OCTOBER 29, 2021.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11 OF 2022

[Arising out of S.L.P.(C) No.12859 of 2020]

Kerala State Beverages Manufacturing &
Marketing Corporation Ltd. ...Appellant

v.

The Assistant Commissioner of Income Tax
Circle 1(1) ...Respondent

W I T H

CIVIL APPEAL NO. 12 OF 2022

[Arising out of S.L.P.(C) No.12162 of 2020]

CIVIL APPEAL NO. 13 OF 2022

[Arising out of S.L.P.(C) No.12768 of 2020]

AND

CIVIL APPEAL NO. 14 OF 2022

[Arising out of S.L.P.(C) No.14150 of 2020]

J U D G M E N T

R. SUBHASH REDDY, J.

1. Leave granted.

2. These appeals are preferred, by the State-owned Undertaking, Kerala State Beverages Manufacturing & Marketing Corporation Ltd., a

company registered under the Companies Act, 1956, engaged in the wholesale and retail trade of beverages, aggrieved by the common judgment and order dated 30.04.2020 passed in I.T.A. No.135; 146 and 313 of 2019 by the High Court of Kerala at Ernakulam. The Civil Appeal arising out of S.L.P.(C)No.12859 of 2020 is filed by the assessee and other three appeals are preferred by the revenue.

3. For the assessment year 2014-2015, the Deputy Commissioner of Income Tax, Circle-2(1), Thiruvananthapuram finalised the assessment of income of the appellant under Section 143(3) of the Income-tax Act, 1961 (in short, 'the Act') vide Assessment Order dated 14.12.2016. The Principal Commissioner of Income Tax, Thiruvananthapuram has exercised power of revision as contemplated under Section 263 of the Act and set aside order of assessment on the ground that same is erroneous and is prejudicial to the interest of the revenue, to the extent it failed to disallow the debits made in the Profit & Loss Account of the assessee, with respect to the amount of surcharge on sales tax and turnover tax paid to the State Government, which ought to have been disallowed under Section 40(a)(iib) of the Act. Against order of the Principal Commissioner, Income Tax, dated

25.09.2018, the appellant herein filed appeal before the Income Tax Appellate Tribunal (in short, 'the Tribunal') in ITA No.536/Coch/2018.

4. With respect to Assessment Year 2015-2016 assessment against the appellant was completed under Section 143(3) of the Act by the Assistant Commissioner of Income Tax, Circle-1(1), Thiruvananthapuram vide order of assessment dated 28.12.2017. Debits contained in the Profit & Loss Account of the appellant with respect to payment of gallonage fee, licence fee, shop rental (*kist*) and surcharge on sales tax, amounting to a total sum of Rs.811,90,88,115/- were disallowed under Section 40(a)(iib) of the Act. Aggrieved by the said order, appellant herein has filed appeal before the Commissioner of Income Tax (Appeals), Thiruvananthapuram and the same was dismissed. The appellant carried the matter by way of second appeal before the Tribunal in ITA No.537/Coch/2018.

The Tribunal has dismissed the ITA Nos.536-537/Coch/2018 by a common order dated 12.03.2019. The appellant herein thereafter has filed miscellaneous application in MP No.47/Coch/2019 on the ground that the Tribunal had failed to consider the issue agitated against the disallowance of the surcharge on sales tax. The said miscellaneous application was allowed by recalling earlier order dated 12.03.2019 passed in I.T.A.No.537/Coch/2018 and a fresh order was passed on

11.10.2019, finding the issue against the appellant and dismissing the appeal. Aggrieved by the aforesaid three orders, the appellant herein has filed Income Tax Appeals before the High Court in ITA Nos.135; 146 and 313 of 2019 which are disposed, by the common impugned order. In the common impugned order passed by the High Court, the question of law raised, was answered partly in favour of the assessee/appellant and partly in favour of the revenue. Para 23 and 24 of the judgment read as under :

> "23. While summing up the conclusions, we are persuaded to answer the question of law raised, partly in favour of the revenue and partly in favour of the assessee. We hold that the levy of Gallonage Fee, Licence Fee and Shop Rental (kist) with respect to the FL-9 licences granted to the appellant will clearly fall within the purview of Section 40 (a) (iib) and the amount paid in this regard is liable to be disallowed. The amount of Gallonage Fee, Licence Fee, or Shop Rental (kist) paid with respect to FL-1 licences granted in favour of the appellant, with respect to the retail business in foreign liquor, is not an exclusive levy on the appellant, which is a state government undertaking. Therefore the disallowance made with respect to those amounts cannot be sustained. The surcharge on sales tax and turnover tax is not a 'fee or charge' coming within the scope of Section 40 (a) (iib) and is not an amount which can be disallowed under the said provision. Therefore the disallowance made in this regard is liable to be set aside.
>
> 24. In the result the assessment completed against the appellants with respect to the assessment years 2014-2015, 2015-2016 are hereby set aside. The matter is remitted to the Assessing Officer to pass revised orders, after computing the I.T. Appeal Nos. 135, 146 &

> 313/2019 -32- liability in accordance with the position settled hereinabove, on affording an opportunity of hearing to the appellant. The needful steps in this regard shall be completed at the earliest, at any rate, within three months from the date of receipt of a copy of this judgment."

5. For the purpose of disposal, we refer to the parties, as arrayed in the appeal filed by Kerala State Beverages Manufacturing & Marketing Corporation Ltd. (KSBC).

6. We have heard Sri S. Ganesh, learned senior advocate for the appellant and Sri N. Venkataraman, learned Additional Solicitor General appearing for the respondent.

7. Section 40 of the Income-tax Act, 1961 is the provision dealing with 'amounts not deductible'. The amounts as detailed in the Section are not deductible, in computing the income chargeable under the head "Profits and gains of business or profession". By the Finance Act, 2013 (Act 17 of 2013), Section 40 of the Act is amended by inserting Section 40(a)(iib), which has come into force from 01.04.2014. The said provision under Section 40(a)(iib) reads as under :

> "**40. Amounts not deductible.**- Notwithstanding anything contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

(i) … … … …

… … … …

(iib) any amount -

(A) paid by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on; or

(B) which is appropriated, directly or indirectly, from,

a State Government undertaking by the State Government.

Explanation.-For the purposes of this sub-clause, a State Government undertaking includes-

(i) a corporation established by or under any Act of the State Government;

(ii) a company in which more than fifty per cent of the paid-up equity share capital is held by the State Government;

(iii) a company in which more than fifty per cent of the paid-up equity share capital is held by the entity referred to in clause (i) or clause (ii) (whether singly or taken together);

(iv) a company or corporation in which the State Government has the right to appoint the majority of the directors or to control the management or policy decisions, directly or indirectly, including by virtue of its shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

(v) an authority, a board or an institution or a body established or constituted by or under any Act of the State Government or owned or controlled by the State Government;".

8. While it is the case of the assessee/appellant that the gallonage fees, licence fee and shop rental (*kist*) for FL-9 licence and FL-1 licence, the surcharge on sales tax and turnover tax do not fall within the purview of the abovesaid amended Section, the case of the revenue is that all the aforesaid amounts are covered under Section 40(a)(iib) as such, such amounts are not deductible for the purpose of computation of income, for the assessment years 2014-2015 and 2015-2016.

9. During the assessment years 2014-2015 and 2015-2016 the appellant was holding FL-9 and FL-1 licences to deal in wholesale and retail of, Indian Made Foreign Liquor (IMFL) and Foreign Made Foreign Liquor (FMFL) granted by the Excise Department. FL-9 licence was issued to deal in wholesale liquor, which they were selling to FL-1, FL-3, FL-4, 4A, FL-11, FL-12 licence holders. The FL-1 licence was for sale of foreign liquor in sealed bottles, without privilege of consumption within the premises. The gallonage fee is payable as per Section 18A of the Kerala Abkari Act and Rule 15A of the Foreign Liquor Rules. The appellant was the only licence holder for the relevant years so far as FL-

9 licence to deal in wholesale, and so far as FL-1 licences are concerned, it was also granted to one other State owned Undertaking, i.e., Kerala State Co-operatives Consumers' Federation Ltd.. By interpreting the word 'exclusively' as worded in Section 40(a)(iib)(A) of the Act, High Court in the impugned order has held that the levy of gallonage fee, licence fee and shop rental (*kist*) with respect to FL-9 licences granted to the appellant will clearly fall within the purview of Section 40(a)(iib) of the Act and the amounts paid in this regard is liable to be disallowed. At the same time the amount of gallonage fee, licence fee and shop rental (*kist*) paid with respect to FL-1 licences granted in favour of the appellant for retail business, the High Court has held that it is not an exclusive levy, as such disallowance made with respect to the same cannot be sustained. With regard to surcharge on sales tax and turnover tax, it is held that same is not a 'fee' or 'charge' within the meaning of Section 40(a)(iib) as such same is not an amount which can be disallowed under the said provision.

10. Sri Ganesh, learned senior counsel appearing for the appellant by referring to Explanatory Note to the Finance Act, 2013, and Section 40(a)(iib) of the Act, has submitted that the levy of gallonage fees, licence fee and shop rental (*kist*) on FL-9 licence is not on any State Government Undertaking but same is a levy on the licensee. It is

submitted that the levy was on the licence holder whoever he or it might be and only in view of the Abkari Policy of the relevant years licences were granted to the appellant as such it cannot be said that same was exclusive levy on the appellant attracting Section 40(a)(iib) of the Act so as to disallow the same. It is submitted that the mere fact that in a particular year, the licence holder happens to be State Government Undertaking does not make the levy, one, which is imposed directly and exclusively on the State Government Undertaking. It is submitted that High Court has failed to appreciate that the decision as to whom FL-9 licences are to be granted, depends only on the State Government's Abkari Policy, which may vary from year to year. It is submitted that said submission also holds good with regard to gallonage fee, licence fee and shop rental for FL-1 licence, which issue is already decided in favour of appellant, by the High Court. With regard to surcharge on sales tax and turnover tax, it is submitted that taxes levied, are completely outside the ambit of Section 40(a)(iib) of the Act. It is submitted that the Kerala Surcharge on Taxes Act, 1957 (for short, 'KST Act') is enacted only to increase the taxes, *inter alia*, on the sale or purchase of goods, as such it is nothing but an increment to the basic sales tax levied under Section 5(1) of Kerala General Sales Tax Act, 1963 (for short, 'KGST Act'). It is submitted that surcharge on

sales tax is nothing but an enhancement of tax itself. In support of the said submission, the learned counsel has placed reliance on the judgments of this Court in the case of **C.I.T.** v. **K. Srinivasan**[1] and in the case of **Sarojini Tea Co. Ltd.** v. **Collector, Dibrugarh**[2]. Reference is also made on the CBDT Circular No.3/2018 dated 11.07.2018, to buttress the said submission. Learned counsel, by drawing our attention to the distinction between 'fee' and 'taxes' which is maintained throughout the scheme under Section 40(a) has submitted that, the sales tax and turnover tax is outside the scope of Section 40(a)(iib) of the Act. Lastly it is submitted that for the assessment year 2014-2015, the assessing officer has allowed deductions in respect of surcharge on sales tax and turnover tax, the Commissioner interfered, in exercise of power of revision under Section 263 of the Act. It is submitted that the view taken by the assessing officer was a possible view, as such the very invocation of revisional power was not permissible, to interfere with the order of the assessing officer.

With the aforesaid submissions, learned counsel has submitted to allow the appeal filed by the assessee and dismiss the appeals filed by the revenue.

[1] (1972(4) SCC 526
[2] (1992) 2 SCC 156

11. Sri Venkataraman, learned ASG appearing for the revenue, by drawing our attention to the provisions under Articles 285 and 289 of the Constitution of India, has explained the intent behind the amendment to Section 40 of the Income-tax Act, 1961, by Act 17 of 2013. It is submitted that in terms of Article 289 of the Constitution, the property and income of a State is exempted from Union taxation. The constitutional protection under Article 289 had led the States in shifting income/profits from the State Government Undertakings into Consolidated Fund of the States. It is submitted that State Government Undertaking – KSBC, which in this case is a company like any other commercial concern, is engaged in trade and business and commercial activity, therefore, is to be treated like any other business entity. However, when it came to filing of Return of Income, the State as the only shareholder or major shareholder in this type of undertakings, exercise control over it and shift profits by appropriating the whole of the surplus or a part of it by way of taxes, fee or similar such appropriations. It is submitted that this resulted in erosion of profits in the hands of State Government Undertakings leading to lesser payment of taxes, since these appropriations by the respective States from their State Government Undertakings were accounted for as allowable expenditure under Section 40(a) and these undertakings

claimed deduction of the same from the income earned, therefore could not be taxed in the hands of the State Government Undertakings. It is further submitted that the shifted profit, upon its transfer, went into the Consolidated Fund of the States and on this basis constitutional protection under Article 289 were claimed as a result of which, these amounts could neither be taxed in the hands of the State Government Undertakings nor in the hands of the respective States. Precisely the underlined spirit in bringing out the said amendment by inserting Section 40(a)(iib), is to plug the possible diversion or shifting of profits from these undertakings into State's treasury. Learned counsel also referred to the Memorandum attached to the Finance Bill of 2013 which explains the provisions relating to direct taxes. The relevant portion of the Memorandum reads as under :

> "**Disallowance of certain fee, charge, etc. in the case of State Government Undertakings**
>
> The existing provisions of section 40 specifies the amounts which shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". The non-deductible expense under the said section also includes statutory dues like fringe benefit tax, income-tax, wealth-tax, etc.
>
> Disputes have arisen in respect of income-tax assessment of some State Government undertakings as to whether any sum paid by way of privilege fee, license fee, royalty, etc. levied or charged by the State Government exclusively

> on its undertakings are deductible or not for the purposes of computation of income of such undertakings. In some cases, orders have been issued to the effect that surplus arising to such undertakings shall vest with the State Government. As a result it has been claimed that such income by way of surplus is not subject to tax. It is a settled law that State Government undertakings are separate legal entities than the State and are liable to income-tax.
>
> In order to protect the tax base of State Government undertakings vis-à-vis exclusive levy of fee, charge, etc. or appropriation of amount by the State Governments from its undertakings, it is proposed to amend section 40 of the Income-tax Act to provide that any amount paid by way of fee, charge, etc., which is levied exclusively on, or any amount appropriated, directly or indirectly, from a State Government undertaking, by the State Government, shall not be allowed as deduction for the purposes of computation of income of such undertakings under the head "Profits and gains of business or profession". It is also proposed to define the expression "State Government Undertaking" for this purpose.
>
> This amendment will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years."

11.1. With regard to gallonage fees, licence fee and the shop rental (kist), it is submitted that High Court has upheld the disallowance in favour of the revenue with regard to FL-9 licence on the ground that the appellant – KSBC is the exclusive licence holder, so far as FL-9 licences are concerned. It is submitted that so far as FL-1 licences are concerned only on the ground that similar licences are also given for

another licence holder, viz., to Kerala State Co-operatives Consumers' Federation Ltd., the High Court has held that there is no exclusivity so far as FL-1 licences are concerned. It is the contention of the learned counsel that the disallowance under Section 40(a)(iib) is not contingent upon the nature of licence. The test should be whether levy under the Abkari Act is exclusive or not and in this case it is exclusive. It is submitted that the restricted interpretation made by the High Court to the extent of FL-1 licences issued in favour of the appellant runs contrary to object and intent of Section 40(a)(iib) of the Act and makes the said provision redundant and *otiose*. It is the case of the revenue that the aspect of exclusivity used under Section 40(a)(iib) of the Act, has to be viewed from the nature of undertaking on which levy is imposed and not on the number of undertakings on which levy is imposed. It is further submitted that the KSBC and the Kerala State Co-operatives Consumers' Federation Ltd. are undertakings of the State of Kerala, therefore, the levy is an exclusive levy on such State Government Undertakings which are licensees.

11.2. So far as surcharge on sales tax is concerned, again it is submitted that such a levy is an exclusive levy on KSBC alone, therefore, attracts Section 40(a)(iib)(A) itself. Alternatively, it is further submitted that even assuming that such tax is not attracted by Section

40(a)(iib)(A), it would fall under Section 40(a)(iib)(B) for the reason that surcharge on sales tax is a 'tax' and tax is a form of appropriation by the State from KSBC. It is submitted that the surcharge levied under Section 3(1) of the KST Act is on the tax payable by a dealer in foreign liquor under Section 5(1) of the KGST Act. It is the contention of the learned counsel that, the cumulative reading of Section 3(1) of the KST Act and Section 5(1)(b) of the KGST Act would reveal that surcharge is levied on the tax payable by a dealer in foreign liquor under Section 5(1) of KGST Act. It is submitted that Section 3(1) does not deal with any other category and specifically pertain only to a dealer in foreign liquor. It is submitted that as much as Section 5(1)(b) of the KGST Act refers to trade in foreign liquor and it applies specifically and exclusively to KSBC and further surcharge levied under Section 3(1) of KST Act is on the sales tax, exclusively payable by KSBC under Section 5(1)(b) of KGST Act. As such, the inevitable conclusion, therefore is that it qualifies as an exclusive levy attracting Section 40(a)(iib) of the Act. To show that the distinction between a 'tax' and a 'fee' has substantially been effaced in the development of constitutional jurisprudence, learned counsel, has placed reliance on a recent judgment of this Court

in the case of **Jalkal Vibhag Nagar Nigam & Ors.** v **Pradeshiya Industrial and Investment Corporation and Another**[3].

11.3. With regard to turnover tax, it is submitted that unlike surcharge which is an exclusive levy on KSBC, it is fairly submitted that such tax was imposed not only on KSBC under Section 5(1)(b) of the KGST Act, but also was being imposed on various other retail dealers specified under Section 5(2) of KGST Act. It is submitted that as the issue has not been dealt and examined in detail by the High Court, made a request to leave it open for fresh adjudication since facts and figures need to be verified.

With the above submissions, learned ASG has pleaded to allow the appeals filed by the revenue and dismiss the appeal filed by the KSBC.

12. Having heard the learned counsels on both sides we have perused the impugned order and other material placed on record.

13. Section 40 of the Income-tax Act, 1961 is a provision which deals with the amounts which are not deductible while computing the income chargeable under the head 'Profits and gains of business or profession'. Section 40 of the Act is amended in the year 2013, and 40(a)(iib) is inserted by Amending Act 17 of 2013, which has come into force from 01.04.2014. In terms of Article 289 of the Constitution of

[3] 2021 SCC OnLine SC 960

India, the property and income of a State shall be exempt from Union taxation. Therefore, in terms of Article 289, the Union is prevented from taxing the States on its income and property. It is the constitutional protection granted to the States in terms of the abovesaid Article. This protection has led the States in shifting income/ profits from the State Government Undertakings into Consolidated Fund of the respective States to have a protection under Article 289. In the instant case the KSBC, a State Government Undertaking, is a company like any other commercial entity, which is engaged in the business and trade like any other business entity for the purpose of wholesale and retail business in liquor. As much as these kind of undertakings are under the control of the States as the total shareholding or in some cases majority of shareholding, is held by States. As such they exercise control over it and shift the profits by appropriating whole of the surplus or a part of it to the Government by way of fees, taxes or similar such appropriations. From the relevant Memorandum to the Finance Act, 2013 and underlying object for amendment of Income-tax Act by Act 17 of 2013, by which Section 40(a)(iib)(A)(B) is inserted, it is clear that the said amendment is made to plug the possible diversion or shifting of profits from these undertakings into State's treasury. In view of Section 40(a)(iib) of the Act any amount, as indicated, which is

levied exclusively on the State owned undertaking (KSBC in the instant case), cannot be claimed as a deduction in the books of State owned undertaking, thus same is liable to income tax.

14. In the instant case the gallonage fee, licence fee, shop rental (*kist*), surcharge and turnover tax are the amounts of which assessee claims that they are not attracted by Section 40(a)(iib) of the Act. On the other hand it is the case of the respondent/revenue that all the said components attract the ingredients of Section 40(a)(iib)(A) or Section 40(a)(iib)(B), as such they are not deductible. Broadly these levies can be divided into three categories. Gallonage fee, licence fee and shop rental (*kist*) are in the nature of fee imposed under the Abkari Act of 1902. These are the fees payable for the licences issued under FL-9 and FL-1. In the impugned order, the High Court has held that the gallonage fee, licence fee and shop rental (*kist*) with respect to FL-9 licence are not deductible, as it is an exclusive levy on the Corporation. Further a distinction is drawn from FL-1 licence from FL-9 licence, to apply Section 40(a)(iib), only on the ground that, FL-1 licences are issued not only to the appellant/KSBC but also issued to one other Government Undertaking, i.e., Kerala State Co-operatives Consumers' Federation Ltd. High Court has held that as there is no other player holding licences under FL-9 like KSBC as such the word 'exclusivity'

used in Section 40(a)(iib) attract such amounts. At the same time only on the ground that FL-1 licences are issued not only to the KSBC but also to Kerala State Co-operatives Consumers' Federation Ltd., High Court has held that exclusivity is lost so as to apply the provision under Section 40(a)(iib). If the amended provision under Section 40(a)(iib) is to be read in the manner, as interpreted by the High Court, it will literally defeat the very purpose and intention behind the amendment. The aspect of exclusivity under Section 40(a)(iib) is not to be considered with a narrow interpretation, which will defeat the very intention of Legislature, only on the ground that there is yet another player, viz., Kerala State Co-operatives Consumers' Federation Ltd. which is also granted licence under FL-1. The aspect of 'exclusivity' under Section 40(a)(iib) has to be viewed from the nature of undertaking on which levy is imposed and not on the number of undertakings on which the levy is imposed. If this aspect of exclusivity is viewed from the nature of undertaking, in this particular case, both KSBC and Kerala State Co-operatives Consumers' Federation Ltd. are undertakings of the State of Kerala, therefore, levy is an exclusive levy on the State Government Undertakings. Therefore, we are of the considered view that any other interpretation would defeat the very object behind the amendment to Income-tax Act, 1961.

14.1. It is fairly well settled that the interpretation is to be in the manner which will subserve and promote the object and intention behind the legislation. If it is not interpreted in the manner as aforesaid it would defeat the very intention of the legislation. To defeat the said provision, the State Governments may issue licences to more than one State owned undertakings and may ultimately say it is not an exclusive undertaking and therefore Section 40(a)(iib) is not attracted. The submission of Sri Ganesh, learned senior counsel for the appellant is that the gallonage fee, licence fee and the shop rental (*kist*) are the levies under the Abkari Act on all the licence holders, as such it cannot be said that same is an exclusive levy on the appellant/KSBC. It is submitted that because of the Abkari Policy in particular year, licences are issued in favour of the appellant – State owned Undertaking, as such it cannot be said that the statutory levies under the Abkari Act are on the State Government Undertaking and such levies are only on the licensees but not on the State-owned Undertakings like KSBC. The said submission cannot be accepted for the reason that by virtue of licence which is granted in favour of State-owned Undertaking, the statutory fees etc., viz., gallonage fees, licence fee and shop rental (*kist*) are payable by the appellant-Undertaking, i.e., KSBC. Once the State Government Undertaking takes licence, the statutory levies referred

above are on the Government Undertaking because it is granted licences. Therefore, we are of the view that the finding of the High Court that gallonage fee, licence fee and shop rental (*kist*) so far as FL-1 licences are concerned, is not attracted by Section 40(a)(iib), cannot be accepted and such finding of the High Court runs contrary to object and intention behind the legislation.

14.2. Further, because another State Government Undertaking, i.e., Kerala State Co-operatives Consumers' Federation Ltd. was also granted licences during the relevant years, as such exclusivity mentioned in Section 40(a)(iib) is lost, also cannot be accepted, for the reason that exclusivity is to be considered with reference to nature of licence and not on number of State owned Undertakings. If the interpretation, as held by the High Court, is accepted, the legislative intent can be defeated by issuing licences in FL-1 to several State Government Undertakings and then make a contention that exclusivity is lost. Said interpretation runs contrary to the intent of the amendment.

14.3. So far as surcharge on sales tax is concerned, the High Court has held in favour of KSBC and against the revenue. The reasoning of the High Court is that surcharge on sales tax is a tax and Section 40(a)(iib) does not contemplate 'tax' and surcharge on sales tax is not a 'fee'

or a 'charge'. Therefore, High Court was of the view that surcharge levied on KSBC does not attract Section 40(a)(iib) of the Act. The submission of Sri Venkataraman, learned ASG with regard to surcharge on sales tax is two-fold. One is that the levy of surcharge on sales tax is also an exclusive levy on KSBC, therefore, attracts Section 40(a)(iib)(A) itself. Secondly, it is submitted, as an alternative submission that if the same is not covered by Section 40(a)(iib)(A) it would fall under Section 40(a)(iib)(B) of the Act, for the reason that the surcharge on sales tax is a tax and tax is a form of appropriation by the State from KSBC. The learned counsel placed reliance on a recent judgment of this Court in the case of **Jalkal Vibhag Nagar Nigam and Others**[3]. On the other hand it is the case of the appellant/assessee that the sales tax is outside the scope of Section 40(a)(iib) and the surcharge is nothing but is an enhancement of the tax. By referring to words used in Section 40(a)(iib), learned counsel Sri Ganesh has submitted that the said provision is to be interpreted by applying the doctrine of *ejusdem generis*. It is submitted that the words 'any other fee or charge' immediately following the words 'royalty, licence fee, service fee, privilege fee, service charge' relate to such similar charges and none of the terms can possibly cover a tax, like sales tax or surcharge on sales tax. With regard to surcharge on sales tax, we are in agreement with

the submission of Sri Ganesh, learned senior counsel appearing for appellant. The 'fee' or 'charge' as mentioned in Section 40(a)(iib) is clear in terms and that will take in only 'fee' or 'charge' as mentioned therein or any fee or charge by whatever name called, but cannot cover tax or surcharge on tax and such taxes are outside the scope and ambit of Section 40(a)(iib)(A) and Section 40(a)(iib)(B) of the Act. The surcharge which is imposed on KSBC is under Section 3(1) of the KST Act which reads as under :

> "**3. Levy of surcharge on sales and purchase taxes.** –
> (1) The tax payable under sub-section (1) of section 5 of the Kerala General Sales Tax Act, 1963, by a dealer in foreign liquor shall be increased by a surcharge at the rate of ten per cent, and the provisions of the Kerala General Sales Tax Act 1963 shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act.
>
> Provided that where in respect of declared goods as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956 the tax payable by such dealer under the Kerala General Sales Tax Act, 1963 together with the surcharge payable under this sub-section, exceeds four per centum of the sale or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed four per centum of the sale or purchase price."

Section 5(1)(b) of the Kerala General Sales Tax Act, 1963 reads as under :

> **5. Levy of tax on sale or purchase of goods**: - (1) Every dealer (other than a casual trader or agent of a non-resident dealer or the Central Government, or Government of Kerala or the Government of any other state or of any Union Territory, or any local authority) whose total turnover for a year is not less than two lakhs rupees and every casual trader or agent of a non-resident dealer, the Central Government, Government of Kerala, the Government of any other state or of any Union Territory, or any local authority whatever be its total turnover for the year in respect of goods included in the Schedule at the rate mentioned against such goods,-
>
> (a) … … … …
>
> (b) in respect of Foreign liquor, at the point of sale by the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited and at the point of first sale in the State by a dealer liable to tax under this section except where the sale is to the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited.
>
> (c) … … … …"

14.4. A reading of preamble and Section 3(1) of the KST Act, make it abundantly clear that the surcharge on sales tax levied by the said Act is nothing but an increase of the basic sales tax levied under Section 5(1) of the KGST Act, as such the surcharge is nothing but a sales tax. It is also settled legal position that a surcharge on a tax is nothing but the enhancement of the tax. In this regard, in support the said view, ready reference can be made to the judgments of this Court in the case

of **K. Srinivasan**[1] and **Sarojini Tea Co. Ltd.**[2]. Para 7 of the judgment in the case of **K. Srinivasan**[1] reads as under :

> "**7.** The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and supertax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word "surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "Income tax" as used in Section 2 includes surcharge."

Para 20 of the judgment in the case of **Sarojini Tea Co. Ltd.**[2] reads as under :

> "**20.** For the reasons aforesaid, we are unable to endorse the view of the High Court that surcharge on land revenue payable under the Surcharge Act is not land revenue but a levy which is distinct from land revenue. In consonance with the law laid down by this Court in *Vishwesha Thirtha Swamiar case* [(1972) 3 SCC 246 : (1972) 1 SCR 137 : AIR 1971 SC 2377] it must be held that the surcharge on land revenue levied under the Surcharge Act, being an enhancement of the land revenue, is part of the land revenue and has to be treated as such for the

purpose of assessing compensation under Section 12 of the Ceiling Act."

14.5. Further, CBDT itself has issued circular in Circular No.3/2018 which is issued, as a measure for reducing litigation, by revision of monetary limits for filing appeals by the Department before the Income-tax Appellate Tribunal, High Courts and SLP/appeals before this Court. In the said circular it is clearly mentioned that for considering tax effect it includes applicable surcharge and cess. Same will also strengthen the stand of the assessee. Thus it is clear that the surcharge which is sought to be levied is nothing but the enhancement of sales tax, which is levied under Section 5(1) of the KGST Act. When the basic sales tax paid by KSBC under Section 5(1)(b) of the KGST Act, deduction was allowed, there is no reason not to allow deduction of surcharge on sales tax. If the revenue does not consider Section 40(a)(iib) is applicable to the basic sales tax paid by KSBC under Section 5(1)(b) of the KGST Act, it is not known how the surcharge on sales tax, which is nothing but the sales tax, can be brought in the net of Section 40(a)(iib)(A) or 40(a)(iib)(B) of the Act. Further a clear distinction between 'fee' and 'tax' is carefully maintained throughout the scheme under Section 40(a) of the Act itself. Wherever the Parliament intended to cover the tax it specifically mentioned as a tax. Section 40(a)(i) and 40(a)(ia) specifically

relate to tax related items. Section 40(a)(ic) refers to a sum paid on account of fringe benefit tax. At the same time, Section 40(a)(iib) refers to royalty, licence fee, service fee, privilege fee or any other fee or charge. If these words are considered to include a tax or surcharge like sales tax, the distinction so carefully spelt out in Section 40 between a tax and a fee will be obliterated and rendered meaningless. It is settled principle of interpretation that where the same Statute, uses different terms and expressions, then it is clear that Legislature is referring to distinct and different things. To support the said view ready reference can be made to judgments of this Court in the case of **DLF Qutab Enclave Complex Educational Charitable Trust** v. **State of Haryana & Ors.**[4]; **Kailash Nath Agarwal & Ors.** v. **Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr.**[5]; and **Shri Ishar Alloy Steels Ltd.** v. **Jayaswals Neco Ltd.**[6]. The judgment relied on by the learned ASG in the case of **Jalkal Vibhag Nagar Nigam and Others**[3] would not render any assistance to support the case of the revenue. The said judgment only considers whether the levy of water tax under Section 52A of the U.P. Water Supply and Sewerage Act is a fee or whether it is a tax covered by Entry 49 of List II of the seventh schedule

[4] (2003) 5 SCC 622
[5] (2003) 4 SCC 305
[6] (2001) 3 SCC 609

to the Constitution. The said judgment in fact maintains and does not take away the basic constitutional distinction between 'fee' and 'tax'. Having regard to language used in Section 40(a)(iib), we are of the view that the aforesaid judgment does not support the case of the revenue. Even the other alternative submission of the learned counsel that it may attract Section 40(a)(iib)(B) also cannot be accepted for the reason that wherever the Parliament intended to include tax, referred clearly to taxes clearly in the very Section 40. That itself indicates that the surcharge or tax were never intended to be included in the net of amended Section 40(a)(iib)(A) or 40(a)(iib)(B) of the Income-tax Act, 1961.

15. So far as turnover tax is concerned it is submitted by the learned ASG appearing for the revenue that such tax was imposed not only on KSBC in terms of Section 5(1)(b) of KGST Act, but it is imposed on various other retail dealers specified under Section 5(2) of the said Act. Further turnover tax is also a tax. The very same reason which we have assigned above for surcharge, equally apply to the turnover tax also. As such turnover tax is also outside the purview of Section 40(a)(iib)(A) and 40(a)(iib)(B).

16. For the aforesaid reasons, we hold that the gallonage fee, licence fee and shop rental (*kist*) with respect to FL-9 and FL-1 licences

granted to the appellant will, squarely fall within the purview of Section 40(a)(iib) of the Income-tax Act, 1961. The surcharge on sales tax and turnover tax, is not a fee or charge coming within the scope of Section 40(a)(iib)(A) or 40(a)(iib)(B), as such same is not an amount which can be disallowed under the said provision and disallowance made in this regard is rightly set aside by the High Court.

17. Accordingly, the civil appeal filed by the assessee is dismissed and the civil appeals filed by the revenue are partly allowed to the extent indicated above. In result, the assessments completed against the assessee with respect to assessment years 2014-2015 and 2015-2016 stand set aside. The assessing officer to pass revised orders after computing the liability in accordance with the directions as indicated above. As the dispute relates to assessment years 2014-2015 and 2015-2016, the assessing officer shall pass appropriate orders, within a period of two months from the date of receipt of this judgment.

.....J.
[R. Subhash Reddy]

.....J.
[Hrishikesh Roy]

New Delhi.
January 03, 2022.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8411 OF 2019

BANK OF BARODA & ANR. **…APPELLANT(S)**

VERSUS

MBL INFRASTRUCTURES LIMITED & ORS. **…RESPONDENT(S)**

J U D G M E N T

M.M. SUNDRESH, J.

1. A judicial interpretation of Section 29A(h) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), as amended by the Act 26 of 2018 is sought from us.

2. We have heard Shri. Tushar Mehta, learned Solicitor General and Mr. Bishwajit Dubey, learned counsel appearing for the Appe1llant, and Shri. Ranjit Kumar and Shri. Parag P. Tripathi, learned senior counsels on behalf of Respondent Nos. 1 and 3, respectively. Perused the documents filed by both sides, and additionally, we had the benefit of going through the written arguments placed on record.

A BRIEF JOURNEY:

3. M/s. MBL Infrastructures Limited (Respondent No.1) was set up by one, Mr. Anjanee Kumar Lakhotiya (Respondent No. 3) in the early 1990s. Loans/ credit facilities were obtained by the Respondent No.1 from the consortium of banks (State Bank of Mysore now State Bank of India as lead bank), some of who are also arrayed as respondents apart from the appellant. On the failure of the Respondent No.1 to act in tune with the terms of repayment, some of the respondents were forced to invoke the personal guarantees extended by the Respondent No.3 for the credit facilities availed by the Respondent No.1.

4. M/s. RBL Bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act' for short), after duly invoking the personal guarantee of the Respondent No.3. This was followed by a similar action at the hands of Respondent No.8 (M/s Allahabad Bank) and M/s. State Bank of Bikaner and Jaipur. We are given to understand that M/s. State Bank of Bikaner and Jaipur got merged with State Bank of India. The aforesaid two proceedings invoking Section 13(2) of the SARFAESI Act were initiated in the month of February and March, 2013, respectively.

5. On the aforesaid factual setting, M/s. RBL Bank filed an application bearing No. (IB)-170/KB/2017 under Section 7 of the Code before the National

Company Law Tribunal, Kolkata (hereinafter referred to as "adjudicating authority") to initiate corporate insolvency resolution process (CIRP) against Respondent No.1. It was admitted vide order dated 30.03.2017, appointing an Interim Resolution Professional, leading to imposition of moratorium in terms of Section 14 of the Code. After the expiry of the initial period of CIRP, an application was filed by the Resolution Professional for extending the duration of CIRP by an additional 90 days, which was duly granted.

6. Two resolution plans were received by the Resolution Professional (Respondent No.2 herein) as he then was, of which, one was authored by Respondent No.3 on 29.06.2017. This was done prior to the introduction of Section 29A of the Code.

7. A series of meetings took place with the active participation of the Committee of Creditors (CoC) on the resolution plan submitted by the Respondent No.3 between October 16, 2017 to November 17, 2017. A decision was made in the 9th meeting of the CoC held on 18.11.2017 seeking an appropriate resolution plan at the hands of Respondent No.3. In tune with the aforesaid directive, the Respondent No.3 submitted a modified resolution plan on 22.11.2017.

8. Thereafter, by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, Section 29A was introduced to the Code with which we are

concerned in the present *lis*, specifically 29A(c) and (h). The same are reproduced as under:

> "**Section 29 A – Persons not eligible to be resolution applicant** – A person shall not be eligible to submit a resolution plan, if such person or any other person acting jointly with such person or any other person who is a promoter or in the management or control of such person, -
>
> xxx xxx xxx
>
> (c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:
>
> Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;
>
> xxx xxx xxx
>
> (h) has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor under insolvency resolution process or liquidation under this code."

9. The CoC held its meeting on 01.12.2017 to deliberate upon the impact of the amendment *qua* the eligibility of the Respondent No.3 in submitting a resolution plan in the CIRP proceedings. In view of the lingering doubt expressed, the Respondent No.3 filed an application bearing CA(IB) No.543/KB/2017 praying for a declaration that he was not disqualified from submitting a resolution plan under sub-section (c) and (h) of Section 29A of the Code.

10. The adjudicating authority, vide its order dated 18.12.2017 held that the Respondent No.3 was eligible to submit a resolution plan, notwithstanding the fact that he did extend his personal guarantees on behalf of the Respondent No.1 which were duly invoked by some of the creditors, as aforesaid. This issue was never placed and raised before the adjudicating authority. Though the adjudicating authority took note of Section 29A(c) of the Code, it did not give any specific findings on it. However, it ruled that inasmuch as the personal guarantee having not been invoked and the Respondent No.3 merely having extended his personal guarantee, as such there is no disqualification *per se* under Section 29A(h) of the Code as the liability under a guarantee arises only upon its invocation. Thus, only those guarantors who had antecedents which might adversely impact the credibility of the process are alone to be excluded. As debt payable by Respondent No.3 was not crystalized, he could not be construed as a defaulter for breach of the guarantee. Incidentally, a finding has been given that the Respondent No.3 did not commit any default. With the aforesaid clarification, the application filed was allowed by taking into consideration the amendment made on 23.11.2017, introducing Section 29A to the Code.

11. The aforesaid order was assailed by the Punjab National Bank (Respondent No.10) before the National Company Law Appellate Tribunal (hereinafter

referred to as “appellate tribunal”) in Company Appeal (AT) (Insolvency) No. 330 of 2017. Upon hearing the Respondent No.10, the following interim order was passed on 21.12.2017:

> “Let notice be issued to respondents by speed post. Requisites by next dated. Dasti service permitted.
>
> Copy of this order may also be forwarded to the respondents. The appellant will file the certified copy of the impugned order by 5th January, 2018. Post the matter on 11th January, 2018.
>
> In the meantime, if the 2nd Respondent filed any Resolution Plan, the Resolution Professional and the Committee of Creditors may go through the same but the Adjudicating Authority will not accept or reject the resolution plan or pass any order in lower court without prior approval of this Appellant Tribunal.”

12. On the very same day, the resolution plan submitted by the Respondent No.3 was put to vote by the Respondent No.2 in the 12th meeting of the CoC by way of e-voting, and the process was completed the next day. The plan received 68.50% vote share of the CoC. Six financial creditors voted against the plan, including Respondent No.10 (PNB) and RBL Bank. The extended 270 day period of CIRP expired on 25.12.2017.

13. RBL Bank filed an appeal against the order dated 18.12.2017 being Company Appeal (AT) (Insolvency) No.1 of 2018 wherein an order was passed upon hearing the parties on 11.01.2018 facilitating the adjudicating authority to proceed further but not to accept the resolution plan, without its prior approval.

14. The Respondent No.3 filed an application on 12.01.2018 invoking Section 60 of the Code bearing CA No.(IB) 50/KB/2018 seeking an appropriate direction to the dissenting and abstaining creditors to facilitate a possible change of mind by supporting the resolution plan, as modified. Thereafter, Bank of Maharashtra (Respondent No. 11), since impleaded by the order of this court dated 26.10.2021, sent a letter to Respondent No.2 dated 31.01.2018 setting forth its conditions for its approval of the resolution plan. Further, Indian Overseas Bank was pleased to give its approval to the resolution plan. As such, the resolution plan gathered 78.50% vote share.

15. In the meanwhile, Section 29A(h) went through a further amendment which came into effect from 18.01.2018:

> "**Section 29 A – Persons not eligible to be resolution applicant** – A person shall not be eligible to submit a resolution plan, if such person or any other person acting jointly or in concert with such person –
>
> xxx xxx xxx
>
> (h) has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this code."

16. On 23.03.2018, the appellate tribunal passed the following order in the appeals filed by Respondent No.10 and RBL Bank:

> "When the matter was taken up learned counsel appearing on behalf of the Appellant – 'Punjab National Bank' sought permission to withdraw the appeal. One of the learned counsel appearing on behalf of the Respondent opposed the prayer. However, we are not inclined to the ground of

> opposition as made by the Respondent. Bank intends to withdraw the appeal, without any liberty. In this background, without taking into consideration the grounds shown in the affidavit for withdrawal, we allow the Appellant to withdraw the Appeal without any liberty to challenge the same very impugned order. The appeal is dismissed as withdrawn. I.A. No.311 of 2018 stands disposed of. The 'question of law' may be decided in some other case. No cost.
>
> The interim order passed by this Appellant Tribunal on 21st December, 2017 stands vacated."

17. The above order was passed while permitting the appellants to withdraw the appeals against the order of eligibility of Respondent No.3, in view of the resolution plan having reached the mandatory requirement of 75% as warranted under Section 30(4) of the Code. Thus, it is clear that those appellants did not have any grievance on the plan as accepted by the majority of the CoC. However, the request made by the present appellant who filed I.A. No. 311 of 2018 before the appellate tribunal, seeking to be impleaded as a party to the aforesaid proceedings to continue the *lis* was not favourably considered though no reason was assigned in the aforesaid order. We may also note that the appellant before us who incidentally filed the aforesaid application was not heard before the adjudicating authority. Suffice it is to state that the appellant did raise its objection to the withdrawal of appeal, presumably on the premise that it wanted to continue by substituting itself in place of the original appellants.

18. The resolution professional, the Respondent No.2 filed a report dated 12.02.2018 for recording the increase in voting share up to 78.50% together with the resolution plan stating that it was accordingly passed. Only on the aforesaid factual setting the pending appeal before the appellate tribunal was withdrawn on 27.02.2018. The adjudicating authority approved the resolution plan submitted by its order dated 18.04.2018 inter alia holding that there is a marked difference between extension and exclusion and therefore, the rigor of Section 12(1) of the Code would not get attracted on the facts of the case particularly when there were pending proceedings with interim orders. It was further held that the issue *qua* the eligibility under Section 29A(h) decided already, coupled with the resolution plan crossing the requisite threshold of approval by the CoC, i.e. 75% vote share, having considered the techno-economic viability and feasibility of the plan, the application filed for approval of the resolution plan submitted by the Respondent No.3 was liable to be allowed. A direction was accordingly given, holding that the approved resolution plan shall come into force with immediate effect.

19. The appellant before us put into challenge, the aforesaid order passed by the adjudicating authority in Company Appeal (AT)(Insolvency) No. 194 of 2018.

20. In the meanwhile, Section 29A(h) went through a further change by way of ordinance dated 06.06.2018, which subsequently became an Act with effect from the same date through the Act 26 of 2018:

> "**Section 29 A- Persons not eligible to be resolution applicant** – A person shall not be eligible to submit a resolution plan, if such person or any other person acting jointly or in concert with such person –
>
> xxx xxx xxx
>
> (h) has executed a guarantee in favour of a creditor, in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this code and such guarantee has been invoked by the credit and remains unpaid if full or part."

21. The appellate tribunal did explore other possibilities during the pendency of the appeal. It also directed the Respondent No.3 to submit a revised resolution plan. After hearing the parties, the order passed by the adjudicating authority was confirmed, dismissing the appeal filed by the appellant while approving the revised resolution plan submitted by the Respondent No.3 before it. After the disposal of the appeals filed including that of the appellant along with the others who have not challenged the same before us, the shareholders of the Respondent No.1 approved the fund raising of Rs.300 crores in the Annual General Meeting.

22. The appeals including that of the appellant were dismissed on the ground that the resolution plan was approved with 78.50% of the voting share of the CoC,

and it was backed by the techno-economic report *qua* the viability and feasibility. The earlier decision of the adjudicating authority dated 18.12.2017 has attained finality *qua* the issue of eligibility of the Respondent No.3 under Section 29A of the Code to submit a resolution plan, and it cannot sit in appeal over the decision of the adjudicating authority or the CoC in the absence of any apparent discrimination. It is this decision of the appellate authority confirming the order passed by the adjudicating authority, which is tested before us.

23. Before we proceed with the submissions made at the Bar, we have to record one more fact, namely, Section 30 of the Code also underwent a change by the introduction of amendment dated 06.06.2018 by way of an ordinance followed by an Act through which the percentage required for approval of a resolution plan by the CoC has been brought down from 75% to 66% of the voting share of the CoC.

SUBMISSIONS OF THE APPELLANT:

24. We will collectively consider the submissions of the learned counsel appearing for the appellant and the Respondent No.7, though the said respondent did not choose to file any appeal before us.

25. Section 29A has to be given a holistic interpretation as the objective is to weed out undesirable persons with the intention of promoting primacy of debt by

disqualifying guarantors who have not fulfilled their co-extensive liability with the insolvent corporate debtor. The Respondent No.3 (who is a promoter of the corporate debtor) was ineligible to submit a resolution plan under Section 29A(h) of the Code, as several personal guarantees executed by the Respondent No.3 in favour of various creditors of the Respondent No.1 stood invoked, prior commencement of CIRP. There is a clear suppression on the part of Respondent No.3, which was not taken note of by the adjudicating authority on both the occasions. Even the Respondent No.2 failed to bring the said fact before the adjudicating authority. Therefore, the premise on which the adjudicating held the Respondent No.3 eligible to submit a resolution plan is *ex facie* false.

26. The law which was prevailing on the date of the application has to be seen, therefore, the disqualification gets attracted on the date of filing of the application and on the same analogy not only Section 29A(h) but also Section 30(4) has to be interpreted. As fraud vitiates all solemn acts, the appeal deserves to be allowed. A legal ineligibility cannot be done away with by alleged estoppel, such ineligibility is a matter of fact to be considered by Courts irrespective of any waiver by any party or creditor. The approval of the resolution plan was made after the mandatory period of 270 days, i.e. after the expiry of the CIRP period. Since there is clear infraction of Section 12, the

orders passed are liable to be interfered with. The learned Solicitor General has sought to place reliance on the judgment of this Court in K. Shashidhar vs. Union of India (Order dated 05.02.2019 in Civil Appeal 10673 of 2018). The revised plan before the appellate tribunal was never approved by the adjudicating authority, including the conditional assent given by the Respondent No.11, which were erroneously accepted.

27. There is no bar in law for questioning the eligibility before the adjudicating authority as the appellant was neither a party before it on earlier occasion nor an adjudication was made on the merits by the appellate tribunal. Therefore, the order passed by the appellate tribunal confirming that of the adjudicating authority requires to be set aside.

SUBMISSIONS OF THE RESPONDENT:

28. A decision made by the CoC in its commercial wisdom on being satisfied with the report of the expert on the viability and feasibility of the resolution plan, is not required to be interfered with by this Court by substituting its views. The revised plan as accepted by the appellate tribunal is an improvement to the earlier one submitted by the Respondent No.3 and, therefore, there cannot be any grievance on that count.

29. The object of the Code has to be read with Section 29A(h). The appellant being aware of the decision of the adjudicating authority in the first instance ought to have taken it further, as such the appellant is estopped from questioning the eligibility of the Respondent No.3 to submit a resolution plan under Section 29A(h) of the Code. The provision has to be literally interpreted to the extent that a personal guarantor is barred from submitting a resolution plan only when the creditor invoking the jurisdiction of the adjudicating authority has invoked a personal guarantee executed in favour of said creditor by the resolution applicant.

30. No personal guarantee stood invoked by RBL Bank at the time of application to the adjudicating authority under Section 7 of the Code. It is further submitted that the invocation of the consortium guarantee by Allahabad Bank and State Bank of Bikaner and Jaipur under Section 13(2) of the SARFAESI Act, 2002 is *ex facie* illegal in terms of the inter-se agreement executed between the members of the consortium of banks. Even otherwise the same is not relevant as neither Allahabad Bank nor State Bank of Bikaner and Jaipur filed an application before the adjudicating authority.

31. The first respondent is an on-going concern as of now and the resolution plan is under implementation since 18.04.2018. The object of the Code is revival of the Corporate Debtor and liquidation is the last resort. Any interference at this

stage will have an adverse effect and militate against the very object of the Code. The Respondent No.3 has infused over Rs. 63 crores since the resolution plan has been in operation and has further received approval of the shareholders to raise Rs. 300 crores to revive the Respondent No.1. Since the approval of the resolution plan submitted by the Respondent No.3, several projects of national importance have been completed and various others are under execution. Further, all workmen have also been paid in full, and all current employees, operational creditors and statutory dues are being regularly paid.

32. Both the forums have rightly construed the issue *qua* extension and exclusion. Admittedly, there were earlier rounds of litigation and proceedings were pending against the interim orders. This issue has also been concluded finally by this Court inter alia holding that in such a scenario exclusion has to be granted, in light of the time spent in litigation.

33. Buttressing the aforesaid submissions, the counsels for the Respondents have sought to place reliance on the following decisions:

- Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17
- K.N. Rajkumar v. V.N. Nagarajan 2021 SCC OnLine 732
- Arcellor Mittal India Pvt. Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1

- Committee of Creditors, Essar Steel India Ltd. v. Satish Kumar Gupta (2020) 8 SCC 531.
- Apollo Joti LLC & Ors. v. Jyoti Structures Ltd. (Company Appeal (AT) (Insolvency) No. 548 of 2018.
- DBS Bank Ltd. vs. Sharad Sanghi (Civil Appeal No. 3434-3436 of 2019)
- Ebix Singapore Pvt. Ltd. vs. COC of Educomp Solutions Ltd. 2021 SCC OnLine SC 707
- National Spot Exchange v. Anil Kohli 2021 SCC OnLine SC 716

STATUTORY INTERPRETATION:

34. The principle governing statutory interpretation has been repeated with regularity by this Court on quite a few occasions. While construing the said principle adequate thought will have to be given to the nature of the statute and the provisions contained thereunder. The focus is on avoiding any interpretation which might cause an injury or destroy the intent behind the legislation.

35. Lord Denning in Seaford Court Estates Ltd. v. Asher, (1949) 2 KB 481 deals with the role required to be played by the Court even when there is a possible defect:

> "When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

36. MAXWELL ON INTERPRETATION OF STATUES, 11th Edition

> "It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where the usual meaning of the language falls short of whole object of the legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words." (Pg. 66)

> "…In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice or legal principles, should, in all cases of doubtful significance, be presumed to be the true one." (Pg. 183)

37. CRAIES IN STATUTE LAW, 7th Edition, Pg. 262:

> "… It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed' .. that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory."

38. A DRIEDGER, CONSTRUCTION OF STATUTE, 2nd Edition, 1983, Pg. 37:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the Scheme of the Act, the object of the Act, and the intention of Parliament."

39. As repeated on various other occasions by this Court, judging a statute through 'Literal to Heydon's Golden rule' has gone through a complete circle. Thus, we have come to a stage of applying a reasonable, creative and fair construction principle.

40. The often quoted words of Justice Chinnappa Reddy in the celebrated judgment in the Reserve Bank of India v. Peerless General Finance and Investment Company Limited, (1987) 1 SCC 424 holds the field even today:

> **"33**. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place…."

41. Apropos the passage in the case of Union of India v. Elphinstone Spg. and Wvg. Co. Ltd., (2001) 4 SCC 139:

> "While examining a particular statute for finding out the legislative intent it is the attitude of Judges in arriving at a solution by striking a balance between the letter and spirit of the statute without acknowledging that they have in any way supplemented the statute would be the proper criterion. The duty of Judges is to expound and not to legislate is a fundamental rule. There is no doubt a marginal area in which the courts mould or creatively

> interpret legislation and they are thus finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing. (See: *Corocraft Ltd.* v. *Pan American Airways Inc*. [(1968) 3 WLR 714 : (1968) 2 All ER 1059 : (1969) 1 QB 616] WLR, p. 732 and *State of Haryana* v. *Sampuran Singh* [(1975) 2 SCC 810] .) But by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. It is, therefore, a cardinal principle of construction of statutes that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed."

42. Touching upon the very interpretation of the Code, this Court on more than one occasion has adopted the very same approach in Arcellor Mittal India Pvt. Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1, Phoenix Arc (P) Ltd. v. Spade Financial Services Ltd., (2021) 3 SCC 475 and Arun Kumar Jagatramka v. Jindal Steel & Power Limited, (2021) 7 SCC 474.

INSOLVENCY AND BANKRUPTCY CODE, 2016:

43. The Code has got its laudable object. The idea is to facilitate a process of rehabilitation and revival of the corporate debtor with the active participation of the creditors. Thus, there are two principal actors in the entire process, viz., (i)the committee of creditors and, (ii) the corporate debtor. The others are mere facilitators. There can never be any other interest than that of the committee of creditors and the corporate debtor. We do not wish to multiply the rationale behind the enactment except by quoting the decision of this Court in the case of Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, which has also found acceptance by the subsequent decision in the case of *Arun Kumar(supra)*:

> "27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to

> higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.
>
> 28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

ON SECTION 29A AND ITS PURPOSIVE INTERPRETATION:

44. Section 29A of the Code has also come up for consideration before this Court on earlier occasions, though, the provision with which we are concerned, i.e. Section 29A(h), was not specifically considered. We do not wish to go into Section 29A(c) since no issue has been raised before us in these proceedings.

45. As stated, Section 29A is a facet of the Code, and therefore, this provision has to be read with the main objective enshrined thereunder. The objective behind Section 29A of the Code is to avoid unwarranted and unscrupulous elements to get into the resolution process while preventing their personal interests to step

in. Secondly, it consciously seeks to prevent certain categories of persons who may not be in a position to lend credence to the resolution process by virtue of their disqualification.

46. The then Hon'ble Minister of Finance and Corporate Affairs made this statement before Parliament on 29.12.2017 while moving the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which introduced Section 29A to the Code:

> "The core and soul of this new Ordinance is really Clause 5, which is Section 29-A of the original Bill. I may just explain that once a company goes into the resolution process, then applications would be invited with regard to the potential resolution proposals as far as the company is concerned or the enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act and, therefore, Section 29-A introduces those who are not eligible to apply. For instance there is a clause with regard to an undischarged insolvent who is not eligible to apply; a person who has been disqualified under the Companies Act as a Director cannot apply and a person who is prohibited under the SEBI Act cannot apply. So these are statutory disqualifications. And there is also a disqualification in clause (c) with regard to those who are corporate debtors and who as on the date of the application making a bid do not operationalise the account by paying the interest itself i.e. you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively this clause will mean that those who are in management and on account of whom this insolvent or non-performing asset has arisen will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational and yet I would like to apply and set the enterprise back at a discount value, for this is not the object of this particular Act. So Clause 5 has been brought in with that purpose in mind."

47. The Statement of Objects and Reasons of the aforesaid Bill is as follows:

> "2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a

> resolution plan or participating in the acquisition process of the assets of the company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of the creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible."

48. The aforesaid was taken note of by this Court in Chitra Sharma & Ors. v. Union of India, (2018) 18 SCC 575 and followed in *Arun Kumar(supra)*, wherein this Court considered the need for adopting a purposive interpretation with the primary aim to revive and restart the corporate debtor, with liquidation of the corporate debtor being the last resort:

> "41. The enactment of the IBC has marked a quantum change in corporate governance and the rule of law. First and foremost, the IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies. Second, the IBC perceives corporate insolvency not as an isolated problem faced by individual business entities but places it in the context of a framework which is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests. Third, the IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment. Fourth, in its diverse provisions, the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements. These salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. Primarily, the IBC is a legislation aimed at reorganisation and resolution of insolvencies. Liquidation is a matter of last resort. These objectives can be achieved only through a purposive interpretation which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier

regime do not enter through the backdoor through disingenuous stratagems.

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48. The underlying purpose of introducing Section 29-A was adverted to in a judgment of this Court in Chitra Sharma v. Union of India (2018) 18 SCC 575 (hereinafter referred to as "Chitra Sharma"). One of us (D.Y. Chandrachud, J.) speaking for a Bench of three learned Judges took note of the Statement of Objects and Reasons accompanying the Bill and emphasised the purpose of Section 29-A thus:

> "38. Parliament has introduced Section 29-A into IBC with a specific purpose. The provisions of Section 29-A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Statement of Objects and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which was ultimately enacted as Act 8 of 2018, states thus:
>
> > '2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.'
>
> Parliament was evidently concerned over the fact that persons whose misconduct has contributed to defaults on the part of debtor companies misuse the absence of a bar on their participation in the resolution process to gain an entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this

> background that Section 29-A has now specified a list of persons who are not eligible to be resolution applicants."
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> (emphasis in original and supplied)

49. The Court held that "Section 29-A has been enacted in the larger public interest and to facilitate effective corporate governance". The Court further observed that "Parliament rectified a loophole in the Act which allowed backdoor entry to erstwhile managements in CIRP.

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52. While adverting to the earlier decision in *Chitra Sharma* [*Chitra Sharma* v. *Union of India*, (2018) 18 SCC 575] and *ArcelorMittal* [*ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1] , which had elucidated the object underlying Section 29-A, this Court in *Swiss Ribbons* [*Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17] held that the norm underlying Section 29-A "continues to permeate" Section 35(1)(*f*) "when it applies not merely to resolution applicants, but to liquidation also". Rejecting the plea that Section 35(1)(*f*) is ultra vires, this Court held : (*Swiss Ribbons case* [*Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17] ,

> "*102*. According to the learned counsel for the petitioners, when immovable and movable property is sold in liquidation, it ought to be sold to any person, including persons who are not eligible to be resolution applicants as, often, it is the erstwhile promoter who alone may purchase such properties piecemeal by public auction or by private contract. The same rationale that has been provided earlier in this judgment will apply to this proviso as well — there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation. Further, given the categories of persons who are ineligible under Section 29-A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29-A continues to permeate the section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected."

A purposive interpretation

> 53. This line of decisions, beginning with Chitra Sharma [Chitra Sharma v. Union of India, (2018) 18 SCC 575] and continuing to ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] and Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] is significant in adopting a purposive interpretation of Section 29-A. Section 29-A has been construed to be a crucial link in ensuring that the objects of the IBC are not defeated by allowing "ineligible persons", including but not confined to those in the management who have run the company aground, to return in the new avatar of resolution applicants. Section 35(1)(f) is placed in the same continuum when the Court observes that the erstwhile promoters of a corporate debtor have no vested right to bid for the property of the corporate debtor in liquidation. The values which animate Section 29-A continue to provide sustenance to the rationale underlying the exclusion of the same category of persons from the process of liquidation involving the sale of assets, by virtue of the provisions of Section 35(1)(f). More recent precedents of this Court continue to adopt a purposive interpretation of the provisions of the IBC. [See in this context the judgments in Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd. [Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd., (2021) 3 SCC 475 : (2021) 2 SCC (Civ) 1 at paras 103-104] , Ramesh Kymal v. Siemens Gamesa Renewable Power (P) Ltd. [Ramesh Kymal v. Siemens Gamesa Renewable Power (P) Ltd., (2021) 3 SCC 224 : (2021) 2 SCC (Civ) 65 at paras 23 and 25] and Jaypee Infratech Ltd. v. Axis Bank Ltd. [Jaypee Infratech Ltd. v. Axis Bank Ltd., (2020) 8 SCC 401 : (2021) 2 SCC (Civ) 334 at paras 28.4 and 28.5]]
>
> **Sustainable revival**
>
> 54. The purpose of the ineligibility under Section 29-A is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution. Section 29-A, it must be noted, encompasses not only conduct in relation to the corporate debtor but in relation to other companies as well. This is evident from clause (c) ("an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as a non-performing asset"), and clauses (e), (f), (g), (h) and (i) which have widened the net beyond the conduct in relation to the corporate debtor."

49. In *Phoenix Arc (P) Ltd.(supra)* case, this Court considered the principle of purposive and creative interpretation while approving the interpretation given

and approach taken by this Court in the earlier decision in *Arcellor Mittal(supra)*:

> "89. In Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta [(2019) 2 SCC 1], the issue was whether ineligibility of the resolution applicant under Section 29-A(c) of the Code attached to an applicant at the date of commencement of the CIRP or at the time when the resolution plan is submitted by the resolution applicant. Speaking for this Court, Rohinton F. Nariman, J. interpreted the pre-2018 Amendment, framing of Section 29-A(c), in the following terms: (SCC pp. 61-62, para 46)
>
> > "46. According to us, it is clear that the opening words of Section 29-A furnish a clue as to the time at which clause (c) is to operate. The opening words of Section 29-A state:'a person shall not be eligible to submit a resolution plan…'. It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non-performing asset. Further, the expression used is "has", which as Dr Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression "has been", which is used in clauses (d) and (g), which refers to an anterior point of time. Consequently, the amendment of 2018 introducing the words 'at the time of submission of the resolution plan' is clarificatory, as this was always the correct interpretation as to the point of time at which the disqualification in clause (c) of Section 29-A will attach."
>
> xxx xxx xxx
>
> 91. However, it is relevant to examine whether the object and purpose for which the proviso was enacted, are fulfilled by the literal interpretation of the first proviso. Justice G.P. Singh in his authoritative commentary on the interpretation of statutes, Principles of Statutory Interpretation [(1st Edn., Lexis Nexis 2015)], has stated that:
>
> > "The intention of the legislature thus assimilates two aspects: In one aspect it carries the concept of "meaning" i.e. what the words mean and in another aspect, it conveys the concept of "purpose and object" or the "reason and spirit" pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other words the legislative intention i.e. the true or

> legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. This formulation later received the approval of the Supreme Court and was called the "cardinal principle of construction".

92. Justice G.P. Singh notes that certain enactments require a liberal construction to give effect to its objects and purpose:

> "A bare mechanical interpretation of the words and application of a legislative intent devoid of concept of purpose will reduce most of the remedial and beneficent legislation to futility. As stated by Iyer, J. "to be literal in meaning is to see the skin and miss the soul. The judicial key to construction is the composite perception of the deha and the dehi of the provision." Even in construing enactments such as those prescribing a period of limitation for initiation of proceedings where the purpose is only to intimate the people that after lapse of a certain time from a certain event a proceeding will not be entertained and where a strict grammatical construction is normally the only safe guide, a literal and mechanical construction may have to be disregarded if it conflicts with some essential requirement of fair play and natural justice which the legislature never intended to throw overboard. Similarly, in a taxing statute provisions enacted to prevent tax evasion are given a liberal construction to effectuate the purpose of suppressing tax evasion although provisions imposing a charge are construed strictly there being no a priori liability to pay a tax and the purpose of a charging section being only to levy a charge on persons and activities brought within its clear terms. For the same reason, in a legislation relating to defence services "the considerations of the security of the State and enforcement of high degree of discipline additionally intervene and have to be assigned weightage while dealing with any expression needing to be defined or any provision needing to be interpreted."

93. Similar words used in different parts of the enactment can have different meanings. As Justice G.P. Singh notes:

> "The rule is of general application as even plainest terms may be controlled by the context, and "it is conceivable," as Lord Watson said, 'that the legislature whilst enacting one clause in plain terms, might introduce into the same statute other enactments which to some extent qualify or neutralise its effect'. The same word may mean one thing in one context and another in a different context. For this reason the same word used in different sections of a statute or

> even when used at different places in the same clause or section of a statute may bear different meanings. The conclusion that the language used by the legislature is plain or ambiguous can only be truly arrived at by studying the statute as a whole. How far and to what extent each component part of the statute influences the meaning of the other part would be different in each given case. But the effect of the application of the rule to a particular case, should not be confounded with the legitimacy of applying it."
>
> (emphasis supplied)

94. In this context, it would be useful to refer to an earlier decision of this Court in Abhay Singh Chautala v. CBI [(2011) 7 SCC 141], where the Court did not interpret the word "is" in praesenti because that would lead to an absurd result, defeating the purpose of the provision concerned. In that case this Court had to interpret Section 19(1) of the Prevention of Corruption Act, 1988, which provided:

> "19. Previous sanction necessary for prosecution.—(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction—
>
> (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
>
> (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office."

95. It was argued before this Court that a literal interpretation should be given to Section 19(1). Since the word "is" has been used in sub-sections (a), (b) and (c), it was urged that this would exclude a public servant who had abused office at an earlier point in time and has now ceased to occupy that office. This Court speaking through Sirpurkar, J. rejected the argument and held: (Abhay Singh Chautala case(supra), SCC p.163, para 44)

> "44. … we reject the argument based on the word "is" in clauses (a), (b) and (c). It is true that the section operates in praesenti; however, the section contemplates a person who continues to be a public servant on the date of taking cognizance. However, as per the

> interpretation, it excludes a person who has abused some other office than the one which he is holding on the date of taking cognizance, by necessary implication. Once that is clear, the necessity of the literal interpretation would not be there in the present case. Therefore, while we agree with the principles laid down in Robert Wigram Crawford v. Richard Spooner; Bidie [(1846 SCC OnLine PC 7)], In re [1949 Ch 121(CA)] and Bourne (Inspector of Taxes) v. Norwich Crematorium Ltd. [(1967) 1 WLR 691], we specifically hold that giving the literal interpretation to the section would lead to absurdity and some unwanted results, as had already been pointed out in Antulay[(1984) 2 SCC 183]."

96. This Court relied on the judgment in R.S. Nayak v. A.R. Antulay(supra) to fortify its interpretation of Section 19(1) of the Prevention of Corruption Act, 1947: (Abhay Singh Chautala case(supra),)

> "22. … '24. … An illustration was posed to the learned counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd end product which of necessity must be avoided. Legislation must at all costs be

interpreted in such a way that it would not operate as a rogue's charter.' (A.R. Antulay case(supra), pp. 206-207, para 24)"

(emphasis supplied)

97. This Court has approved of a purposive interpretation of Section 29-A IBC in Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta(supra), where it was observed that: (SCC pp. 46-47, paras 29-30)

"29. … In *Eera v. State (NCT of Delhi)* [(2017) 15 SCC 133], this Court, after referring to the golden rule of literal construction, and its older counterpart the "object rule" in Heydon case [(1584) 3 Co Rep 7a], referred to the theory of creative interpretation as follows: (*Eera case(supra)*, SCC pp. 200-01 & 204, paras 122 & 127)

'122. Instances of creative interpretation are when the Court looks at both the literal language as well as the purpose or object of the statute in order to better determine what the words used by the draftsman of legislation mean. In D.R. Venkatachalam v. Transport Commr. [(1977) 2 SCC 273], an early instance of this is found in the concurring judgment of Beg, J. The learned Judge put it rather well when he said: (SCC p. 287, para 28)

"28. It is, however, becoming increasingly fashionable to start with some theory of what is basic to a provision or a chapter or in a statute or even to our Constitution in order to interpret and determine the meaning of a particular provision or rule made to subserve an assumed "basic" requirement. I think that this novel method of construction puts, if I may say so, the cart before the horse. It is apt to seriously mislead us unless the tendency to use such a mode of construction is checked or corrected by this Court. What is basic for a section or a chapter in a statute is provided: firstly, by the words used in the statute itself; secondly, by the context in which a provision occurs, or, in other words, by reading the statute as a whole; thirdly, by the Preamble which could supply the "key" to the meaning of the statute in cases of uncertainty or doubt; and, fourthly, where some further aid to construction may still be needed to resolve an uncertainty, by the legislative history which discloses the wider context or perspective in which a provision was made to meet a particular need or to satisfy a particular purpose. The last-mentioned

> method consists of an application of the Mischief Rule laid down in Heydon case (supra) long ago."
>
> * * *
>
> *127. It is thus clear on a reading of English, US, Australian and our own Supreme Court judgments that the "Lakshman Rekha" has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon (supra), where the Court must have recourse to the purpose, object, text and context of a particular provision before arriving at a judicial result.* In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon case (supra), which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid-1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon case (supra).'
>
> 30. A purposive interpretation of Section 29-A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same.
>
> (emphasis supplied)"

50. We have already observed that we do not wish to interpret Section 29A(c) as no arguments have been addressed on that, perhaps for the reason that Respondent No.3 might not attract any disqualification on that score.

SCOPE OF SECTION 29A(h)

51. Section 29A(h) of the Code creates one more category of persons not being eligible to be a resolution applicant. Other than the persons mentioned thereunder, there may not be any disqualification. The word "person" is of a wider import to include a promoter or a director, as the case may be. The

definition of “person” as mentioned under Section 3(23) of the Code includes certain categories of persons and thus, there is no such exclusion. It is merely illustrative/inclusive in nature and therefore, the persons mentioned in Section 29A alone are ineligible to be resolution applicants.

52. Once a person executes a guarantee in favour of a creditor with respect to the credit facilities availed by a corporate debtor, and in a case where an application for insolvency resolution has been admitted, with the further fact of the said guarantee having been invoked, the bar *qua* eligibility would certainly come into play. What the provision requires is a guarantee in favour of ‘a creditor’. Once an application for insolvency resolution is admitted on behalf of ‘a creditor’ then the process would be one of *rem*, and therefore, all creditors of the same class would have their respective rights at par with each other. This position has also been dealt with by this Court in the case of *Swiss Ribbons(supra)*:

> “82. It is clear that once the Code gets triggered by admission of a creditor’s petition under Sections 7 to 9, the proceeding that is before the adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a Committee of Creditors is constituted (as per the timelines that are specified, a Committee of Creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for

> withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case."

53. The word "such creditor" in Section 29A(h) has to be interpreted to mean similarly placed creditors after the application for insolvency application is admitted by the adjudicating authority. As a result, what is required to earn a disqualification under the said provision is a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of insolvency resolution process. This is subject to further compliance of invocation of the said personal guarantee by any other creditor. We have already said that the concern of the Court is only from the point of view of two entities viz., corporate creditors and the corporate debtors. Any other interpretation would lead to an absurdity striking at the very objective of Section 29A, and hence, the Code. Ineligibility has to be seen from the point of view of the resolution process. It can never be said that there can be ineligibility *qua* one creditor as against others. Rather, the ineligibility is to the participation in the resolution process of the corporate debtor. Exclusion is meant to facilitate a fair and transparent process.

54. The provision after the amendment speaks of invocation by a creditor. The manner of invocation can never be a factor for the adjudicating authority to

adjudge, as against its existence. Adequate importance will have to be given to the latter part of the provision which also disqualifies a person whose liability under the personal guarantee executed in favour of a creditor, remains unpaid in full or in part for the amount due from him, upon invocation.

55. It is quite obvious that a resolution applicant, other than a financial creditor under Section 7, an operational creditor under Section 8 and a corporate debtor under Section 10, can ever have an independent right to insist for the protection of its own interest in the resolution process. Thus, Section 29A has a laudable object of protecting and balancing the interest of the committee of creditors and the corporate debtor, while shutting the doors to canvas the interests of others. That is the reason why it consciously excludes certain categories of persons. We may add that Section 29A(h) foresees the creditors who are otherwise either already under the insolvency resolution process or are entitled to go under it.

56. Yet another issue which requires consideration is to the date of reckoning *qua* the provision. That is, the date of submission of resolution plan or the date of adjudication by the authority. Having understood the provision and the objective behind it, as well as the Code, it is clear that, if there is a bar at the time of submission of resolution plan by a resolution applicant, it is obviously not maintainable. However, if the submission of the plan is maintainable at the

time at which it is filed, and thereafter, by the operation of the law, a person becomes ineligible, which continues either till the time of approval by the CoC, or adjudication by the authority, then the subsequent amended provision would govern the question of eligibility of resolution applicant to submit a resolution plan. The resolution applicant has no role except to facilitate the process. If there is ineligibility which in turn prohibits the other stakeholders to proceed further and the amendment being in the nature of providing a better process, and that too in the interest of the creditors and the debtor, the same is required to be followed as against the provision that stood at an earlier point of time. Thus, a mere filing of the submission of a resolution plan has got no rationale, as it does not create any right in favour of a facilitator nor it can be extinguished. One cannot say, what is good today cannot be applied merely because an applicant was eligible to submit a resolution plan at an earlier point of time. It is only a part of procedural law. We quote with profit the decision in Ebix Singapore Pvt. Ltd. vs. COC of Educomp Solutions Ltd., 2021 SCC OnLine 707:

> "130. The CoC even with the requisite majority, while approving the Resolution Plan must consider the feasibility and viability of the Plan and the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53 of the IBC. The CoC cannot approve a Resolution Plan proposed by an applicant barred under Section 29A of the IBC. Regulation 37 and 38 of the CIRP Regulations govern the contents of a Resolution Plan. Furthermore, a Resolution Plan, if in compliance with the mandate of the IBC, cannot be rejected by the Adjudicating Authority

> and becomes binding on its approval upon all stakeholders - including the Central and State Government, local authorities to whom statutory dues are owed, operational creditors who were not a part of the CoC and the workforce of the Corporate Debtor who would now be governed by a new management. Such features of a Resolution Plan, where a statute extensively governs the form, mode, manner and effect of approval distinguishes it from a traditional contract, specifically in its ability to bind those who have not consented to it. In the pure contractual realm, an agreement binds parties who are privy to the contract. In the context of a resolution Plan governed by the IBC, the element of privity becomes inapplicable once the Adjudicating Authority confirms the Resolution Plan under Section 31(1) and declares it to be binding on all stakeholders, who are not a part of the negotiation stage or parties to the Resolution Plan. In fact, a commentator has noted that the purpose of bankruptcy law is to actually solve a specific 'contracting failure' that accompanies financial distress. Such a contracting failure arises because "financial distress involves too many parties with strategic bargaining incentives and too many contingencies for the firm and its creditors to define a set of rules of every scenario." Thus, insolvency law recognizes that parties can take benefit of such 'incomplete contract' to hold each other up for their individual gain. In an attempt to solve the issue of incompleteness and the hold-up threat, the insolvency law provides procedural protections i.e., "the law puts in place guardrails that give the parties room to bargain while keeping them from taking position that veer toward extreme hold up"

ON MERIT

57. Having discussed Section 29A(h) of the Code as we understood, we shall now go into the facts of the instant case.

58. Admittedly, the Respondent No.3 has executed personal guarantees which were invoked by three of the financial creditors even prior to the application filed. The rigor of Section 29A(h) of the Code obviously gets attracted. The eligibility can never be restricted to the aforesaid three creditors, but also to other financial creditors in view of the import of Section 7 of the Code. In the

case at hand, in pursuance to the invocation, an application invoking Section 7 indeed was filed by one such creditor. It was invoked even at the time of submitting a resolution plan by the Respondent No.3. Thus, in the touchstone of our interpretation of Section 29A(h), we hold that the plan submitted by the Respondent No.3 ought not to have been entertained.

59. The adjudicating authority and the appellate tribunal were not right in rejecting the contentions of the appellant on the ground that the earlier appeals having been withdrawn without liberty, the issue *qua* eligibility cannot be raised for the second time. Admittedly, the appellant was not a party to the decision of the adjudicating authority on the first occasion, in the appeal the appellant merely filed an application for impleadment. The appellate authority did not decide the matter on merit. In fact, the question of law is left open. The principle governing *res judicata* and *issue estoppel* would never get attracted in such a scenario. Thus, the reasoning rendered by the appellate tribunal to that extent cannot be sustained in law.

60. On the question of limitation, we are in agreement with the views expressed by the adjudicating authority as confirmed by the appellate tribunal. There were earlier rounds of litigation with the interim orders. The delay of 106 days has been rightly condoned and excluded by the adjudicating authority by invoking Section 12(3) of the Code. It was done only on one occasion. The adjudicating

authority was right in holding that there is a marked difference between extension and exclusion. Exclusion would come into play when the decision is challenged before a higher forum. Extension is one which is to be exercised by the authority constituted.

61. Having held so, we would like to come to the last part of our order. Though the very resolution plan submitted by the Respondent No. 3, being ineligible is not maintainable, much water has flown under the bridge. The requisite percentage of voting share has been achieved. We may also note that the percentage has been brought down from 75% to 66% by way of an amendment to Section 30(4) of the Code.

62. Secondly, majority of the creditors have given their approval to the resolution plan. The adjudicating authority has rightly noted that it was accordingly approved after taking into consideration, the techno-economic report pertaining to the viability and feasibility of the plan. The plan is also put into operation since 18.04.2018, and as of now the Respondent No. 1 is an on-going concern. Though, the Respondent No.11 has taken up the plea that its offer was conditional, it has got a very minor share which may not be sufficient to impact by adding it with that of the appellant and Respondent No.7. The Respondent No.7 and the Respondent No.11 did not choose to challenge the order of the appellate tribunal.

63. We need to take note of the interest of over 23,000 shareholders and thousands of employees of the Respondent No.1. Now, about Rs. 300 crores has also been approved by the shareholders to be raised by the Respondent No.1. It is stated that about Rs. 63 crores has been infused into the Respondent No.1 to make it functional. There are many on-going projects of public importance undertaken by the Respondent No.1 in the nature of construction activities which are at different stages.

64. We remind ourselves of the ultimate object of the Code, which is to put the corporate debtor back on the rails. Incidentally, we also note that no prejudice would be caused to the dissenting creditors as their interests would otherwise be secured by the resolution plan itself, which permits them to get back the liquidation value of their respective credit limits. Thus, on the peculiar facts of the present case, we do not wish to disturb the resolution plan leading to the on-going operation of the Respondent No.1.

65. The appeal stands disposed of. Accordingly, all applications stand disposed of. No costs.

……J.
(SANJAY KISHAN KAUL)

……J.
(M.M. SUNDRESH)

New Delhi,
January 18, 2022

$~J-2 to 7

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

% *Judgment reserved on 09.08.2021*
Judgment pronounced on 19.01.2022

\+ **ITA 68/2021 & CM No. 9319/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI .....Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **ITA 69/2021 & CM No. 9322/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI .....Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **ITA 70/2021 & CM No. 9346/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3,

NEW DELHI .....Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **ITA 71/2021 & CM No. 9352/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI .....Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **ITA 72/2021 & CM No. 9355/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI .....Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advs. with Mr Mahesh

Agarwal, Mr Rishi Agrawala, Mr Karan Luthra, Mr Sameer Rohatgi & Mr Ankit Banati, Advs.

\+ **ITA 73/2021 & CM No. 9356/2021**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)- 3, NEW DELHI .....Appellant

Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

M/S AGSON GLOBAL PVT. LTD. .....Respondent

Through: Mr B.B Gupta, Senior Adv. with Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Mr. Sameer Rohatgi, Mr. Karan Luthra, and Mr. Ankit Banati, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J.:

TABLE OF CONTENTS

Preface:-

1. These appeals, which are six in number, are preferred under Section 260A of the Income Tax Act, 1961 [hereafter referred to as "the Act"] and are directed against a common order dated 31.10.2019, passed by the

Income Tax Appellate Tribunal [in short "the Tribunal"].

1.1 The Tribunal, *via* the impugned order, rendered a decision in twelve appeals out of which six were preferred by the respondent i.e., Agson Global Pvt. Ltd. [hereafter referred to as "assessee"], while the remaining six appeals were preferred by the appellant [hereafter referred to as "revenue"].

1.2. The impugned order concerned six assessment years [in short "AYs"] i.e., 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017 and 2017-2018.

2. The record shows that the Tribunal was, principally, grappling with three broad issues. These issues concerned additions/deletions made to the declared/returned income of the assessee under the following broad heads:

(i) Additions *qua* amounts received by the assessee in the form of share capital/share premium under Sections 68 of the Act.

(ii) Deletions made on account of alleged bogus purchase transactions. Under this head, the Assessing Officer ruled that 25% of the bogus purchases in value should be added to the assessee's declared/returned income.

(iii) Addition made, under Section 68 of the Act, in respect of monies deposited by the assessee with its banker during the demonetization period.

2.1. Insofar as issue nos. (i) and (ii) are concerned, they were common to all six AYs, referred to hereinabove. However, insofar as issue no. (iii) is concerned, it arises only in AY 2017-2018. In this regard, it requires to be noticed that demonetization was brought about on 08.11.2016 and the period of demonetization spanned between 09.11.2016 and 30.12.2016.

2.2. Therefore, we would be dealing with submissions and counter-submissions of parties bearing in mind the aforesaid issues and the fact as to

whether or not substantial questions of law have arisen which require consideration and/or adjudication.

Background:-

3. Before we proceed further, certain facts and circumstances, in the backdrop of which the above-captioned appeals have been lodged, are required to be noticed.

3.1. The assessee had filed its return of income *qua* AY 2012-2013 under Section 139 (1) of the Act on 31.10.2013. In this return, the assessee had declared its income as Rs.6,02,85,750/-. The Assessing Officer [in short "A.O."] passed an assessment order under Section 143(3) of the Act, on 24.03.2015. *Via* the said assessment order, the A.O. made an addition of Rs.18,50,00,000/- to the declared/returned income of the assessee on account of "unexplained share capital and share premium". Resultantly, the assessed income shot up to Rs.24,52,85,750/-. Being aggrieved, the assessee preferred an appeal. The CIT(A), vide order dated 31.03.2016, deleted the aforesaid addition. Pertinently, the revenue did not carry the matter further. Consequently, the assessment proceedings vis-à-vis AY 2012-2013, stood concluded.

3.2. Likewise, for AYs 2013-2014 and 2014-2015, the A.O. passed assessment orders under Section 143(3) of the Act, whereby the income declared/returned by the assessee was accepted. The assessment order *qua* AY 2013-2014 was passed on 31.03.2016. The assessed income, which was also the declared/returned income, was pegged at Rs.7,22,89,816/-. Similarly, for AY 2014-2015, the assessment order was passed on 28.12.2016 and the assessed income, which was also the declared/returned

income, was pegged at Rs.3,16,41,113/-.

3.3. Insofar as the remaining three AYs are concerned i.e., 2015-2016, 2016-2017 and 2017-2018, even while the returns filed by the assessee were pending assessment, a search and seizure operation was carried out *qua* the assessee on 21.03.2017. For ease of reference, as regards these three AYs, the details as to when returns were filed and the amount which was declared as income by the assessee is set forth hereafter:

AY	**Date of return of income**	**Amount Declared/Returned as Income**
2015-2016	30.03.2017	Rs.15,87,75,950/-
2016-2017	29.12.2017	Rs.35,50,09,894/-
2017-2018	29.12.2017	Rs.68,18,55,980/-

3.4. Thus the position which emerged *qua* each of the six AYs, once additions/deletions were made by the AO, and thereafter, when some of these were deleted/scaled down by CIT(A), is set forth hereafter:

Particulars	Assessment Years					
	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
ITA No.	69/2021	71/2021	72/2021	73/2021	70/2021	68/2021
Date of filing of return of income	31.10.2013	11.03.2015	01.04.2015	31.03.2017	29.12.2017	29.12.2017
Addition u/s 68 on a/c of share capital/premium:						
(i) Unrelated parties	48,19,87,000	NA	NA	NA	NA	NA
(ii) From alleged associated parties:						
- M/s. Mahalaxmi	14,92,00,000	NA	NA	NA	NA	NA

Traders - M/s. Sri Balaji Enterprise	NA	15,20,00,000	NA	NA	NA	NA
- M/s. Vishal Traders	NA	34,79,50,000	65,30,99,000	24,81,49,800	17,86,74,750	NA
- Rustagi Exim P. Ltd	NA	NA	09,55,55,000	11,60,00,100	37,60,99,650	52,23,87,900
- M/s. Vikas International	NA	NA	06,48,90,000	NA	NA	NA
(iii)From alleged unknown parties	02,31,66,700	NA	NA	NA	NA	NA
Total addition	65,43,53,700	49,99,50,000	81,35,44,000	36,41,49,900	55,47,74,400	52,23,87,900
Alleged commission expenses @ 2% on the above	01,30,87,074	99,99,000	1,62,70,880	72,82,998	01,10,95,488	01,04,47,758
Total addition u/s 68 on account of share capital/ premium (1)	66,74,40,774	50,99,49,000	82,98,14,880	37,14,32,898	56,58,69,888	53,28,35,658
Disallowance of alleged bogus purchases (being 25% of purchases from alleged related parties) (2)	88,31,23,282	65,25,24,882	179,46,43,207	2,67,93,04,397	2,99,56,36,930	1,21,763
Addition u/s 68 on a/c of cash deposited in bank a/c post demonetisation (3)	NA	NA	NA	NA	NA	150,53,24,000
Total Additions (1+2+3)	1,55,05,64,056	1,16,24,73,882	2,62,44,58,087	3,05,07,37,295	3,56,15,06,818	2,03,82,81,421
Income as per Return (4)	6,02,85,750	7,22,89,816	13,16,41,113	15,87,75,950	35,50,09,894	68,18,55,980
Assessed Income	1,61,08,49,806	123,47,63,69	275,60,99,20	3,20,95,13,24	3,91,65,16,	2,72,01,37,4

(1+2+3+4)		8	0	5	712	01

AY	Addition u/s 68 on a/c of share capital/ premium & alleged commission expenses @ 2% thereon		Disallowance on a/c of alleged bogus purchases	
	Made by the A.O.	Sustained by the C.I.T.(A)	Made by the A.O.	Sustained by the C.I.T.(A)
2012-13	66,74,40,774	66,74,40,774	88,31,23,282	54,43,23,729
2013-14	50,99,49,000	50,99,49,000	65,25,24,882	23,50,36,945
2014-15	82,98,14,880	82,98,14,880	1,79,46,43,207	54,71,66,863
2015-16	37,14,32,898	37,14,32,898	2,67,93,04,397	72,00,54,941
2016-17	56,58,69,888	56,58,69,888	2,99,56,36,930	1,08,45,52,031
2017-18	53,28,35,658	53,28,35,658	1,21,763	4,87,053
Total	**3,47,73,43,098**	**3,47,73,43,098**	**9,00,53,54,461**	**3,13,16,21,562**

4. The record shows that, during the search and seizure operations, the statement of the Managing Director, Mr Arpesh Garg was recorded under Section 132(4) of the Act. The assessment was made under Section 153A of the Act.

4.1. It is also relevant to note that the statement made by Mr Arpesh Garg i.e., the Managing Director of the assessee on 22.03.2017 (which is referred to above) was retracted by him on 24.03.2017, that is, within two days.

4.2. What is of some significance is that a deviation report dated 20.12.2018 was prepared by the AO, which was, markedly different from the assessment orders passed by him. This aspect of the matter has been adverted to at great length by the Tribunal in the impugned order and shall also be alluded to by us in the latter part of the judgment.

4.3 Suffice it to state that the Deputy Director of Investigation Wing had submitted a written appraisal report on 04.01.2018. Despite the stand taken by the Deputy Director (Investigation) in the appraisal report and the communication dated 24.12.2018, at the meeting held on 28.12.2018, the AO and the Assistant Commissioner of Income Tax (ACIT) reiterated the

position taken in the deviation report.

4.4 Briefly, in the deviation report, the AO concluded that since the source of the cash movement concerning receipt of money by the assessee in the form of share capital/share premium amounting to Rs.365.28 crores was traceable directly to the assessee's bank accounts, the addition of the said sum was not justified.

4.5 Likewise, insofar as the issue concerning addition of Rs.941.86 crores *qua* bogus purchases was concerned, the AO in the deviation report made the following significant observations:

(i) Contrary to what the appraisal report had held, all purchases made by the assessee were not bogus.

(ii) 50% of the purchases were verified by issuing notices under Section 133(6) of the Act. Qua them, confirmatory letters, as well as copies of the ledger accounts, were presented by the assessee. In respect of these, no variation was found.

(iii) If the value of such purported bogus purchases, as noticed in the appraisal report, was taken into account and juxtaposed against sales booked against the very same persons- it would show that the assessee has, in fact, declared a profit. In other words, if transactions with such parties are treated as bogus purchases, the profit reflected in the books will have to be reduced. The rationale given was that one cannot disallow bogus purchases and at the same time treat the sales with the same parties as genuine and bring the same to tax. Therefore, the suggestion made in the appraisal report that an *ad hoc* addition of 25% should be made to the income on account of such bogus purchases, may ultimately be detrimental to the interest of the revenue, if the sale is also to be treated as bogus.

(iv) Reference was made to the transactions arrived at with three entities by the assessee in the financial year 2016-2017. It was noticed that similar transactions made with the same or different parties that were bogus transactions, is something which obtained strength from the fact that stock worth Rs.450 crores, was found short, although the same stood recorded in the books of accounts. In sum, the conclusion reached was that the books of accounts were not genuine and were liable to be rejected under Section 145(3) of the Act and thereafter a gross profit rate had to be estimated on a reasonable basis keeping in mind the prevailing market trend.

4.6 As regards cash deposits made by the assessee during the demonetization period; against a proposal to add Rs.180.53 crores, as suggested by the Investigation Wing, for the reasons given in the deviation report, the amount was pared down to Rs.99.04 crores. Thus, the suggested addition on this score to the total income of the assessee concerning AY 2017-2018 was restricted to Rs. 99.04 crores.

5. At this juncture, it would be relevant to note that the revenue, upon queries being raised by the Tribunal concerning various issues including the basis on which the deviation report had been prepared in the instant matter, was told in no uncertain terms that preparation of a "deviation note" is part of the assessment proceedings as per the guidelines envisaged in the Income Tax Manual of Office Procedure: Vol.-II (Technical, Chapter-3, paragraph 4 at page 44) (see paragraph 51 of the impugned order passed by the Tribunal).

5.1. Furthermore, the Tribunal, in paragraph 92 of the impugned order, after perusal of the appraisal report prepared by the Investigation Wing, has made the following observations :

> "*Appraisal report was produced before the bench and it was found that in para no.4.3.7, the Investigation Wing has mentioned that the above addition*[1] *is required to be made in order to protect the interest of the revenue....*"

5.2. The Tribunal, however, *via* the impugned order, even deleted the scaled-down addition made by the CIT(A) of Rs.73.13 crores concerning AY 2017-2018 in respect of cash deposits made with the bank during the demonetization period. Consequently, the Tribunal partially allowed the six appeals filed by the assessee while dismissing the six appeals preferred by the revenue.

6. It is in these circumstances that the revenue has preferred the instant appeals.

7. Submissions on behalf of the revenue were advanced by Mr Ajit Sharma, learned senior standing counsel, while insofar as the assessee is concerned, arguments were advanced by Mr Mukul Rohtagi, learned senior counsel, instructed by Mr Mahesh Agarwal.

Submissions on behalf of the revenue:-

8. Insofar as Mr Sharma is concerned, the arguments advanced by him can be, broadly, paraphrased as follows :

(i) That the assessment orders passed in each of the aforementioned assessment years ought to have been sustained by the Tribunal.

(ii) The Tribunal lost sight of the fact that most of the entities which had invested amounts in the form of share capital/share premium in the assessee had no resources of their own. All told about 50 entities had invested a huge

[1] made with respect to bogus purchases

amount in the form of share premium at the rate of Rs.9,990/-, while they were sold at an appreciably low premium ranging between Rs.70 to Rs.80 per share.

(iii) The Tribunal also failed to take into account the true import and effect of the statement made by an accommodation entry provider i.e., one, Shri Praveen Aggarwal who had denied having made any investment in the assessee. This statement pointed in the direction that the monies which ostensibly had been invested in the assessee in the form of share capital/share premium were unaccounted funds of the assessee routed through accommodation entry providers.

(iv) The Tribunal erred in not taking into account the fact that the CIT(A) had concluded that incriminating material had been recovered during the search carried out by the revenue. Therefore, the Tribunal had erred in applying the ratio of the judgment of the Division Bench of this Court rendered in ***Commissioner of Income Tax (Central)-III v. Kabul Chawla***, 2015 SCC OnLine Del 11555, and, thus, wrongly concluded that insofar as AYs 2012-2013 to 2014-2015 was concerned, those assessments could not be disturbed.

(v) The Tribunal also erred in ignoring concurrent findings returned by, both, the A.O. and the CIT(A) that the investor entities had not been able to establish their creditworthiness, and, thus, the ostensible investment made in the assessee was a sham transaction. The fact that the investor entities had returned borrowed funds, as claimed by the assessee, did not add to their creditworthiness.

(vi) Although the Tribunal relied upon certain parts of the deviation report to set aside the conclusions reached by the A.O. and the CIT(A), it

erroneously chose to ignore the conclusion arrived at in the deviation report that the assessee had not been able to account for Rs.99.04 crores which had been deposited by it, in the wake of demonetization.

(vii) Likewise, the Tribunal also failed to take note of the observations made in the deviation report that instead of adding the entire share premium received by the assessee, only that share premium ought to be added under Section 68 of the Act where money was not sourced from the assessee. In support of this plea, reliance was placed on paragraph 3(ix) of the deviation report.

(viii) The deviation report categorically rejected the assessee's books of accounts while considering the issue regarding bogus purchases. In this context, the deviation report also emphasized the fact that stock worth Rs.450 crores, was short, as against that which was recorded in the assessee's books of accounts.

(ix) The Tribunal failed to consider that the CIT(A), while discussing the issue concerning bogus sales had reached the following conclusions (even while reducing the addition made by the A.O. in this respect) : (a) that the assessee had booked a loss when it traded with related parties, however, when it was trading with non-related parties, the assessee had reported a profit of approximately 9% per annum. (b) the assessee had entered into artificial transactions to suppress profit; this conclusion was reached by CIT(A) after considering the remand report and the statement of Mr Arpesh Garg i.e., the Managing Director of the assessee.

(x) The Tribunal also failed to appreciate that cash deposits made to the tune of approximately Rs.180 crores post Diwali and/or after demonetization, were unexplained and excessive, as compared to the earlier

years. In this context, reliance was placed on the following information culled out from the record :

Month	FY 2014-15		FY 2015-16		FY 2016-17	
	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits
November	16.49	14.46	45.18	47.12	47.73	113.52
December	22.26	28.08	97.35	94.36	69.83	89.75

Submissions on behalf of the assessee:-

9. Insofar as Mr Rohtagi was concerned, his submissions were broadly the following :

(i) This court had jurisdiction to entertain the instant appeals only if a substantial question of law, and not just any question of law, arises for consideration. The Tribunal was the final fact-finding authority. The Tribunal, having examined the material on record, has correctly concluded that the orders passed by the A.O., which were partially modified by the CIT(A), deserved to be set aside.

(ii) A careful perusal of the deviation report and the assessment orders would show that the A.O. has acted under the dictate of the investigation wing, as noted by the Tribunal in paragraphs 91 and 92 of the impugned order. The additions [qua bogus purchases] were made to the assessee's declared/returned income only to protect the interest of the revenue, as

directed by the investigation wing. On this short ground alone, the assessment orders deserved to be set aside. The A.O. performs a quasi-judicial function, which could not have been interfered with by the revenue i.e., in this case, the investigation wing. [See ***P. Palaniswami v. Shri Ram Popular Service (P) Ltd. & Anr.,*** (1974) 1 SCC 197.]

(iii) In this context, it is important to note that the A.O. had prepared the deviation report dated 20.12.2018, after perusing the appraisal report generated by the investigation wing pursuant to the search and seizure operation carried out *vis-a*-vis the assessee on 21.03.2017. The deviation report prepared by the A.O. had received the approval of the ACIT, despite which the A.O. reversed its position while passing the assessment orders, as alluded to above, at the say-so of his superiors who were part of the investigation wing. In this context, reliance was placed on the letter dated 24.12.2018 addressed by the Deputy Director of Income Tax (Investigation) to the ACIT.

(iv) Insofar as the merits of the matter are concerned, it was submitted that the addition made by the A.O. on account of share capital/share premium (along with supposed commissions paid by the assessee), was rightly deleted by the Tribunal as it concluded that the monies invested in the assessee were its own money, which had been advanced to the investor entities, who, in turn, had invested the same in the assessee in the form of share capital/share premium. A finding of fact has been returned by the Tribunal that these transactions were carried out, via banking channel, and involved money which was accounted for in the assessee's books of accounts and, therefore, it need not be disturbed.

(v) Insofar as deletion of disallowance on account of bogus purchases

was concerned, the Tribunal has once again reached a correct conclusion. The Tribunal, after considering the material on record, reached a finding that no evidence of bogus purchases could be found during the search and seizure action. The Tribunal noted that the statement made by the Managing Director of the assessee had been retracted within 48 hours, and, therefore, could not form the basis of addition in respect of "abated years". Furthermore, the Tribunal correctly concluded that, while disallowing the purported bogus purchases, it had ignored the sales made against such purchases. According to the Tribunal, if sales were taken into account, it would be seen that the assessee had returned a profit on these transactions. Besides this, it needs to be appreciated (as noted by the Tribunal) that the purported bogus purchases were backed by bills and vouchers and details entered in the assessee's stock register. The assessee's books of accounts, which were duly audited, reflected these transactions. The assessee had proved the validity of these transactions by relying upon the balance sheet(s) and profit and loss account(s) of third parties. Importantly, as noted by the Tribunal, the revenue had failed to take into account—stock worth nearly Rs.450 crores, which was lying at the assessee's Sonipat godown.

(vi) As regards deletion of addition made on account of cash deposited by the assessee with its banker post demonetization, the Tribunal, on carrying out an analysis of the transactions made during the relevant period, came to the conclusion that the cash deposited aligned with the cash sales effected by the assessee during the said period. As noted by the Tribunal, there was no evidence available on record which would persuade it to hold that the assessee had booked non-existent sales. Furthermore, as noted by the Tribunal, the A.O., while making the addition under this head, erroneously

added Rs.63.41 crores, which included new currency notes of denomination of Rs.2,000 and Rs.500 and old currency notes bearing the denomination of Rs.100/-, Rs.50/-, Rs.20/- and Rs.10/-; which had not been demonetized. The Tribunal also noted, in this context, that the A.O. had failed to take into account that the period in issue spanned between 9.11.2016 and 30.12.2016, and, therefore, the total amount worked out to Rs.175.57 crores and not 180.53 crores, which was the sum that the A.O. sought to add to the assessee's declared/returned income. Thus, in effect, the Tribunal concluded that no addition could be made even under this head.

Analysis and Reasons:-

10. We have heard the learned counsel for the parties and perused the record.

10.1. According to us (as noted at the very outset), there are three heads under which the authorities below have dealt with the assessee's case concerning the six AYs, in issue. But before we move further, as noted by us right at the beginning of our discussion, amongst the six AYs, in three AYs i.e., 2012-2013, 2013-2014 and 2014-2015, assessment orders were passed under Section 143(3) of the Act. Insofar as AY 2012-2013 was concerned, the A.O. had sought to add Rs.18.50 crores towards unexplained share capital/share premium; an addition which was set aside by the CIT(A), vide order dated 31.03.2016. Therefore, insofar as these AYs are concerned, the assessed income of the assessee could be disturbed only if incriminating material had been found by the revenue during the search.

10.2. As noted hereinabove, the search and seizure operation was carried on 21.03.2017. During the search and seizure operation, the statement of the

Managing Director of the assessee i.e., one Mr Arpesh Garg was recorded, under Section 132(4) of the Act. This statement was recorded on 22.03.2017. Mr Arpesh Garg retracted his statement on 24.03.2017.

10.3. It is, therefore, relevant to note, at this juncture, as to what exactly Mr Arpesh Garg stated in his statement recorded under Section 132(4) of the Act, and in the letter dated 24.03.2017, whereby he retracted his statement. A careful perusal of the extract of the statement made by Mr Arpesh Garg, Managing Director of the assessee (as recorded in the assessment orders in-issue) would show that all that he had stated was that it was the assessee's own money, given in the form of loan and/or bogus sales or purchases, that had been routed back to the assessee in the form of share capital/share premium, *albeit*, through banking channels.

10.4. The Tribunal, in this context, records a finding of fact that "no unaccounted income of the assessee" had been introduced in its books of accounts in the form of share capital. Based on this, the Tribunal concluded that there was "no confession" made by Mr Arpesh Garg that unaccounted income had been introduced by the assessee in the form of share capital. Therefore, according to the Tribunal, the statement made under Section 132(4) of the Act did not constitute incriminating material.

10.5. Likewise, insofar as the retraction (as noted above) was concerned, the Tribunal noted that in the letter dated 24.03.2017, it had only been indicated that to avail benefits under the Pradhan Mantri Garib Kalyan Yojna (PMGKY) Scheme, it had offered to pay tax on Rs.50 crores, which was later modified to Rs.30 crores. The Tribunal notes that there was no disclosure concerning share capital, and, hence, the aforementioned statement, which formed part of the letter dated 24.03.2017, could not be

treated as incriminating material.

10.6. Insofar as the revenue sought to argue that photocopies of (blank) share transfer forms, (blank) signed receipts, (blank) signed power of attorney and other documents necessary for the transfer of shares was concerned- that the said documents constituted incriminating material, the Tribunal noted the following :

(i) Firstly, out of the 36 shareholders, photocopies were found only *qua* 12 shareholders.

(ii) Secondly, that such transfer forms and documents even when recovered in original, as per its [i.e., the Tribunal] own precedents[2], had not been considered as incriminating material to unravel a concluded assessment.

(iii) Thirdly, photocopies do not constitute primary evidence and, in the absence of any other material, it could not be treated as secondary evidence as well. Importantly, it was not the stand of the revenue that the photocopy had been made from an original document.

(iv) Lastly, the revenue ought to have summoned all those investors who ostensibly had executed the documents, whose photocopies were produced, to substantiate its stand that they constituted incriminating material.

10.7 Based on the aforesaid, the Tribunal concluded that since for AYs 2012-2013, 2013-2014 and 2014-2015, no incriminating material concerning

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[2] See ***ACIT, Central Circle-5, New Delhi vs M/s Gee Ispat Pvt. Ltd.***, A-28, Sector 19, Rohini, Delhi-110085, passed in ITA Nos. 4256-59/Del/2014, dated 31/5/2018; ***M/s Brahmaputra Realtors (P) Ltd. vs Dy. Commissioner Of Income-Tax*** 2018 (3) TMI 1598 - ITAT Delhi; ***M/s M.L. Singhi & Associates (P) Ltd. vs Deputy Commissioner Of Income Tax, Central Circle-7, New Delhi***, 2018 (10) TMI 50 - ITAT Delhi; ***M/s Galaxy Rice Industries Pvt. Ltd. vs. D.C.I.T., Central Circle, Karnal,*** passed in ITA Nos.1451-53/Del/2013, dated 1/3/2018

the share capital was found, no additions could have been made by the revenue.

10.8 As noted above, a coordinate bench of this court in the ***Kabul Chawla*** case on the aspect concerning the jurisdiction tax authorities to disturb the concluded assessments has made the following observations:

> *"37.....vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."*

First Issue

11. Therefore, having regard to the aforesaid observations made in ***the Kabul Chawla*** case, the only aspect that the Tribunal had to examine was whether the statement made by Mr Arpesh Garg, Managing Director of the assessee under Section 132(4) of the Act and the photocopies of the documents found during the search and seizure action constituted incriminating material.

11.1. The Tribunal, in our view, has correctly analysed the statement of Mr Arpesh Garg. The statement does not allude to the fact that the assessee had introduced "unaccounted money" in the form of share capital/share premium through investor entities. The retraction letter, as noted by the Tribunal, also did not advert to the introduction of investment of money in the assessee in the form of share capital/share premium.

11.2. Furthermore, as noticed above, based on past precedents, the Tribunal noted that the photocopies of documents such as blank share transfer forms,

blank receipts and blank power of attorney did not constitute incriminating material. Mr Sharma was not able to draw our attention to any authority, which has taken a contrary view. According to the Tribunal, even in those cases where originals of such documents were found, they were not construed as incriminating material, based on which assessment could be made under Section 153(A) read with Section 143(3) of the Act. Significantly, the revenue chose not to examine those, who had ostensibly executed these documents. It was not argued before us that the finding returned by the Tribunal on this aspect of the matter was perverse.

11.3. Thus, having regard to the aforesaid, we concur with the view of the Tribunal that assessments concluded in respect of AYs 2012-2013, 2013-2014 and 2014-2015 under Section 143(3) of the Act could not be disturbed, as no incriminating material was found.

11.4. Besides this, on merits, the Tribunal, after detailing out in paragraph 76 of the impugned order the trail of the money received from various entities in the form of share capital/share application money, concluded that the assessee had been able to place before the A.O. sufficient documentary evidence which established that the money which the assessee had paid to the investor entities was routed back to it in the form of share capital/share premium.

11.5. That being the position, the Tribunal concluded that the assessee had been able to prove the identity of the investors, their creditworthiness and genuineness, which are the ingredients of Section 68 of the Act. The relevant observations made in paragraph 86 by the Tribunal read as follows :

> *"86. Considering the facts of the case in the light of material on record in voluminous paper books and confirmations of the parties*

and the summary of transfer of funds reproduced above, it is clear that assessee produced sufficient documentary evidences before the A.O. to prove that money routed from the assessee itself which came back to the assessee in the form of share capital/premium, therefore, assessee proved identity of the Investors, their creditworthiness and genuineness of the transaction in the matter and as such have been able to prove ingredients of Section 68 of the I.T. Act. The A.O. however did not make any further enquiry on the documentary evidences filed by the assessee. The A.O. did not verify the trail of the source of funds received by assessee through various entities as explained above. We may also note that during the course of hearing of these appeals, A.O. was present in the Court, but, did not make any adverse comment upon the documentary evidences filed in the paper book filed by the assessee. The A.O. thus, failed to conduct scrutiny of the documents at assessment stage and merely suspected the transaction between the Investor Companies and the assessee company despite the fact that in the deviation report the A.O. expressed doubts in making addition into the matter. It may also be noted here that no cash have been reported to have been deposited in the accounts of the assessee, the Investor Companies and other related parties. Considering the totality of the facts and circumstances of the case and material on record, we are of the view that assessee has been able to prove that it has received genuine amounts which is routed through various companies. Therefore, there was no justification to make any addition under section 68 of the I.T. Act."

11.6. The moot point which the Tribunal, thus, dealt with, as noted by us hereinabove, was- that as long as there was no material on record which established that unaccounted money (i.e., income generated which was not recorded in the books of accounts) had been funnelled in the form of investment by way of share capital/share premium, it could not be made the basis for making addition under Section 68 of the Act.

11.7. It is important to bear in mind that Section 68 empowers the AO (provided all others ingredients are met) to tax credits found in the books of

accounts maintained by the assessee for any previous year, for which he offers no explanation about its nature and source. The first proviso, which was inserted by Finance Act, 2012 in the context of share application money, share capital, share premium or any other amount by whatever name called, engrafted a deeming section as to when the explanation would be considered satisfactory. Pertinently, motivation of the assessee in routing its own money (which was given to the investor entities in the form of loan, etcetera) as an investment in share capital/share premium has not been adverted to therein. That motivation is not the basis for attracting the provisions of the Income Tax Act, if otherwise, an assessee does not fall within its net, is a well-established principle. This principle, in our view, should also apply to Section 68 of the Act. [See ***Aruna Group of Estates, Bodinayakanur v. State of Madras***, 1961 SCC OnLine Mad 252[3];

[3]"……The Tribunal seems to have been considerably obsessed by the supposed motive of Subbaraj and his sons of lessening the incidence of taxation in holding that there was no partition between them. A partition cannot be vitiated by a bad motive or a *mala fide* object. It may be an obstacle to a creditor seeking remedies in the execution of a decree or to a taxing authority levying a tax but nonetheless it is effective and cannot be put aside. Let us assume that Subbaraj and his sons desired to lighten their tax burden by exercising their undoubted right to disrupt the joint family, and let us also assume that the giving effect to the partition will reduce their tax liability. But there is nothing wrong or illegal about it. Avoidance of tax is not tax evasion and it carries no ignominy with it for it is sound law and, certainly, not bad morality for anybody to so arrange his affairs as to reduce the brunt of taxation to a minimum.....

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The next question for consideration is whether registration can be refused on the ground that Suppan Chettiar's sons have not validly derived their respective shares by any transfer of title from Suppan Chettiar. It is true that the only evidence on record which enables the sons of Suppan Chettiar to claim his share is the letter already referred to. It is always open to any partner to retire from the firm yielding his place to his nominee or nominees. If all the other partners of the firm agree to this retirement and substitution of the new partner or partners, a new partnership springs into existence. The absence of any valid document of transfer from Suppan Chettiar to his sons, we do not say that the letter of Suppan Chettiar is not enough, cannot really affect the question whether the sons of

Commissioner of Income-tax v. A. Raman & Co. [1968] 67ITR11 (SC)[4]; ***Commissioner of Income-Tax v. T.K.E. Ibrahimsa Routher***, 1928 SCC OnLine Mad 21[5]; ***S. Raghbir Singh Sandhawalia v. Commissioner of Income-tax*** [1958] 34 ITR 719 (Punjab & Haryana)[6].]

Suppan Chettiar became partners of the new partnership each holding 1/48 share. The terms of the partnership deed dated 23rd November, 1955, do not indicate that the sons of Suppan Chettiar were mere dummies either for the other partners or for Suppan Chettiar, who was not *eo nomine* a partner.

The formation and constitution of a partnership can in no way be affected by the fact that one of the partners is a benamidar for a stranger or that a partner holds his share as a manager of his joint family, or that a partner has agreed to give a portion of his share to another by constituting a sub-partnership with him. These are Incidents which are outside the scope of partnership arrangement and have no bearing on the truth or reality of the partnership as such…"

[4] "….Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented….."

[5] "……There can be no question also in this case of the motives of the assessee in bringing about a particular arrangement, because as has been pointed out by the House of Lords in more than one case it is not proper to take such motives or objects into consideration, and a subject is entitled, if he can in any legal manner, to circumvent the incidents of a particular taxing or financing Act.
…..No doubt as indicated in the question itself the land subject to the mortgage is leased back again by the mortgagee to the mortgagor and therefore even reading both the instrument of mortgage and the instrument of lease together as indicated by the Judicial Committee in *Abdullah Khan* v. *Basharat Husain*(1) it must appear that the amount sought to be assessed is legally only rent. If it be rent and in this case these is nothing to show that it is anything else, then on the considerations set out already it follows that it is not assessable."

[6] "….A taxpayer has full liberty to decrease what otherwise would be his taxes, or altogether to avoid them, by means which the law allows. The fact that a certain transaction has been entered into with the ulterior object of enabling the taxpayer to avoid payment of income-tax would not render the transaction void, for motive alone cannot make unlawful what the law allows. In such a case the transaction should be

11.8. It may well be that the assessee, by wrongly padding his accounts, has violated other Statutes but that by itself cannot be the reason to make addition under section 68 of the Act. Mr Sharma was not able to demonstrate as to how such a transaction, though rather curious, would come within the ambit of Section 68 of the Act.

12. The other argument of the revenue that once photocopies of documents such as blank share transfer forms, blank receipts and blank power of attorney were found, the onus shifted on to the assessee, in our view, does not have weight, as onus is a relevant factor only till such time the entire evidence is not placed before the adjudicating authority. Since, in this case, according to the Tribunal, the assessee had given its explanation about the nature and source of money; it was incumbent upon the revenue to carry out further investigation to bring it within the ambit of Section 68 of the Act. [See ***Koppula Koteshwara Rao and Anr. v. Dr Koppula Hemantha Rao,*** 2002 AIHC 4950, cited with approval in ***Rangammal v. Kuppuswami*** (2011) 12 SCC 220]

12.1. In this case, insofar as the assessee is concerned, it placed the evidence on record, which established the trail of the money, the mode through which the money had travelled from the assessee to the investor entities and back to the assessee, and the fact that each of the investor

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examined with the object of seeing whether it is in reality what it appears to be in form. As pointed out by an American jurist, purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation. If therefore a taxpayer alters the basic facts affecting his liability to taxation by legal means available to him but for the purpose of avoiding taxation, the court will uphold the changes unless it is satisfied that the changes are not actual, but merely simulated. The question is not whether the motive for the transaction was proper or otherwise but whether what the taxpayer has done actually accomplishes the result anticipated…."

entities was in existence. Therefore, once the assessee claimed (and it was found as a fact) that it was its own money which was routed back to it in the form of share capital/share premium, the traditional test which is sought to be applied by the revenue, for triggering the provisions of Section 68 of the Act, which is, that the assessee had to establish the creditworthiness, genuineness and identity of the transactions would have to adapt to the circumstances obtaining in the present case.

13. Although the judgement of the Bombay High Court in ***Royal Rich Developers Pvt. Ltd. vs. PCIT*** [MANU/MH/3859/2019] was not cited by the revenue before us, it is referred to in the appeal. A perusal of the facts obtaining in that case, whereby addition under Section 68 of the Act was sustained, would show that they are distinguishable from the facts which obtain in the instant matter. In that case, the assessee-company had claimed that it had received money in the form of share capital/share premium from certain investors; however, the assessee was unable to produce before the AO the concerned investors; who had made the investment. Furthermore, during the search action, one of the directors of the assessee had made a categorical statement that the entire investment was bogus and that blank receipts were obtained from shareholders as also signatures were obtained on blank share transfer forms. Pertinently, this statement made by the director of the assessee was not retracted.

13.1. As noticed in the instant matter, the Tribunal found that it was the assessee's money which was routed back to it, albeit, through banking channels. The director of the assessee i.e., Mr Arpesh Garg retracted his

statement, within 48 hours. More importantly, the AO in the deviation report, inter alia, made the following observations :

> *"b) About 50% of the purchases made by the assessee from different persons have been verified by issuing notices u/s 133(6) of the IT Act and on account of confirmatory letters as well as copies of ledger accounts presented by the assessee and no any variation has been found so far."*

13.2. In the backdrop of this, the Tribunal made the following observations:

> *"86. Considering the facts of the case in the light of material on record in voluminous paper books and confirmations of the parties and the summary of transfer of funds reproduced above, it is clear that assessee produced sufficient documentary evidences before the A.O. to prove that money routed from the assessee itself which came back to the assessee in the form of share capital/premium, therefore, assessee proved identity of the Investors, their creditworthiness and genuineness of the transaction in the matter and as such have been able to prove ingredients of Section 68 of the I.T. Act. The A.O. however did not make any further enquiry on the documentary evidences filed by the assessee. The A.O. did not verify the trail of the source of funds received by assessee through various entities…."*

13.3. Therefore, this judgment would have no applicability in the present matter.

14. At this point, it may be relevant to note that, in order to make addition under section 68 of the Act, the following broad principles would have to be borne in mind :

(i) Amounts should be found credited in the books of the assessee.

(ii) The assessee should be unable to offer a satisfactory explanation about the nature and source of the sum so credited.

(iii) The assessee is not able to explain the source of the source.

(iv) The crucial aspect of this exercise is that the initial onus is on the assessee, after the assesse is able to: identify the creditor, show how the creditor acquired the capacity to advance the money and the genuineness of the transaction, which, in this case, would have to viewed from the angle as to how the money circulated from the assessee back to the assessee.

14.1. As noted by us above, there is no finding by the Tribunal that the money which was received by the assessee in form of share capital/share premium constituted the assessee's unaccounted income. [See observations made in ***Principal Commissioner of Income Tax-1 vs. Ami Industries (India) (P.) Ltd.*** [2020] 116 taxmann.com 34 (Bombay)[7]]

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[7] "**13.** Section 68 of the Act deals with cash credits. As per Section 68, where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. Simply put, the section provides that if there is any cash credit disclosed by the assessee in his return of income for the previous year under consideration and the assessee offers no explanation for the same or if the assessee offers explanation which the Assessing Officer finds to be not satisfactory, then the said amount is to be added to the income of the assessee to be charged to income tax for the corresponding assessment year.

14. Section 68 of the Act has received considerable judicial attention through various pronouncements of the Courts. It is now well settled that under section 68 of the Act, the assessee is required to prove identity of the creditor; genuineness of the transaction; and credit worthiness of the creditor. In fact, in *NRA Iron & Steel (P.) Ltd.* (*supra*), Supreme Court surveyed the relevant judgments and culled out the following principles:-

"11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the inquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

15. It is also a settled proposition that assessee is not required to prove source of source. In fact, this position has been clarified by us in the recent decision in *Gaurav Triyugi Singh* v. *ITO* [IT Appeal No. 1750 of 2017, dated 22-1-2020].

16. Having noted the above, we may now advert to the orders passed by the authorities below.

17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds…….

xxx xxx xxx

21…… Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In *NRA Iron & Steel (P.) Ltd.* (*supra*), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case."

14.2. Therefore, on facts, what is crucial is the observations that the AO made in his deviation report, with respect to the share premium/share capital. For the sake of convenience, the same are extracted hereafter :

> *"……i) On verification from records as well as details and evidences filed by the assessee, it is seen that assessment proceeding u/s.143(3) of the Income-tax Act, 1961 was conducted for the Assessment Years 2012-13, 2013-14 and 2014-15 wherein the issues of Share Capital were examined and verified in detail by the Assessing Officer and were partly accepted at that stage.*
> *ii) It has been noticed that the AO had added an amount of Rs.18.50 Crs to the total income of Assessee Company for AY 2012-13 on account of share application & premium. The above addition of Rs. 18.50 Crs was later on deleted by the Ld. CIT (A) after examination of the details filed by the assessee. Since the Ld. CIT (A) being a higher authority had duly examined the amount of Share Capital of Rs.18.50 Crs and allowed relief thereof against which no appeal was preferred by the department before the Income Tax Appellate Tribunal. Therefore, the addition of this amount on the grounds of bogus share capital/premium can only be made in the light of incriminating seized material.*
> *iii) On verification from the balance sheet, the chart prepared is factually incorrect since it has been prepared on the basis of Share Capital allotted in each year in respect of the share capital received for such allotment. After verification the corrected Share application details and share capital received covered during the period are as under:*

Assessment Year	*Amount*
2012-13	*63,12,00,000*
2013-14	*49,99,50,000*

2014-15	*81,35,44,000*
2015-16	*32,36,88,800*
2016-17	*55,47,74,400*
2017-18	*52,23,87,900*

iii) Out of the total sum for the Assessment Year 2012-13 an amount of Rs.14,92,00,000/- was received from M/s. Mahalakshmi Traders being the proprietorship concern of Shri Manoj Gupta. The assessee has filed details during the course of assessment to show that this amount of Rs.14,92,00,000/- was initially paid by the assessee itself to M/s. Mahalakshmi Traders as advance which was returned back by M/s. Mahalakshmi Traders as Share Capital to the assessee company.

In view of the above fact, the source of fund for Share Capital made by M/s. Mahalakshmi Traders was the assessee itself. As such, it cannot be alleged that the said share capital was unexplained/undisclosed income of the assessee to be added u/s. 68 of the Income-tax Act, 1961. These transactions were duly reflected both in the bank account of the assessee and M/s. Mahalakshmi Traders.

iv) Similarly, for the Assessment Year 2013-14, the assessee received Share Capital from Shri Vishal Traders (Prop. Shri Vishal Bhatia) of Rs. 34,79,50,000/- and Shri Balaji Enterprises (Prop. Shri Himanshu Garg) of Rs. 15,12,000/-. As per the details filed by the assessee alongwith books of accounts, the entire sum of Rs. 19,99,50,000 was received by these concerns either directly or indirectly from the assessee-company itself as advances or payments for purchase.

v) As per documents and bank accounts relevant to FY-2016-17, during the year M/s Rustagi Exim Pvt. Ltd. has taken introduced Rs. 52.23 Crs. On examination of the transactions, the assessee company has transferred Rs. 54.56 Crs to M/s Rustagi Exim which has been routed back to the assessee company in the form share application money / premium which

also suggests that sources of funds introduced in the shares is assessee itself.

vi) Similar is the case in the Assessment Years 2014-15, 2015-16, 2016-17 and 2017-18 wherein from the details filed by the assessee it is seen that the ultimate sources of the share application money received by the assessee was from the disclosed sources of the assessee itself. The transactions are verifiable from the bank accounts of the both the parties.

vii) In some cases Assessee Company has routed its own fund directly through the share application money transactions; in those cases sources are apparently proved.

viii) It has also been observed that the assessee company has routed its funds through different intermediaries persons who are closely associated and under the control of the assessee company, therefore, the commission payments @2% of the transaction value is not likely. However the assessee may make some payment to oblige them. Commission payment @2% is to be restricted only to cases where share capital/premium is held to be bogus.

ix) As the source of share capital/premium can be traced directly to the bank account of the assessee company and there is no cash movement, addition of entire share capital/premium of Rs. 365.28 Crs is not justifiable and may lead to allegation of high pitch assessment. Only where there is no direct trail of money being sourced from the bank account of the assessee, the introduced share capital/premium needs to be added to the income of the assessee."

14.3. As noted by the AO in the deviation report, in AY 2012-13, the revenue attempted to make an addition on account of share capital/share premium which was reversed by the CIT(A). The revenue did not carry the matter further, and, therefore, what is important to underscore in this case is the finding of fact returned by the Tribunal that it was the assessee's own money which was routed back to it, and not that these were paper entries, where there was no banking trail.

14.4. In the context of M/s Mahalaxmi Traders, the submission advanced on behalf of the revenue that because Mr Manoj Gupta had, in his statement, said that he had not made any investment, and, therefore the addition made under Section 68 of the Act needed to be sustained is untenable, in view of the following finding recorded by the Tribunal, in this behalf. None of these findings have been assailed in the appeal preferred by the revenue.

> *"……The A.O. in A.Y. 2012-2013 has referred to statement of Shri Manoj Gupta, Proprietor of M/s. Mahalaxmi Traders whose statement was recorded during the course of search in which he has stated that he has not made any investment in assessee company. However, it is not clear from the Orders of the authorities below whether copy of such statement was supplied to assessee for rebuttal or whether he was produced before A.O. for cross-examination on behalf of the assessee. Since nothing is clear from the assessment order, therefore, any statement recorded at the back of the assessee, cannot be read in evidence against the assessee unless it is confronted to assessee and right of cross-examination have been provided by the A.O. to assessee to cross-examine that statement…."*

Second Issue

15. This brings us to the second issue that concerns bogus purchases. Insofar as this issue is concerned, it requires to be noticed that the A.O. had disallowed, for the six AYs, a cumulative amount of Rs.900,53,54,641/-. The CIT(A), *via* the appellate order dated 25.04.2019 (albeit, passed separately qua the AYs in issue), reduced the disallowance to Rs.313,16,21,562/-.

15.1. In the context of this aspect, the Tribunal returned the following findings of fact :

(i) The CIT(A), during proceedings before him, had called for a remand report from A.O. The A.O., accordingly, had submitted the remand report

dated 22.03.2019.

(ii) In the remand report, the A.O. had adverted to the fact that 50% of the purchases had been sourced by the assessee from third parties i.e., non-related parties. These transactions were verified, and in furtherance thereto notices under Section 133(6) of the Act were issued to the concerned persons. The assessee had filed confirmation letters of the third parties. The reply received from the third parties, in response to the notice issued under Section 133(6) of the Act, did not reveal any variation.

(iii) Since no variation was found between the responses received from the third parties and purchases, as recorded in the assessee's books, the addition made on account of bogus purchases was not sustainable.

(iv) In the remand report, the A.O. had dropped the issue concerning the purported shortage of the stock of the assessee amounting to Rs.450 crores.

(v) Because there was dissonance in the AO's views, as recorded in the deviation report and the remand report when compared to the additions/disallowance made in the assessment orders, the appraisal report generated pursuant to the search and seizure action was called for by the Tribunal and perused. A perusal of the report by the Tribunal revealed that addition/disallowance concerning bogus purchase was made only to protect the interest of the revenue.

(vi) The Tribunal also found the following: the entire purchase and sales had been duly recorded in the regular books of accounts of all parties; the transactions were routed through regular banking channels; the purchase and sales were duly supported by quantitative details; copies of bank statements showing sales and purchases were placed before the A.O., and no incriminating documents concerning sales and purchases were found in the

course of search and seizure actions.

(vii) The Tribunal also found that in respect of AYs 2012-2013, 2013-2014 and 2014-2015, sale and purchase transactions were verified and assessment orders were framed under Section 143(3) of the Act. The books of accounts were duly audited, both, under the Companies Act, 2013 and the Act in-issue [i.e. Income Tax Act, 1961]; no defects concerning books were found either by the A.O. or the CIT(A). Thus, according to it, for the concluded AYs i.e., 2012-2013, 2013-2014 and 2014-2015, no incriminating evidence was found.

(viii) Insofar as the abated AYs were concerned i.e., AYs 2015-2016, 2016-2017 and 2017-2018, it was, as per the Tribunal, apparent that the assessee had purchased goods, which were in value less than the sum for which they were sold. Therefore, as held by the A.O. in the deviation report, if the purported bogus purchases were to be disallowed then necessarily the sales shown in the assessee's regular books of accounts would also have to be excluded which would result in the assessee's income falling below the returned/declared income. In this regard, the Tribunal recorded that for the AYs 2012-2013 to 2017-2018, the total sales recorded by the assessee was Rs.36,20,60,89,783/-, as against purchases made from the same very parties amounting to Rs.36,02,14,17,848/-. Resultantly, for the said period, the assessee had shown a profit of Rs.18,46,71,935/-.

15.2. Thus, according to the Tribunal, if as portrayed by the revenue, the purchases were bogus then it was unlikely that the assessee would have recorded a profit against the same in its books of accounts. The Tribunal notes that the revenue cannot blow hot and cold i.e., cannot portray the purchases as bogus, even while holding that the sales made to those very

parties were genuine.

15.3. Furthermore, according to the Tribunal, the A.O. had not placed on record any material to justify the disallowance of 25% of the purchases on the ground that they were bogus without carrying out any inquiry or investigation. In particular, the Tribunal also flagged the issue that the purported shortage of stock amounting to Rs.450 crores was based on a reference made qua that aspect in the appraisal report which, as noted above, did not find mention in the remand report, as during the search it was found that the stock worth the aforementioned value was lying at the assessee's warehouse in Sonipat; something which was completely ignored. This position, according to the Tribunal, was fortified by the fact that no addition in respect of any excess or shortage of stock had been made in the assessment orders of any of the years. In effect, according to the Tribunal, the stock found in the books reconciled with the stock which was found physically.

15.4. Insofar as the CIT(A)'s approach with regard to bogus purchases was concerned, the Tribunal noted that it had concentrated on related parties and attempted to quantify the disallowance by applying the gross profit ratio in respect of transactions entered by the assessee with unrelated parties. The Tribunal, however, returned a finding of fact that the approach adopted by the CIT(A) was not consistent. In this context, the Tribunal made the following observations :

> *"99. When the matter reached before the learned CIT – A, he rejected the action of the learned assessing officer so far as addition with respect to the alleged bogus purchases are concerned. He applied the provisions of section 145 (3) of the income tax act. He segregated the transactions of purchase and sales from the alleged bogus parties and*

applied the gross profit ratio, which is earned by the assessee from transactions with other parties. He applied such ratio for making an addition for assessment year 2012-13, 2013 – 14 2015 – 16 and 2016 – 17. For assessment year 2014 – 15, the gross profit ratio of the assessee from other parties (other than the alleged parties) was only 4.13 percentages. However, the learned CIT – A did not apply this percentage but took average gross profit ratio for assessment year 2012 – 13 and 2013 – 14 of 16.20 percentage and 9.41 percentage. He applied the average, which is 12.80 percentages to the sales for that year for making an addition. For assessment year 2017 – 18 the gross profit on transactions other than alleged related parties were found to be 6.02 percentage however the learned CIT – A did not apply that ratio but made an addition of INR 4 87053/– as there was loss. Therefore, wherever it was beneficial to the revenue, the learned CIT – A applied higher percentages and made the addition. Wherever it was against the revenue, he applied average gross profit of last 2 years or made on ad hoc addition. Thus, it is apparent that the learned CIT – A was not at all consistent in his approach."

15.5. Although, the Tribunal concluded that CIT(A) could take recourse to the provisions of Section 145(3) of the Act he/she finds that the A.O. had failed to apply his/her mind to the said provision—however, before embarking on that course, the CIT(A) would have to form a view, after examining the books of accounts, that he/she is not satisfied with the correctness or completeness of the accounts of the assessee. The Tribunal was of the view that the CIT(A) was also required to examine the method of accounting followed by the assessee.

15.6. It appears, as has been recorded by the Tribunal, that the CIT(A) did not call for the books of accounts i.e., to examine the same. Furthermore, the Tribunal records that the A.O., in the remand report, did not advert to the fact that the books of accounts were either incorrect or incomplete. According to the Tribunal, the books of accounts could not have been

rejected till such time the revenue found "patent, latent and glaring defects in the books of accounts". The revenue, according to the Tribunal, made no such attempt and simply relied upon the statement of the Managing Director, which was retracted and in any event, did not relate to the booking of "bogus expenditure". Therefore, insofar as the Tribunal was concerned, the rejection of books of accounts by the CIT(A) did not meet the legal standards.

15.7. Given this background, thus, in effect, the Tribunal held that the books of accounts were rejected without crystalizing the defect in the books of accounts, which could have been done only after examining the same. Furthermore, according to the Tribunal, even if it is assumed that the books of accounts could be rejected, the profit had to be estimated based on proper material. As noted above, the Tribunal recorded the inconsistent approach adopted by the CIT(A) in applying the gross profit ratio concerning non-related parties to purported bogus transactions i.e., those involving related parties, resulting in unsustainable conclusions.

15.8. According to us, the observations made by the Tribunal are pure findings of fact, which cannot be interdicted by us in appeal. The inconsistency in the approach adopted by the A.O., while preparing the deviation report and framing the assessment order with regard to purported bogus purchases is an aspect, which cannot be ignored and has been correctly highlighted by the Tribunal.

15.9. If the revenue chooses to disallow bogus purchases, it would necessarily have to, in our view, ignore the corresponding sales recorded against the very same parties. As pointed out by the Tribunal, the CIT(A) could have rejected the books of accounts only, after it had examined and come to the conclusion that he was not satisfied as regards their correctness

or completeness. The finding of fact returned by the Tribunal is that books of accounts were not examined by the CIT(A). If that be so, then, Section 145(3) of the Act could not have been triggered by the CIT(A), based on the mere statement of the Managing Director of the assessee. Besides this, as noted by the Tribunal, the CIT(A) had attempted to quantify the profit by resorting to a methodology, which was incomprehensible. The relevant observations made by the Tribunal read as :

> *"105. ……Nevertheless, they are not entitled to make a pure guess in making assessment with reference to any evidence or material at all. There must be more than a mere suspicion to support an assessment u/s 143 (3) of the act. Against this, the assessee has supported his books of accounts with adequate evidences of his own business as well as also supported it with the balance sheet and profit and loss account of comparable 3rd parties. The assessee has demonstrated that gross profits earned by those parties in the similar line of business are less than the gross profit declared by the assessee.*
>
> *106. Further, the quantification of the profit by the learned CIT – A, has been made on in comprehensible assumptions. He applied the gross profit rate of other parties to the sales of allegedly bogus parties. He has application of the gross profit rate also changed from the year to year. In 1 of the years, he adopted the gross profit rate being average of gross profit of 2 preceding years on by the assessee from other parties and applied the same rate to the sales from allegedly bogus parties. We fail to understand that how the gross profit ratio of one year can be applied to another year for determining the profit of some of the transactions of another year.*
> *107. In view of the above discussion, we are of the opinion that the learned assessing officer has incorrectly disallowed 25% of the purchases from the alleged bogus parties without finding any evidence and ignoring the sales paid by them to the assessee. Further, the learned CIT – A applied the provisions of section 145 (3) of the income tax act by rejecting the books of accounts of the assessee partially, without even looking at the books of accounts is also incorrect……"*

Third Issue

16. Insofar as the third issue is concerned, the revenue's stand has been that the cash deposits made post demonetization represented unaccounted income of the assessee qua AY 2017-2018.

16.1. According to the revenue, the average cash deposited by the assessee with its bankers before demonetization was, approximately, Rs.42.35 crores, whereas the actual sum deposited during the demonetization period was Rs.180.53 crores. The assessee's explanation was, broadly, that deposits were made out of cash sales and, during Diwali, cash sales increase; especially in the business in which the assessee is i.e., dry fruits.

16.2. Thus, according to the assessee, in October 2016, there was an increase in cash sales, which resulted in increased cash deposits. The revenue, however, appears to have taken the position that the assessee increased the cash sales to manipulate its gross profits so that it could adjust, in the process, its unaccounted cash income. This was vigorously countered by the assessee, and, in support of its plea that cash deposits were made by the assessee in respect of sales which were duly accounted for, reliance was placed on the following material:- audited books of accounts; bank-wise summary of cash deposits; copies of bank statements; and details of monthly cash sales and cash deposits made in earlier financial years.

16.3. Despite this, the A.O. qua AY 2017-2018 (relevant FY 2016-2017) added Rs.150.53 crores to the returned income of the assessee, after adjusting Rs.30 crores deposited by the assessee under the PMGKY Scheme from Rs.180.53 crores; which was, according to the A.O., the actual amount deposited in cash by the assessee with its bankers during the demonetization

period.

16.4 The CIT(A), on the other hand, concluded that even though the assessee had, as of 08.11.2016, cash amounting to Rs.113.03 crores in its hand, it had chosen to deposit only Rs.13.99 crores. Thus, according to CIT(A), Rs.13.99 crores, which was deposited immediately after demonetization was ordered, represented genuine cash sales. Therefore, according to CIT(A), the balance amount i.e., Rs.99.04 crores represented the unaccounted income of the assessee. In other words, the said sum did not, according to the CIT(A), represent cash sales. Pertinently, the CIT(A) observed that cash deposited in new currency notes amounting to Rs.63.41 crores, represented cash sales made by the assessee. Thus, in sum, the CIT(A) scaled down the addition made under Section 68 of the Act from Rs.150.53 crores to Rs.73.13 crores. The figure of Rs.73.13 crores was arrived at by adjusting from Rs.150.53 crores, Rs.13.99 crores and Rs.63.41 crores [i.e., (180.53 crores – 30 crores) i.e., 150.53 crores-13.99 crores-63.41 crores].

16.5. It is in this background that the Tribunal examined the merits of the case put up by both sides. In this context, the Tribunal analysed the data pertaining to cash sales and cash deposits made in the financial year in issue i.e., FY 2016-2017 (relevant AY 2017-2018), as against FYs 2014-2015 and 2015-2016. The analysis made by the Tribunal showed that, in the three financial years, the total cash deposits more or less corresponded with the cash sales. A relevant part of the table extracted in paragraph 126 of the impugned order is set forth hereafter :

	F.Y.2014-2015	F.Y.2015-2016	F.Y.2016-2017

	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits	Cash Sales	Cash Deposits
Total Rs.(Cr.)	237.44	242.65	412.52	428.19	633.86	633.74

16.6. Besides this, the Tribunal also noted the increase in sales between FYs 2014-2015, 2015-2016 and 2016-2017, both in absolute and percentage terms. Insofar as the increase in sales between FYs 2014-2015 and 2015-2016 was concerned, it was found that in absolute terms, sales had increased by Rs.175.08 crores, which, in percentage terms amounted to an increase of 73.74%. Likewise, the cash sales between FYs 2015-2016 and 2016-2017 had increased in absolute terms by Rs.221.34 crores, but, in percentage terms, the increase was only 53.66 %. Based on these figures, the Tribunal concluded that, in the year in which demonetization kicked in i.e., F.Y. 2016-2017, the increase in sales in percentage terms was less than the earlier year. The Tribunal, thus, held that it could not be said that the assessee had booked non-existing sales in its books post demonetization.

16.7. Similarly, the Tribunal examined the cash sales figures for November of the following three years to see if there were any anomalies. The Tribunal noticed that the cash sales made in November 2014, was Rs.16.49 crores; whereas in November 2015, cash sales made was Rs. 45.18 crores, while in November 2016, cash sales recorded a slight increase i.e. was Rs. 47.43 crores. The Tribunal noticed that there was a substantial jump in sales in November 2015 over November 2014. In absolute terms, the increase was Rs. 28.69 crores, which, in percentage terms, amounted to 173.98%, whereas when November 2015 cash sales figure was compared with November 2016 cash sales figure, the increase was merely Rs. 2.55 crores, which, in percentage terms, amounted to an increase of 5.64%. According

to the Tribunal, this again was an indicator that the assessee had not booked non-existing sales in November 2016 by showing cash deposits against them.

16.8. In the same vein, the Tribunal picked up the figures of cash sales made in December 2014, which was Rs.22.26 crores, December 2015, which was Rs.97.35 crores and December 2016, which was Rs. 69.83 crores. The comparison made showed that the cash sales in December 2015, as compared to December 2014, in absolute terms, increased by Rs.75.09 crores, whereas when figures of cash sales of December 2015 was compared with December 2016, it showed a dip of Rs.27.52 crores. In percentage terms, the increase in sales between December 2014 and December 2015 was 337.33%, whereas, in December 2016, cash sales decreased by 28.27%. This again demonstrated, according to the Tribunal, that assessee had not attempted to book cash sales that had not taken place, as alleged by the revenue.

16.9. In sum, it was the Tribunal's assessment of the material placed on record that cash deposits made by the assessee with its bankers, as noticed above, more or less compared with the cash sale transactions entered into by it with its customers. The Tribunal's view was that given the fact that there was no allegation made by the revenue that the assessee had backdated its entries to enhance its cash sale figures, one could only conclude that there was a growth in the assessee's business.

17. The Tribunal also took note of the fact that one of the reasons furnished by the A.O., in support of the impugned addition, was that physical stock was short by Rs.450 crores. In other words, the stock register represented a higher figure, as against that which was found physically. This

conclusion arrived at by the A.O. was found by the Tribunal to be erroneous, inasmuch as the A.O. had failed to notice the fact that part of the stock was available at the assessee's godown at Sonipat, Haryana, which had not been covered during the search action. In this context, the following observations made by the Tribunal are relevant and the same are extracted hereafter :

> ***"……..****The stock lying at the said premises was not taken into consideration while arriving at the physical stock as on the date of search, thus resulting in the alleged difference of Rs. 450 crores. Though originally at the time of recording of the statement of the managing director on the date of such there were certain discrepancies in the stock however later on it is stated by the learned authorised representative that they were reconciled after inclusion of the stock at Sonipat and ultimately there was no discrepancy in the physical stock found during the course of search as well as stock at Gurgaon at Sonipat with the book stock. There was thus actually no difference in the stock physically lying with the Assessee vis-à-vis the stock as per books of accounts as on the date of search. This submission of the assessee is not controverted by the learned assessing officer as well as the learned CIT DR. It was not also shown to us that there was any discrepancy in the physical stock found during the course of search and stock as per the books of account if the stock at the Sonipat go down was taken into consideration. There is no whisper about the alleged shortage of stock during the assessment proceedings, deviation proceedings and also in remand proceedings. During assessment proceedings, we also directed AO to show the shortage of stock of Rs 450 Crore, which is also the basis of addition along with the panchanama and response to explanation of assessee about stock lying at godown at Sonipat as stated by the assessee. There is no reference in any of the statements recorded by the investigation wing with respect to such shortage of stock. Even in the appraisal report produced before us there is no such finding about shortage of stock. Even in the submissions made by the learned CIT DR there is no reference made to such shortage of stock during the course of search proceedings. There is no addition in any of the assessment year including the search year with respect to any such shortage of stock. No quantitative details of stock physically verified*

as well as the book stock found by the search party were shown to us, which suggested that there is a shortage of stock after considering stock lying at Sonipat."

17.1. The Tribunal also seems to have accepted the explanation that the gross profit ratio for the AY in issue i.e., AY 2017-2018 (relevant F.Y.2016-2017) was in line with the earlier years. In this context, the Tribunal took note of the fact that, at the time when the search and seizure action had taken place, the data had not been finalized as adjustments towards depreciation, interest and provisions for expenses could be made only after the end of the relevant financial year.

17.2. Besides this, the Tribunal also appears to have accepted the explanation given by the assessee that the purported misalignment of the gross profit ratio occurred, as unaudited data of the year in issue was compared with the audited data of the previous years. It is in this context that the Tribunal took note of the gross profit percentage of AYs 2015-2016 (6.14%), 2016-2017 (4.19%) and 2017-2018 (5.85%), as also the respective net profit ratio for the very same years, which, according to the assessee, were 0.72% 0.81% and 1.35% respectively. The sense that the Tribunal derived from the data presented to it, which was based on documentary evidence, was that there was no substantial variation in either the gross profit or net profit in the relevant year i.e., A.Y. 2017-2018, as compared to the previous years.

17.3. Furthermore, based on details furnished by the assessee for the AY 2017-2018 concerning its closing stock, list of debtors, details of purchases and sales made, list of creditors, copies of bank statements and books of accounts—the Tribunal concluded that it was not a case where it could be

said that the assessee had purchased or sold goods to unidentified parties.

17.4. The CIT(A)'s emphasis on the fact that, although the assessee had undertaken liabilities in the form of loans, it chose to keep a large amount as cash in hand was repelled by the Tribunal, while, broadly, accepting the explanation given by the assessee that the long-term loans taken by it had to be repaid at regular intervals, which obliged the assessee had to bear commitment charges, and, thus, repayment of loans, as suggested by the revenue, was not a viable option.

17.5. Insofar as short-term borrowings was concerned, the Tribunal appears to have accepted the assessee's explanation that most of these were liabilities that were outstanding against bills payable under the letter of undertaking and cash credit, which were secured by closing stock maintained by the assessee. According to the assessee, these were available at a lesser rate of interest. Besides this, certain funds were secured by a hundred per cent margin, supported by fixed deposits. These funds bore a small rate of interest. In addition, thereto, certain advances were received also in the form of packing credit, which again bore a small rate of interest. In a nutshell, the explanation of the assessee, which found favour with the Tribunal, was that outstanding loan liabilities had no relationship with the cash held in hand by the assessee.

17.6. Having regard to the extensive material which has been examined by the Tribunal, in particular, the trend of cash sales and corresponding cash deposited by the assessee with earlier years, we are of the view that there was nothing placed on record—which could have persuaded the Tribunal to conclude that the assessee had, in fact, earned unaccounted income i.e., made cash deposits which were not represented by cash sales. Therefore, in

our opinion, the Tribunal correctly found in favour of the assessee and deleted the addition made by CIT(A) of Rs.73.13 crores, under Section 68 of the Act.

18. Before we conclude let us deal with the submissions advanced by Mr Sharma in the context of the three issues discussed The submission made by Mr Sharma that because there was a huge variation in the share premium i.e., the rate at which share premium was paid by the investor entities and the rate at which it was sold, and therefore addition concerning amount received as share capital/ share premium, should be sustained, is not tenable. The answer, to our minds, lies in what has been held by the Tribunal, which is, that at the end of the day it was found that it was the assessee's own money, which had been routed through the investor entities. As indicated above, as a matter of fact, in AY 2012-2013, addition on this account was sought to be made by the A.O., which was deleted by CIT(A) in appeal. The revenue, for reasons best known, did not carry the matter in appeal.

18.1. We agree with the Tribunal, as observed above, that since no incriminating material was found qua AYs 2012-2013 to 2014-2015 vis-à-vis share capital/share premium, the addition under Section 68 could not have been made, apart from the fact that the revenue was unable to dislodge the conclusion arrived by the Tribunal that the money invested in the assessee was the assessee's own money.

18.2. Insofar as the submission made by Mr Sharma that, one Mr Praveen Agarwal i.e., the purported accommodation entry provider had denied making any investment in the assessee, and, therefore, it was a factor that the Tribunal ought to have taken into account, is a submission which fails to appreciate the following facts:

(i) That Mr Praveen Aggarwal's statement was recorded in a separate search action on 12.11.2012; which, as is obvious from the record, occurred before the search action that was carried out vis-à-vis the assessee on 21.03.2017.

(ii) Share capital was received from three companies controlled by Mr Praveen Agarwal i.e., Abhilasha Exports Pvt. Ltd., Subhshree Hirise Pvt. Ltd. and Pushpanjali Commotrade Pvt. Ltd. in AY 2012-2013.

(iii) The total amount, which the assessee received, as share capital/share premium in AY 2012-2013 amounted to Rs.48.20 crores, which included monies received from the aforementioned three companies controlled by Mr Praveen Agarwal.

(iv) These transactions were examined by the A.O. in A.Y.2012-2013, and an assessment order dated 24.03.2015 was passed under Section 143(3) of the Act whereby, the addition of Rs.18.50 crores was made by the A.O. under Section 68 of the Act, as unexplained credits. As indicated above, in appeal, the CIT(A), by an order dated 31.03.2016, set aside the deletion and, while doing so, observed that due confirmations were received from investor entities against notices issued to them under Section 133(6) of the Act.

(v) The revenue did not point to any part of the record which would show that the statement made by Mr Praveen Agarwal was furnished to the assessee and was allowed to cross-examine or rebut the statement. Since the assessee was not allowed to cross-examine or rebut the statement made by Mr Praveen Agarwal, the said statement could not be used against the assessee. Furthermore, there is no ground taken in the appeal which makes any such assertion.

(vi) The failure on the part of the revenue to demonstrate from the record

that the aforesaid person i.e., Mr Praveen Agarwal was examined by the A.O. in the assessment proceedings concerning the assessee. Nothing was shown to us, which could establish that the A.O. conducted an independent enquiry to test the veracity of the statement made by Mr Praveen Agarwal.

18.3. Therefore, given the aforesaid circumstances, we are of the view that no cognizance can be taken of the statement made by Mr Praveen Agarwal.

18.4. As regards Mr Sharmas's contention that although the Tribunal has relied upon the deviation report in support of certain conclusions arrived at by it, it has ignored certain other parts of the deviation report. For instance, reference is made to the fact that the deviation report prepared by the A.O. concluded that the assessee had introduced unaccounted cash to the extent of Rs.99.04 crores, which is liable to be added to its total income for AY 2017-2018. We have already discussed this aspect at length in the earlier part of the judgment. Suffice it to reiterate that the assessee's explanation that the banks had advised deposit of money in tranches, does not appear to be unreasonable.

18.5. Besides this, as noticed above, the Tribunal, after a detailed analysis, has concluded that the cash deposits made post demonetization were in line with the cash deposits made in the earlier years, against corresponding cash sales.

18.6. As regards the other observations made in the deviation report on which Mr Sharma has placed reliance i.e., that addition on account of share premium should be made under Section 68 of the Act, in cases where money was not sourced from the assessee is answered by the Tribunal after noticing the fact that investments from unrelated parties were received only in AY 2012-2013. The addition made by the A.O. for AY 2012-2013, as observed

above, was deleted by CIT(A) in the assessee's appeal. It would be relevant to note that, insofar as related parties were concerned, the deviation report clearly stated in paragraphs 3(iii) to (ix) that the ultimate source of money was the assessee itself. As a matter of fact, the observation made by the A.O., in paragraph 3(ix) of the deviation report, was different from what was understood by the revenue:

> *"ix) As the source of share capital/premium can be traced directly to the bank account of the assessee company and there is no cash movement, addition of entire share capital/premium of Rs, 365.28 Crs is not justifiable and may lead to allegation of high pitch assessment. Only where there is no direct trail of money being sourced from the bank account of the assessee, the introduced share capital/premium needs to be added to the income of the assessee."*

18.7. Concededly, the Tribunal, in its analysis, has adverted to the trail of money (which is something we have noticed above), and, therefore, its conclusion that it was not unexplained credit, and thus, not liable to be added under Section 68 of the Act to the income of the assessee, cannot be disturbed.

18.8. Insofar as the submission of Mr Sharma that the deviation report adverts to rejection of books of accounts and refers to the shortage of stock amounting to Rs.450 crores, is concerned, the same has already been alluded to by us, and, therefore, needs no further elaboration.

18.9. Likewise, the aspect concerning cash deposits made post demonetization and bogus purchases/sales have also been discussed hereinabove at length.

Conclusion:-

19. Thus, for the foregoing reasons, we are of the opinion that the revenue

has not been able to persuade us that a substantial question(s) of law arose for our consideration.

19.1. The result of the appeals filed before the Tribunal was turned on appreciation of evidence placed before the Tribunal. The Tribunal is the final fact-finding authority. We have not been able to conclude that the findings returned by the Tribunal are perverse. Importantly, neither in the grounds nor in the questions of law as suggested in the appeals, the revenue has averred that the findings of the Tribunal are "perverse". This fact imposes a limitation on this court while entertaining an appeal under Section 260A of the Act. In a nutshell, this court cannot revaluate the findings of fact returned by the Tribunal, except on the limited ground of perversity/complete lack of evidence. [See ***K. Ravindranathan Nair v. CIT***, (2001) 1 SCC 135[8].]

19.2. As has been, repeatedly, noted hereinabove, and as is also observed by the Tribunal, the A.O. shifted his position vis-à-vis the assessee. This is clearly evident if one were to compare the deviation report prepared by the A.O. (pursuant to the submission of the appraisal report by the investigation

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[8] "**7.** …. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In this case, there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it.

8. The only jurisdiction of the High Court in a reference application is to answer the questions of law that are placed before it. It is only when a finding of the Tribunal on fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise."

wing) with the assessment order(s) framed by him.

19.3. It is disconcerting to note that the investigation wing directed the A.O. to frame the assessment in a manner that would protect the revenue's interest. The A.O. performs a quasi-judicial function while framing an assessment. The revenue cannot dictate the manner, in which, the A.O. frames the assessment order. In this case, the investigation wing appears to have crossed the Rubicon, when it advised the A.O. to frame the assessment to protect the interest of the revenue. [See ***CIT v. Greenworld Corpn.***, (2009) 7 SCC 69[9]; ***P. Palaniswami case***[10]]

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[9] "**53.** ……. No doubt in terms of the circular letter issued by CBDT, the Commissioner or for that matter any other higher authority may have supervisory jurisdiction but it is difficult to conceive that even the merit of the decision shall be discussed and the same shall be rendered at the instance of the higher authority who, as noticed hereinbefore, is a supervisory authority. It is one thing to say that while making the orders of assessment the assessing officer shall be bound by the statutory circulars issued by CBDT but it is another thing to say that the assessing authority exercising quasi-judicial function keeping in view the scheme contained in the Act, would lose its independence to pass an independent order of assessment.

xxx xxx xxx

55. When a statute provides for different hierarchies providing for forums in relation to passing of an order as also appellate or original order, by no stretch of imagination a higher authority can interfere with the independence which is the basic feature of any statutory scheme involving adjudicatory process."

[10] "**5.** The respondent then filed a Letters Patent Appeal. By this time the decision of this Court in *B. Rajagopala Naidu* v. *State Transport Appellate Tribunal* [AIR 1964 SC 1573 : (1964) 7 SCR 1 : (1964) 2 SCJ 570.] had been rendered and by that decision GO No. 1298 dated April 28, 1956, which was the previous direction issued by the State Government under Section 43-A of the Motor Vehicles Act, was set aside. It was held that it was legitimate to assume that the Legislature intended to respect the basic and elementary postulate of the rule of law that in exercising their authority and discharging their quasi-judicial functions, the tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment guided only by the statutory light. It was pointed out that it was of the essence of fair and objective administration of law that the decision of judges or tribunals must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. It was true that Section 43-A empowered the State Government to issue directions

20. Accordingly, for the aforesaid reasons, the appeals are dismissed.

20.1. Pending applications shall also stand closed.

21. There shall be, however, no order as to costs.

RAJIV SHAKDHER, J

TALWANT SINGH, J

JANUARY 19, 2022/aj

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to the Regional Transport Authority and the authority was bound under that Section to give effect to all such directions. But since the Government Order purported to give directions in respect of matters which had been entrusted to the authorities constituted under the Act and which have to be dealt with in quasi-judicial manner the Government Order to that extent was outside the purview of Section 43-A. The result was that the decisions of the Transport Authorities which were based upon the Government Order and not on an independent assessment of the matters referred to in Section 47 of the Motor Vehicles Act were liable to be set aside……'

xxx xxx xxx

8. …..When there is a Government Order in existence and parties applying for permits come to know that the authorities under the Motor Vehicles Act, were disposing of their applications for permits in accordance with the Government Order, matters not referred to in the Government Order but which may be very germane for consideration under Section 47 get automatically excluded during the hearings. The Government Order, instead of Section 47, becomes the last word on the subject. That is the real vice of such Government instructions. The authorities feel bound by these instructions and the parties before them feel equally bound by them. They, naturally exclude from the controversy other matters which though relevant under Section 47 do not find a place in the Government Order. As pointed out by this Court in *R.M. Subhraj* v. *K.M. Union* (*P*) *Ltd.* [(1973) 3 SCC 871 : AIR 1972 SC 2266] "Once it is found that a Tribunal which under the statute has to deal with applications for permits in a judicial manner is directed by the Government to adopt any specified method for assessing the merits of the applicants and the Tribunal takes into consideration such direction of the executive, the judicial determination by the Tribunal is polluted". It is polluted not merely because those instructions have a tendency to interpret Section 47 in their own way but also because considerations other than those in the instructions get automatically excluded although they are quite relevant for the purpose of Section 47. We are, therefore, of the opinion that the High Court was right in remanding the case to the Tribunal for a re-hearing without the constraint of the Government Order."

$~**S-35**

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

\+ **ITA 7/2022 & CM APPL.1972/2022**

PRINCIPAL COMMISSIONER OF
INCOME TAX (CENTRAL) – 3 ..... Appellant
Through: Ms.Vibhooti Malhotra, Advocate.

versus

ISHWAR CHAND MITTAL ..... Respondent
Through: None.

% Date of Decision: 12th January, 2022.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J. (Oral)

1. The appeal has been heard by way of video conferencing.

2. Present appeal has been filed challenging the order passed by the Income Tax Appellate Tribunal [ITAT] dated 25th August, 2020 rejecting the appellant's appeal being ITA 8706/Del/2019 for the Assessment Year 2011-12.

3. The relevant facts of the present case are that the respondent/assessee filed the original return of income on 27th July, 2011. A search was conducted at the premises of the respondent/assessee on 22nd March, 2012 and the assessment was framed under Section 153A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') vide order dated 28th February, 2014.

4. On 31st March, 2016, a notice of reassessment under Section 148 of the Act was issued and served upon the respondent/assessee. The reason for re-opening the assessment was that the Investigation Directorate of Kolkata had informed the Assessing Officer that the respondent/assessee had traded in penny stocks and used the said transactions to allegedly book bogus claims of Long Term Capital Gain.

5. However, the admitted position is that the Long Term Capital Gain had not only been disclosed in the return of income by the respondent/assessee, but the same was also claimed to be exempt.

6. No adverse inference was made to the returned income of the respondent/assessee even when the Assessing Officer was fully aware of the Long Term Capital Gain claimed as exempt from tax.

7. Consequently, this Court is of the view that in the garb of reassessment proceedings, the appellant cannot seek to verify the same details on the strength of material which was already available on record. This Court is also in agreement with the finding of the Tribunal that the assumption of jurisdiction by issuing notice under Section 148 of the Act is bad in law. Accordingly, the present appeal and application are dismissed.

MANMOHAN, J

NAVIN CHAWLA, J

JANUARY 12, 2022
TS

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.16139 of 2016

Sri Laxmi Narayan Agency .... ***Petitioner***

Mr. Siddhartha Ray, Advocate

-versus-

The Income Tax Officer, Angul Ward, Angul and others .... ***Opposite Parties***

Mr. S.S. Mohapatra, Senior Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

ORDER
03.01.2022

Order No.

04. 1. The challenge in the present petition is to a re-assessment order dated 22nd August 2016 passed by the Income Tax Officer, Angul Ward, Angul (ITO) under Section 143 (3) read with Section 147 of the Income Tax Act, 1961 (Act) for the assessment year (AY) 2011-12.

2. One of the principal grounds on which the impugned re-assessment order has been challenged is that the mandatory requirement of dealing with the objections raised by the Assessee for reopening of the assessment as spelt out by the Supreme Court of India in ***GKN Driveshafts (India) Ltd. v. Income Tax Officer [2003] 259 ITR 19 (SC)*** has not been followed.

3. The second ground of challenge is that the documents on the basis of which the ITO formed the reason to believe that income

had escaped assessment for the AY in question were not supplied to the Petitioner.

4. Thirdly, during the re-assessment proceedings, the Petitioner made a written request for cross-examination of the persons on the basis of whose statements the reopening was supposed to have been directed and that opportunity too was not provided to the Petitioner.

5. While issuing notice in the present petition on 10th November 2016, this Court directed that no coercive action would be taken against the Petitioner, and that interim order is continuing.

6. A counter affidavit has been filed on behalf of the Opposite Parties in which, *inter alia,* while not denying that the objections of the Petitioner to the reopening of the assessment were not separately dealt with, it is claimed that the documents "not supplied to the Petitioner were held in the fiduciary capacity". This admittedly included the report of the Deputy Director of Income Tax (Investigation), which was not supplied prior to the re-assessment order being passed.

7. The background facts which were not in dispute are that a survey operation was conducted in the case of M/s Vertex Gold Trading Limited in Hyderabad on 12th August 2015 by the DDIT (Inv.), Unit-1(3), Hyderabad. According to the Department, and in the course of that survey operation, it was found that the

present Petitioner had made purchases of gold bullion to a tune of over Rs.93lacs and RTGS purchases of over Rs.2.6crores. The total purchases were over Rs.3.53crores whereas the Petitioner Assessee had disclosed purchases of Rs.3.26crores in the return of income. On the ground that the Petitioner had made unaccounted purchase, the assessment for the AY in question was sought to be reopened.

8. The impugned assessment order itself notes that in response to the notice issued under Section 147 of the Act, the Assessee on 30th June 2016 submitted objections to the reopening of the assessment. Admittedly, the said objections were not separately dealt with by the Assessing Officer (AO) as mandatorily required by the judgment of Supreme Court in ***GKN Driveshafts (India) Ltd.*** (*supra*). On that short ground, the reopening of the assessment is rendered bad in law and the impugned re-assessment order deserves to be set aside.

9. Further, it is seen that the reasons for reopening of the assessment merely repeats the language of the report of the DDIT (Inv.) without any independent application of mind by the AO. In ***Sabh Infrastructure Ltd. v. Asst. Commissioner of Income Tax [2017] 398 ITR 198 (Delhi),*** the Delhi High Court in similar circumstances set aside the re-assessment order. In paragraph-15 of the said decision, it has been observed that assessment proceedings, especially those under Section 143 (3) of the Act

"have to be accorded sanctity and any reopening of the same has to be on a strong and sound legal basis." It was further emphasized that "there have to be reasons to believe and not merely reasons to suspect that income has escaped assessment." The Delhi High Court also set out the guidelines for reopening of the assessment as under:

> "(i) while communicating the reasons for reopening the assessment, the copy of the standard form used by the AO for obtaining the approval of the Superior Officer should itself be provided to the Assessee. This would contain the comment or endorsement of the Superior Officer with his name, designation and date. In other words, merely stating the reasons in a letter addressed by the AO to the Assessee is to be avoided;
>
> (ii) the reasons to believe ought to spell out all the reasons and grounds available with the AO for re-opening the assessment - especially in those cases where the first proviso to Section 147 is attracted. The reasons to believe ought to also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the AO on the same and if so, the conclusions thereof;
>
> (iii) where the reasons make a reference to another document, whether as a letter or report, such document and/ or relevant portions of such report should be enclosed along with the reasons;
>
> (iv) the exercise of considering the Assessee's objections to the reopening of assessment is not a mechanical ritual. It is a quasi- judicial function. The order disposing of the objections should deal with each objection and give proper reasons for the

> conclusion. No attempt should be made to add to the reasons for reopening of the assessment beyond what has already been disclosed."

10. In the present case, apart from the fact that the reopening of the assessment being bad in law for non-supplying of the vital documents on the basis of which the reasons to believe were formed, the Court finds that the reasons for reopening merely reproduces the language of the report of the DDIT (Inv.) without the AO independently applying his mind to the material on record.

11. For all of the aforementioned reasons, the Court finds the impugned re-assessment order to be unsustainable in law and the same as well as the consequential demand notices are hereby set aside. The writ petition is allowed in the above terms but, in the circumstances, with no order as to costs.

12. An urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Guin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3640 OF 2019

Yashoda Shivappa Nagangoudar
an individual residing at
B-3, 4th Floor, Room No.408,
Sai Leela Building, Tardeo Road,
New Maharashtra Nagar,
Mumbai – 400 034. ….Petitioner

V/s.

1. Income Tax Officer – 19(3)(5)
Room No.201, 2nd Floor, Matru
Mandir, Tardeo Road,
Mumbai – 400 007.

2. The Principal Commissioner of
Income Tax – 19
Room No.228, 2nd Floor, Matru
Mandir, Tardeo Road,
Mumbai – 400 007.

3. The Union of India
Through the Secretary,
Ministry of Finance,
Government of India, North Block,
New Delhi – 110 001. …Respondents

Mr. Devendra H. Jain i/b Mr. Nikhil C. Bhise for Petitioner.
Mr. Sham V. Walve for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
R.N. LADDHA, JJ.
DATED : 5th JANUARY, 2022

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Petitioner received a notice dated 16th March, 2019 under Section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2012-13. According to respondents they had reasons to believe that petitioner's

income chargeable to tax for A.Y. 2012-13 has escaped assessment. The reasons for re-opening is annexed to the petition. The reasons indicate that respondents have information that petitioner has deposited Rs.13,40,000/- in cash during F.Y. 2011-12. Notwithstanding that petitioner has not filed return of income for A.Y. 2012-13. Therefore, the income chargeable to tax amounting to Rs.13,40,000/- has escaped assessment due to failure on the part of the petitioner to disclose fully and truly all material facts for his assessment.

2. Petitioner filed objections dated 10th October, 2019 to the re-opening of assessment. In that petitioner has explained as under :

> *"However, the bank, viz; Dena bank in which I hold an account, made a factual mistake in reporting the above transactions. I had deposited total cash of only Rs.18,000/- on two occasions during the relevant year which were out of gifts received by me/out of my past savings. Whereas, the figure of Rs.13,40,000/- reported by the bank as cash deposited, was in fact the exact amount of cash withdrawn by me, whihc was erroneously reported as Cash depost in the AIR/CIB. In support of this, I have attached a copy of the bank statement for F.Y. 2011-12. Refenr Annexure – 1.*
>
> *I have already written to Dena bank pointing out their mistake and have asked them to rectify the same and issue a clarificatory letter to me. I attach a copy of the letter submitted to them. Refer Annexure – 2.*
>
> *Thus, this proves that the re-opening of my case u/s 147 of the Income-tax act, 1961 was made on the basis of incorrect material facts and the same should hence be dropped."*

3. We have also considered bank statement which does not show any cash deposit of Rs.13,40,000/-. It only shows cash deposits of Rs.18,000/-. In the order dated 6th November, 2019 disposing the objections

respondents admit and accept that there were cash deposits of only Rs.18,000/- and not Rs.13,40,000/- as alleged in the reasons for re-opening. But according to respondents there were deposits/credits to petitioner account other than in the form of cash, i.e., total credits of Rs.18,81,092/- (cash and non cash) and therefore as no return of income was filed to show such credits it remained unexplained.

4. To confer jurisdiction under Section 147 of the Act, the Assessing Officer must have reasons to believe that income chargeable to tax has escaped assessment. In this case, the Assessing Officer felt that there were reasons to believe that income had escaped assessment on incorrect facts and that is even accepted in the order disposing the objections which is impugned in the petition. Therefore, the entire basis on which jurisdiction is assumed under Section 147 of the Act fails. On this ground alone, the notice dated 16th March, 2019 and consequential order on objections dated 6th November, 2019 has to be quashed and set aside.

5. Mr. Walve submitted that as per explanation 3 to Section 147 of the Act, the Assessing Officer may assess or re-assess the income in respect of any issue which has escaped assessment even if such issue comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under Sub Section 2 of the Section 148 of the Act.

6. Though, there cannot be any dispute on this statement of Mr.Walve, explanation 3 presupposes that the notice which has been issued was a valid notice. As per explanation 3 it empowers the Assessing Officer to assess or re-assess the income in respect of any issue that comes to his notice subsequently in the course of the proceedings under Section 147 of the Act but if the proceedings under Section 148 of the Act itself has been initiated wrongly, the question of any new issue that would come to his notice subsequently during the course of proceedings under Section 147 of the Act would not arise. The assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of which comes to his notice subsequently during the course of the any other income proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. We find support for this view in **Commissioner of *Income Tax vs. Jet Airways (I) Ltd.*[1]** where paragraph

1 (2011) 331 ITR 236 (Bombay)

nos.6, 14, 15 and 22 reads as under :

> *6. The effect of Explanation 3 which was inserted by the Finance (No. 2) Act of 2009 is that even though the notice that has been issued under section 148 containing the reasons for reopening the assessment does not contain a reference to a particular issue with reference to which income has escaped assessment, the Assessing Officer may assess or reassess the income in respect of any issue which has escaped assessment, when such issue comes to his notice subsequently, in the course of the proceedings. The reasons for the insertion of Explanation 3 are to be found in the Memorandum Explaining the Provisions of the Finance (No. 2) Bill of 2009. The Memorandum treats the amendment to be clarificatory and contains the following explanation ([2009] 314 ITR (St.) 183, 206) :*
>
> *"Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.*
>
> *With a view to further clarifying the legislative intent, it is proposed to insert an Explanation in section 147 to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section notwithstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148."*
>
> *14. The rival submissions which have been urged on behalf of the Revenue and the assessee can be dealt with both as a matter of first principle, interpreting the section as it stands and on the basis of precedent on the subject. Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has power to assess or reassess the income which he has reason to believe had escaped assessment, and also any other income chargeable to tax. The words "and also" cannot be ignored. The interpretation which the court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words "assess or reassess such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those*

words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word "or". The Legislature did not rest content by merely using the word "and". The words "and" as well as "also" have been used together and in conjunction.

15. The Shorter Oxford Dictionary defines the expression "also" to mean further, in addition besides, too. The word has been treated as being relative and conjunctive. Evidently therefore, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess : (i) such income ; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words "such income" refer to the income chargeable to tax which has escaped assessment, and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of which comes to his notice subsequently during the course of the any other income proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from April 1, 1989 clearly stipulated that the Assessing Officer has to assess to reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceeding. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter.

22. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment of reassessment on grounds other than those on the basis of which a notice was issued under section 148. Setting out the reasons, for the belief that income had escaped assessment. Those

judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance (No. 2) Act of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

(emphasis supplied)

7. In the circumstances, petition is allowed in terms of prayer clause -

(a) which reads as under :

(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the notice u/s 148 dated 16.03.2019 ("Exhibit A") and the subsequent Order dated 06.11.2019 ("Exhibit E") disposing of Petitioner's objections on the issue of impugned notice.

8. Petition disposed with no order as to costs.

(R.N. LADDHA, J.) (K.R. SHRIRAM, J.)

Purti Parab

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3638 OF 2021

Parinee Realty Pvt. Ltd.
102 & 103, Smag House,
Plot No.157-A, Sarojini Road Extension,
Vile Parle, Mumbai – 400 056. ….Petitioner

V/s.

1. Assistant Commissioner of Income Tax
Central Circle - 2(3)
Room No.803, 8th Floor,
Pratishtha Bhavan, Old CGO,
M.K. Road, Mumbai – 400 020.

2. The Union of India
Through the Secretary,
Government of India,
Ministry of Finance,
New Delhi – 110 001. …Respondents

Mr. Nishant Thakkar a/w Mr. Hiten Chande i/b Lumiere Law Partners for Petitioner.
Mr. Suresh Kumar for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
R.N. LADDHA, JJ.
DATED : 19th JANUARY, 2022

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Petitioner is impugning a notice dated 30th March, 2021 issued under Section 148 of the Income Tax Act, 1961 (the Act) seeking to re-open the assessment for A.Y. 2017-18 and the order dated 22nd June, 2021 rejecting petitioner's objections.

2. The re-opening is proposed to be made within four years of the end of the relevant assessment year. In such a situation even though proviso

to Section 147 of the Act would not apply, and the Assessing Officer has to only make out availability of tangible material, it is settled law that if the re-opening is based on mere change of opinion, the notice issued under Section 148 of the Act has to be set aside. Paragraph No.12 of the judgment dated 23rd November, 2021 ***Reserve Bank Officers Co-operative Credit Society Ltd. vs. The Income Tax Officer - 17(3)(1) and Ors.***[1] (unreported) reads as under:

> *12. Section 147 enables the Assessing Officer to assess or reassess any income chargeable to tax which he has reason to believe has escaped assessment for an assessment year. The proviso to section 147 imposes additional requirements where an assessment is sought to be reopened beyond a period of four years from the end of the relevant assessment year. In the present case, the exercise of power is within a period of four years and, therefore, the requirements of the proviso are not attracted. Where the Assessing Officer purports to exercise power under section 147 within a period of four years of the end of the relevant assessment year, the condition precedent to the exercise of the power, is the existence of a reason to believe that any income chargeable to tax has escaped assessment. We must keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. The reassessment has to be based on the fulfillment of certain conditions. It is settled law that if the concept of change of opinion is removed, then in the guise of reopening the assessment, the review would take place. The concept of change of opinion has been built in the statute to check abuse of power by the Assessing Officer. The Assessing Officer has the power to reopen only when there is tangible material to come to the conclusion that there is escapement of income from the original assessment. The test of "tangible material" has been enunciated in a judgment of the Supreme Court in CIT v. Kelvinator of India Ltd. 1 held thus (page 564):*
>
> > *"... one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of*

1 Writ Petition No. 3332 of 2019

> *'mere change of opinion', which can-not be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain pre-conditions. If the concept of 'change of opinion' is removed, as contended on behalf of the Department, then the review would take place in the garb of reopening the assessment. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has the power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief..."*

3. We have considered the reasons recorded and communicated to petitioner on 19th April, 2021. The reasons indicate that the Jurisdictional Assessing Officer (JAO) has proceeded on incorrect facts and also he has proceeded on pure change of opinion. We say incorrect facts because the assessment order under Section 143(3) of the Act was passed on 21st December, 2019 determining total income of Rs.1,20,89,790/-. The JAO however states *"Subsequently, an information was received on 20.01.2019 in this case from Investigation Directorate, Mumbai ..... During the course of survey, it was found that assessee has taken interest bearing loan from various institutions in market and advanced part of loan so taken to group companies either at low interest rate or at NIL interest rate."* Therefore, the information on which reliance has been placed was received before the assessment order dated 21st December, 2019 was passed. On this

ground alone, we can safely conclude that the conditions precedent to the exercise of the powers to re-assessment, i.e., existence of a reason to believe that income chargeable to tax has escaped assessment has not been met.

4. We have to also note that after the information on 20th January, 2019 was received, as noted in the assessment order dated 21st December, 2019 five notices were issued by the Assessing Officer under Section 142(1) of the Act. In the notice dated 1st October, 2019 a specific query has been raised by which petitioner was called upon to provide party wise details alongwith address of the parties to whom loan and advances were given and details of interest received on such loans and also furnish the nature of the loans/advances. Petitioner responded by its letter dated 8th November, 2019 and 14th November, 2019. In the reply dated 14th November, 2019 at Item No.4, petitioner has provided party wise details alongwith address of the parties to whom loans and advances were given, interest received on such loans and the nature of the loans/advances. The list includes all the names given in paragraph no.3 of the reasons for re-opening.

These have been considered in the assessment order because in the assessment order there is reference to five notices issued under Section 142(1) of the Act and it is also noted that the assessee has filed details through ITBA Module in response to the notices issued from time to time which are placed on record.

5. Mr. Suresh Kumar submits that these cannot be said to have been subject of consideration of the Assessing Officer because the assessment order does not contain reference and/or discussion. We will have to reject the submissions of Mr. Suresh Kumar since this court has time and again held that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not even necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. [***Aroni Commercials Ltd. vs. Deputy Commissioner of Income-tax 2(1)[2]]***.

It is also settled law that change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

6. There can be no doubt in the facts of the present case that the issue of loan being given to group companies either at low interest rate or no interest rate was a subject matter of consideration by the Assessing Officer during the original assessment proceedings. It would therefore, follow that the re-opening of the assessment is merely on the basis of change of opinion of JAO from that held during the course of assessment proceedings leading to the assessment order dated 21st December, 2019.

2 [2014] 44 taxmann.com 304 (Bombay)

This change of opinion does not constitute justification and/or reason to believe that income chargeable to tax has escaped assessment.

7. According to the JAO, survey report submitted by DDIT investigation indicate that interest should be charged at 12% per annum on loan given to sister concern totaling to Rs.4,17,04,380/- and therefore income chargeable to tax has been under assessed by the said amount. According to the JAO this interest income of Rs.4,17,04,380/- has escaped assessment. We find it rather strange that such an opinion is formed by the JAO. It is an accepted position that petitioner has in fact not received any interest in respect of the loans/advances given to seven of its group companies in the assessment order 2017-18. When no income is received there is no question of paying any tax on income which respondent think should have been received but was in fact not received. Income which accrues to a person is taxable in his hands but we have not seen any provision of law which says that income which he could have earned but he has not earned is taxable as income accrued to him. It will be useful to reproduce paragraph no.7 of the judgment of this court in ***India Finance & Construction Co. (P.) Ltd. vs. B.N. Panda, Deputy Commissioner***[3] . The same reads as under :

> *7. The second transaction on the basis of which notice under section 148 is issued relates to a transaction entered into in May, 1982, under which the assessee-company advanced to M/s. C. R. Developers (P) Ltd. a sum of Rs.15 lakhs purporting to be an advance for the purpose of construction of a hotel. The advance is in the nature of a loan*

3 [1993] 200 ITR 710 (Bombay)

> *and no interest is being charged on this account. The respondents contend that the assessee-company should have received an interest income worth approximately income worth approximately Rs. 3 lakhs if interest had been charged on this advance. Hence, this interest income of approximately Rs. 3 lakhs has escaped assessment. Once again the reason which is recorded is beyond the scope of section 147. It is an accepted position that the assessee-company has in fact not received any interest in respect of this advance from M/s. C. R. Developers (P) Ltd. in the assessment year 1988-89. When no income is received there is no question of paying any tax on income which the respondents think, should have been received but was in fact not received. In the case of CIT v. A. Raman and Co. [1968] 67 ITR 11, the Supreme Court said that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands. Income which he could have but has not earned, is not made taxable as income accrued to him. The Court also said that the High Court exercising Jurisdiction under article 226 of the Constitution has power to set aside a notice issued under section 147(b) if the condition precedent for the exercise of jurisdiction does not exist. It is open to the court to ascertain whether the ITO had in his possession any information and whether from the information the ITO have reason to believe that the income chargeable to tax has escaped assessment. In the present case, the reasons which are recorded clearly show that there is no material at all on the basis of which the Assessing Officer could have reason to believe that any interest income had escaped assessment. No such income had accrued during the assessment year in question.*

8. It will also be useful to reproduce paragraph nos.5, 6 and 7 of the judgment of the High Court of Delhi in ***Shivnandan Buildcon (P.) Ltd. vs. Commissioner of Income-tax***[4] .

> *5. On going through the said decision, it can be discerned that the Guwahati High Court held that there was nothing to show that the assessee had, in fact, received interest or that the company to whom the loan was given had, in fact, paid interest to the assessee. There was also nothing on record to show that the alleged interest was not reflected in the accounts. The only finding recorded was that the assessee "ought to" have charged interest. Referring to an earlier*

4 [2015] 60 taxmann.com 347 (Delhi)

> *decision of the Guwahati High Court, in Highways Construction Co. (P.) Ltd. v. CIT [1993] 199 ITR 702, the Court observed that their attention had not been invited to any provision of the Income-Tax Act empowering the income-tax authorities to include in the income, interest which was not due or not collected.*
>
> *6. In similar vein, when we asked Mr Sahni, who is appearing for the respondent to point out some provision of the Income Tax Act, whereunder such 'notional' interest could be made the subject matter of tax, the only reference he made was to Section 144 of the said Act. However, we are clear that Section 144 does not at all apply to the present proceedings because the present proceedings originate from an assessment under Section 143(3) of the said Act.*
>
> *7. In the absence of any specific provision under which the so called notional income on advances, could be brought to tax, we do not see as to how the impugned orders passed by the Commissioner of Income Tax can be sustained.*

9. As held by the Apex Court in the case of ***Indian & Eastern Newspaper Society, New Delhi vs. Commissioner of Income Tax, New Delhi***[5], even if it is an error that the Assessing Officer discovered, still an error discovered on a re-consideration of the same material does not given him power to re-open. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to

5 119 ITR 996 (SC)

reopen the assessment based on the very same material with a view to take another view.

10. In the circumstances, petition is allowed. The impugned notice dated 30th March, 2021 issued under Section 148 of the Act and the order dated 22nd June, 2021 rejecting petitioner's objections are quashed and set aside.

11. Petition disposed with no order as to costs.

(R.N. LADDHA, J.) (K.R. SHRIRAM, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3554 OF 2019

Svitzer Hazira Pvt. Ltd.]
302 Delta, Hiranandani Business Park,]
Powai, Mumbai – 400 076.] … Petitioner

Versus

1. Assistant Commissioner of Income Tax]
Circle-5(3)(2), Room No.583, 5th Floor,]
Aayakar Bhavan, M. K. Road,]
Mumbai-400 020.]

2. Joint / Addl. Commissioner of Income-tax,]
Range-5(3), Room No.521, 5th Floor,]
Aayakar Bhavan, M. K. Road,]
Mumbai-400 020.]

3. The Union of India]
Through the Secretary,]
Government of India,]
Ministry of Finance,]
New Delhi – 110 001.] … Respondents

Mr. Nishant Thakkar a/w Mr. Hiten Chande i/b PDS Legal for Petitioner.
Mr. Sham V. Walve a/w Mr. Pritish Chatterjee for Respondent Nos.1 & 2.

CORAM :- K. R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATE :- 21 DECEMBER, 2021

ORAL JUDGMENT : (PER : AMIT B. BORKAR. J.) :-

1. Rule. Rule is made returnable forthwith by consent of parties.

2. By this Petition under Article 226 of Constitution of India, the Petitioner is challenging notice dated 31/03/2019 reopening assessment for AY 2014-15, order dated 28/11/2019 disposing of the objections of Petitioner against the reopening of assessment and notice dated 09/10/2019 issued under Section 143(2) and 142(1) of Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. Since we are disposing of the present petition only on the ground of lack of prior approval as contemplated under Section 151 of the Act, only those facts essential for adjudication of the said issue are stated hereinafter.

4. The Petitioner is incorporated under the Companies Act, 1956. It provides tailor-made marine services to LNG terminals, ports, and oil & gas terminals around the world.

5. On 31/03/2019, Respondent No.1 uploaded a notice under Section 148 of the Act and reasons for reopening the assessment on the ITBA portal, informing that the assessment for AY 2014-15 has been reopened and requested the Petitioner to file a return of income for that year. The notice was uploaded at 2.40 p.m. on 31/03/2019 on the portal under the digital signature of Respondent No.1. Respondent No.1

furnished a copy of the approval necessary before issuing notice. Petitioner contends that said approval was signed at 2.55 p.m. on 31/03/2019 by the specified authority under Section 151 of the Act.

6. On 26/04/2019, Petitioner filed the original return of income in response to the said notice under Section 148 of the Act. On 14/06/2019, Petitioner filed objections against the reopening of assessment, stating that the notice issued under Section 148 was issued merely based on a change of opinion without any fresh or tangible material on record. It is also stated that the notice under Section 148 had been issued without prior sanction under Section 151 of the Act, and in any case, the sanction had been granted without any application of mind.

7. On 09/10/2019, Respondent No.1 issued a notice under Section 143(2) of the Act and Section 142(1) of the Act requesting Petitioner to attend his office on 16/10/2019 at 11.00 a.m. Petitioner, vide order dated 15/10/2019, informed Respondent No.1 that the objections against the reopening notice have not been disposed of. On 29/11/2019, Respondent No.1 passed the order of disposing of objections holding that notice under Section 147 is based on tangible material.

8. Petitioner has filed the present petition for the reliefs stated above. This Court, on 18/12/2019, granted time to Respondents to file a reply. However, the Respondents, till today, have failed to file their reply. Therefore, the petition is being decided without the reply of Respondents.

9. Mr. Nishant Thakkar, learned Counsel for Petitioner, *inter alia*, submitted that Respondent No.1 has committed an error of jurisdiction by passing the re-assessment order without there being valid sanction as contemplated under Section 151 of the Act. He submitted that prior approval under Section 151 of the Act is mandatory. From the copy received by the Petitioner, it is clear that the notice was issued at 2.40 p.m. and sanction under Section 148 was granted at 2.55 p.m. He submitted that Respondent No.1 was not justified in observing while disposing of the objections that the approval of competent authority was taken physically. After that, approval was granted online. He submitted that the proceedings under Section 148 of the Act are therefore vitiated.

10. Mr. Sham Walve, learned Counsel for Respondent Nos.1 and 2, submitted that Respondent No.1 had initially granted prior approval physically. However, online approval was granted after that, which was uploaded by digital signature at 2.55 p.m. on 31/03/2019. He, therefore, submitted that there is substantial compliance of prior approval as contemplated by Section 151 of the Act.

11. It must be noted that Sections 147 and 148 grant power to Revenue to reopen the earlier assessment and therefore Assessees are protected by safeguard against unnecessary harassment. Prior approval as contemplated by section 151 operates as a shield from the arbitrary exercise of power by the Assessing Officer. The power of prior approval has been conferred on the superior Officer so that the superior Officer shall examine the reasons, material or grounds and adjudicate whether they are sufficient and adequate to the formation of necessary belief on the part of the Assessing Officer. It is, therefore, necessary for the superior Officer to apply his mind and record his reasons howsoever brief so that the Assessing Officer's belief is well reasoned and *bona fide*. The remark on the part of superior authority must indicate application of mind by giving reasons for prior approval.

12. The legislature has advisedly used the expression '*No notice shall be issued*' in section 151. The expression '*No notice shall be issued* ' cannot be construed to mean post-facto approval. The expression "*No notice shall be issued"* reflects the intention of the legislature to indicate that prior approval is the *sine qua non* before issuance of notice under Section 148 of the Act. The purpose of insertion of expression '*No notice shall be issued* ' before issuing a notice of re-assessment is to avoid harassment to taxpayers and the arbitrary exercise of the power to reopen

the assessment. It is introduced as an in-built safeguard by the legislature. Therefore, we have no doubt in holding that sanction to be granted by the authority under Section 151 has to be prior in point of time of issuance of notice under Section 148 of the Act.

13. In the facts of the present case, it is clear from the digital signature on the notice issued by Respondent No.1 that the notice was issued at 2.40 p.m. on 31/03/2019. The sanction by the authority under Section 151 was digitally signed at 2.55 p.m. on 31/03/2019. The explanation furnished by Respondent No. 1 in the order of disposing of objections that initially physical approval was granted and thereafter online approval was granted has not been supported by any material on record. We fail to understand the need to grant online approval at 2.55 p.m. if physical approval was already granted before 2.40 p.m. In the absence of valid explanation by cogent material, we cannot accept explanation by Respondent No.1 in the order of disposing of objections that physical approval was granted before issuance of notice under Section 148 of the Act.

14. We find that while according sanction, the Joint CIT, Range 5(3), Mumbai has recorded his approval in the following words:

'*Yes, I am satisfied*'.

In the context of recording of reasons while according sanction under section 151 of Act, High Court of ***Madhya Pradesh, in the case of Commissioner of Income-tax, Jabalpur Vs. S. Goyanka Line & Chemicals Ltd.***[1], in paragraph 7 held as under :

> "*7. We have considered the rival contentions and we find that while according sanction, the Joint Commissioner, Income Tax has only recorded so "Yes, I am satisfied". In the case of Arjun Singh (supra), the same question has been considered by a Coordinate Bench of this Court, and the following principles are laid down :*
>
> > *'The Commissioner acted, of course, mechanically in order to discharge his statutory obligation properly in the matter of recording sanction as he merely wrote on the format "Yes, I am satisfied" which indicates as if he was to sign only on the dotted line. Even otherwise also, the exercise is shown to have been performed in less than 24 hours of time which also goes to indicate that the Commissioner did not apply his mind at all while granting sanction. The satisfaction has to be with objectivity on objective material."*

15. The Apex Court, in the case of ***Chhugamal Rajpal Vs. S. P. Chaliha***[2], held as under :

> "*…….. We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under section 148. To question No.8 in the report which reads "Whether the Commissioner is satisfied*

1 ***[2015] 56 taxmann.com 390 (Madhya Pradesh)***
2 ***[1971] 79 ITR 603 (SC)***

> *that it is a fit case for the issue of notice under section 148", he just noted the word "Yes" and affixed his signature thereunder. We are of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under section 148. The important safeguards provided in sections 147 and 151 were lightly treated by the Income-tax Officer as well as by the Commissioner. Both of them appear to have taken the duty imposed on them under these provisions as of little importance. They have substituted the form for the substance.*"

16. We are, therefore, satisfied that there is complete non application of mind on the part of Joint CIT, Range 5(3), Mumbai, while granting sanction under section 151 of Act. There is no prior sanction granted by Respondent No.2 before issuance of notice under Section 148 of the Act. Therefore, the jurisdictional condition of complying with Section 151 was not satisfied, resulting in Respondent No.1 committing the error of jurisdiction by issuing notice under Section 148 of the Act calling for interference under Article 226 of the Constitution of India.

17. We, therefore, pass the following order :-

> "*Rule is made absolute in terms of prayer clause (1) which reads thus :*
> *(a) This this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's*

case and after examining the legality and validity thereof quash and set aside the Impugned Notice under Section 148 of the Act (Exhibit "L") and the Impugned Order (Exhibit "Q") and the notice dated 9 October 2019 (Exhibit "O") issued by Respondent No.1."

(AMIT B. BORKAR, J.) (K. R. SHRIRAM, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3620 OF 2019

Sanjeev Amritlal Chheda ….Petitioner

V/s.

The Income Tax Officer 30(3)(2)
& Anr. …Respondents

Mr. Nishit M. Gandhi a/w Ms. Akshita Bhandari for Petitioner.
Mr. Sham V. Walve for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
R.N. LADDHA, JJ.
DATED : 5th JANUARY, 2022

P.C. :

1. Petitioner was served with a notice dated 28th March, 2019 under Section 148 of the Income Tax Act, 1961 (the Act) for the Assessment Year 2012-13 in which the Jurisdictional Assessing Officer (JAO) has stated *"Whereas I have reasons to believe that your income chargeable to tax for the Assessment Year 2012-13 has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961 ……. This notice is being issued after obtaining the necessary satisfaction of the Pr. CIT 30, Mumbai."*

2. We have seen the reasons for re-opening under Section 147 of the Act made available to petitioner which is dated 25th March, 2019. The reasons does not even indicate initially that income chargeable to tax has escaped assessment. The entire basis of the notice is that respondent had

information that petitioner had borrowed cash loan of Rs. 16,30,000/- in A.Y. 2012-13 from one Mahavir Engineer and therefore petitioner has violated provisions of Section 269SS of the Act. There is not even a whisper as to what was the amount of income of petitioner that has escaped assessment. Though in the reasons the JAO states that he has reasons to believe that petitioner has borrowed cash loan of Rs.16,30,000/- and has violated the provisions of Section 269SS of the Act, in the proforma for recording reasons for initiating proceedings under Section 148 of the Act and for obtaining the approval of the Commissioner of Income Tax/Pr. Commissioner of Income Tax, the JAO has incorrectly stated that the quantum of income which has escaped assessment is Rs.16,30,000/- and not borrowing or cash loan taken. Taking admittedly a loan cannot be any reason to be even considered as income. What we find is that the Joint Commissioner has expressed that from the reasons recorded it is a fit case for issuance of notice under Section 148 of the Act and the Principal Commissioner has also expressed he is satisfied about issuance of notice under Section 148 of the Act. If these two gentlemen had only read the reasons as recorded for re-opening, certainly they would have realised that there is no income which has escaped assessment because the problem according to the JAO was that petitioner has borrowed cash loan of Rs.16,30,000/-. In fact in paragraph no. 9 of the reasons recorded it reads as under :

9. In the light of the above discussion and in consequence of

> *information in the possession of the undersigned, I have reason to believe that by accepting cash loan of Rs.16,30,000/-, the assessee has violated the provision of section 269SS of I.T. Act, 1961 in the Assessment Year 2012-13. Hence, <u>there is escapement of assessment</u> by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary within the meaning of section 147 of Income Tax Act, 1961.*

He says 'there is escapement of assessment' by reason of the failure on the part of the assessee to disclose fully and truly all material facts but does not say that 'there is escapement of income chargeable to tax that has escaped assessment'.

3. Moreover, even in the Assessment Order dated 4th December, 2019 respondents accept the total income as per the return of income declared by petitioner of Rs.7,87,370/- and the whole basis in the assessment order is only to justify respondents' allegations that petitioner had contravened the provisions of Section 259SS of the Act. Since the notice under section 148 of the Act is issued only where there is income that has escaped assessment, notice as impugned in the petition could not have been issued. If respondents felt that they have information that petitioner had taken cash loan of Rs.16,30,000/- and there has been contravention of the provisions under Section 269SS of the Act and petitioner was liable to penalty under Section 271D of the Act for failure to comply, then respondents could have commenced action or proceedings towards imposition of penalty under Section 271D of the Act. Once respondent proceeds on the basis that petitioner had accepted cash loan of

Rs.16,30,000/- that loan could never be considered as income and therefore there cannot be any escapement of income of the loan amount of Rs.16,30,000/-.

4. In the circumstances, without making any observations as to whether respondents could take any action under Section 271D of the Act or whether respondents are right in the allegations against petitioner of borrowing cash loan in the sum of Rs.16,30,000/-, only on the jurisdictional issue under Section 148 of the Act, we are allowing the petition in terms of prayer clause – (a) which read as under :

> *(a) That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction, order or a writ, including a writ in the nature of 'Certiorari', calling for the records of the case and, after satisfying itself as to the legality thereof, quash and set aside the Notice u/s 148 dated 28.03.2019, Ex. "B" herein, the order disposing objections dated 05.11.2019, Ex. "H" herein and the ex-parte assessment order dated 04.12.2019 Ex. "J" herein passed by the Respondent;*

5. Mr. Walve states that respondent should be permitted to take action under Section 271D of the Act. It is open to respondent to take such action as adviced in accordance with law. We are not making any observations on the merits of the case.

6. Petition disposed.

(R.N. LADDHA, J.) (K.R. SHRIRAM, J.)

Purti Para6

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

\+ W.P.(C) 14528/2021 & CM APPL. 45702/2021

BHARAT ALUMINIUM COMPANY LTD. ..... Petitioner
Through: Mr. Arvind Datar, Senior Advocate with Mr. Gopal Mundhra, Advocate.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Gigi C. George, Advocate for UOI. Mr. Sanjay Kumar, Advocate for Revenue.

% Reserved On : 24th December, 2021
Date of Decision: 14th January, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J:

1. Present writ petition has been filed by the petitioner challenging the action of respondent No.3 in passing the impugned final assessment order dated 27th November, 2021 under Section 143(3) of the Income Tax Act, 1961 [for short '*the Act*'] and the impugned notice dated 27th November, 2021 under Section 156 of the Act for Assessment Year 2018-19.

ARGUMENTS ON BEHALF OF THE PETITIONER

2. Mr. Arvind Datar, learned senior counsel for the petitioner stated that the impugned orders have been passed arbitrarily, without following the

principles of natural justice and in gross violation of the scheme of faceless assessment under Section 144B of the Act, inasmuch as even after the 'Nil' or 'Null' variation proposed in the show cause notice, additions had been made to the assessed income in the draft assessment order as well as in the impugned final assessment order.

3. He contended that respondent No.3 in the draft assessment order as well as in the impugned final assessment order had proceeded to make additions to the assessed income on the false premise that the petitioner had not furnished relevant details / information in response to the statutory notice dated 19th August, 2021, issued under Section 142(1) of the Act. He stated that respondent No.3 had failed to appreciate that the petitioner was unable to upload the file due to technical glitches on the respondent's own portal. He emphasised that the petitioner had still filed reply to the notice that too within the due date vide email dated 3rd September, 2021 and, thus, there was no non-compliance on the part of the petitioner.

4. Mr. Arvind Datar submitted that while Section 144B(1)(xvi) provides an opportunity to the assessee by serving a Show Cause Notice in case any variation of assessment is proposed which is prejudicial to the interest of assessee, Section 144B(1)(xxv) provides for issuance of draft assessment order to the assessee after considering the reply to Show Cause Notice. He emphasized that in the present case, respondent No.3 issued a Show Cause Notice under Section 144B(1)(xvi) proposing 'Null' or 'Nil' variation and the petitioner duly confirmed the same vide letter dated 16th September, 2021. However, thereafter, respondent No.3 took a complete turnaround and issued the draft assessment order proposing variations for which no Show Cause Notice was ever issued to the petitioner.

5. He pointed out that this Court in multiple cases, including ***Rani Promoter Pvt. Ltd. vs. Additional Commissioner of Income Tax [2021 (7) TMI 919-Delhi High Court]*** and ***Toplight Corporate Management (P.) Ltd. vs. National Faceless Assessment Centre Delhi [(2021) 128 taxmann.com 221 (Delhi)],*** has unequivocally held that issuance of Show Cause Notice, mentioning the proposed additions under Section 144B(xvi), is a mandatory requirement and any assessment order passed without issuance of such Show Cause Notice is bad in law. He even stated that in the instant case, the Show Cause Notice, referred to in the final Assessment Order, was never served upon the petitioner.

6. He also stated that the petitioner had not been granted any opportunity of personal hearing, despite a specific request having been made under Section 144B(7) of the Act by the petitioner. He submitted that Section 144B(7)(vii), (viii) and (ix) provides opportunity of personal hearing through video conferencing where such option is exercised by the assessee. He stated that this Court in ***Sanjay Aggarwal vs. National Faceless Assessment Centre [2021 (6) TMI 336 - Delhi High Court] and Umkal Healthcare (P.) Ltd. vs. NFAC [(2021) 131 taxmann.com 325 (Delhi)]*** has held that it was incumbent upon the Department to accord a personal hearing to the assessee where such a request was made under Section 144B(7) and failure to do so would amount to violation of principles of natural justice as well as mandatory procedure prescribed in the Faceless Assessment Scheme under Section 144B of the Act.

7. He lastly submitted that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are forbidden**.**

ARGUMENTS ON BEHALF OF THE RESPONDENTS

8. *Per contra*, learned counsel for the respondents/Revenue submitted that cases of violation of principle of natural justice can be summarized in two categories i.e. (i) denial of opportunity and (ii) insufficiency of opportunity. He stated that the cases falling under the first category, wherein no opportunity was provided to the person charged, cannot withstand the scrutiny of law and were required to be set aside. However, in cases where insufficiency of opportunity was complained of, the prejudice caused to the person deprived of sufficient opportunity had to be taken into account before any finding on legality of such proceedings was recorded.

9. He further stated that personal hearing in assessment proceedings under the Act is an added opportunity in addition to the written replies submitted by assessee and hence denial thereof would fall under the second category of "insufficiency of opportunity". According to him, Section 144B of the Act, made effective from 1st April, 2021, had brought about a new era of faceless assessment where Assessing Officers cannot be identified during the assessment proceedings. He submitted that grant of personal hearing in routine and mechanical manner or stereotyped manner would not only frustrate the entire concept of Faceless Assessment Scheme but would also defeat the very purpose for which this Scheme was brought about by the Legislature. He pointed out that the Legislature, in its own wisdom, had provided for a mechanism for grant of personal hearing in deserving cases falling in the category of Section l44B of the Act itself. The relevant portion of Section 144B of the Act, relied upon by learned counsel for respondents/Revenue, is reproduced hereinbelow:-

"144B. Faceless assessment:

> *(7)(vii) in a case where a variation is proposed in the draft assessment order or final draft assessment order or revised draft assessment order, and an opportunity is provided to the assessee by serving a notice calling upon him to show cause as to why the assessment should not be completed as per the such draft or final draft or revised draft assessment order, the assessee or his authorized representative, as the case may be, may request for personal hearing so as to make his oral submissions or present his case before the income-tax authority in any unit;*
>
> *(viii) the Chief Commissioner or the Director General, in charge of the Regional Faceless Assessment Centre, under which the concerned unit is set up, may approve the request for personal hearing referred to in clause (vii) if he is of the opinion that the request is covered by the circumstances referred to in sub-clause (h) of clause (xii);*
>
> *……*
> *(xii):*
> *(a) to (g) *******
> *(h) circumstances in which personal hearing referred to clause (viii) shall be approved"*

10. He further stated that this Court in ***Sanjay Aggarwal*** (supra) and other similar matters has held that as no standards, procedures and process in terms of sub-clause (h) of Section 144B(7)(xii) read with Section 144B(7)(viii) of the Act had been framed, it was incumbent upon Revenue to accord personal hearing to the petitioner. He emphasised that the aforesaid finding given by this Court was due to Revenue counsel not producing the standard procedure and process framed by the Revenue. He pointed out that the Standard Operating Procedure for personal hearing through video conference under the Faceless Assessment Scheme, 2019 was issued by CBDT vide Circular F.No.Pr.CCIT/NeAC/SOP/2020-21 dated 23rd November, 2020. He stated that CBDT vide order F.NO.187/3/2020-

ITA-I dated 31st March, 2021 extended the Circulars/notifications issued under Faceless Assessment Scheme to the Faceless Assessment under Section 144B of the Act and, therefore, the SOP contained in circular dated 23rd November, 2020 was equally applicable to the proceedings under Section 144B of the Act also. The circular dated 23rd November, 2020 is reproduced hereinbelow:-

> *"Where any modification is proposed in the draft assessment order (DAO) issued by any AU and the Assessee or the authorized representative* ***in his/her written response disputes the facts underlying the proposed modification*** *and makes a request for a personal hearing, the CCIT ReAC may allow personal hearing through Video Conference, after considering the facts & circumstances of the case, as below:-*
>
> > *1. The Assessee has submitted written submission in response to the DAO.*
> >
> > *2. The Video Conference will ordinarily be of 30 minutes duration. It may be extended on the request of the Assessee or authorised representative.*
> >
> > *3. The Assessee may furnish documents/evidence, to substantiate points raised in the Video Conference during the session or within a reasonable time allowed by the AU, after considering the facts and circumstances of the case."*
>
> *(emphasis supplied)*

11. Therefore, according to him, the personal hearing is discretionary. He emphasised that under faceless assessment under Section 144B of the Act, the assessee does not have a vested right to personal hearing and the same could be granted depending upon the individual facts of each case and fulfilling of the conditions laid down in SOP dated 23rd November, 2020.

COURT'S REASONING

THIS COURT IS UNABLE TO COMPREHEND AS TO HOW DESPITE 'NIL' OR 'NULL' VARIATION PROPOSED IN THE SHOW CAUSE NOTICE, THE IMPUGNED FINAL ASSESSMENT ORDER AND NOTICE MAKES A DEMAND OF Rs.1,69,77,44,240/-.

12. Having heard learned counsel for the parties, this Court is unable to comprehend as to how despite 'Nil' or 'Null' variation proposed in the show cause notice, additions had been made to the assessed income in the draft Assessment Order and the final Assessment Order. Infact, while the show cause notice assessed a total loss of Rs.1,76,94,91,428/-, the impugned final assessment order and notice makes a demand of Rs.1,69,77,44,240/- as if the petitioner made a super profit!

13. Further, no Show Cause Notice, as mandatorily required by Section 144B(1)(xvi) of the Act, had been served upon the petitioner with respect to the variations made. The draft Assessment Order had also been issued without considering the reply which was submitted by the petitioner well in time in response to notice issued under Section 142(1) of the Act through email, given the technical glitch in the online facility.

FACELESS ASSESSMENT SCHEME DOES NOT MEAN NO PERSONAL HEARING. NOT UNDERSTOOD AS TO HOW GRANT OF PERSONAL HEARING WOULD EITHER FRUSTRATE THE CONCEPT OR DEFEAT THE VERY PURPOSE OF FACELESS ASSESSMENT SCHEME.

14. Last but not the least, this Court finds that no opportunity of personal hearing was given despite a specific request made by the petitioner.

15. This Court is of the opinion that a faceless assessment scheme does not mean no personal hearing. It is not understood as to how grant of

personal hearing would either frustrate the concept or defeat the very purpose of Faceless Assessment Scheme.

16. In ***Piramal Enterprises Limited vs. Additional/Joint/Deputy Assistant Commissioner of Income-tax/Income-tax Officer & Ors., 2021 SCC OnLine Bom 1534***, while interpreting Section 144B of the Act, the Bombay High Court has held as under:-

> *"65. Principles of natural justice firmly run through fabric of section 144B(1) of the Income Tax Act, 1961. Whenever DAO, FDAO is prejudicial to the interest of assessee or RDAO is prejudicial to the interest of assessee in comparison to DAO or FDAO, upon a response to show-cause notice, personal hearing for oral submissions or to present its case before income tax authority is strongly entwined in the provisions on a request from an assessee unless it is absurd, strategised and/or intended to protract assessment etc. It would also emerge from various decisions, referred to above, ordinarily, such a request would not be declined. Judgments cited on behalf of petitioner referred to hereinbefore give exposition on significance and importance of principles of natural justice.*
>
> *66. Section 144-B of the Income Tax Act, 1961 captioned 'Faceless Assessment' commences vide its sub-section (1) with a non-obstante clause and compulsively requires assessment u/ss 143(3) and 144 shall be by prescribed procedure contained in sub-section (1) of section 144-B in the cases referred to in sub-section (2) thereof.*
>
> *67. Sub-section (9) of section 144B declares that assessment made under section 143(3) or under section 144(4) referable to subsection (2) other than sub-section (8) on or after 1st day of April, 2021 shall be non est if such assessment is not made in accordance with the procedure laid down under section 144B. There is a telling/pronounced rigour, to follow the procedure under section 144B, lest the assessment would be non est.*
>
> *68. Going by the provisions under section 144B, when hearing has been envisioned and incorporated, it is imperative to observe principles of natural justice as stipulated.*

xxx *xxx* *xxx*

> *70. In the circumstances, when an assessee approaches with response to show cause notice, the request made by an assessee, as referred to in clause (vii) of sub section 7 of section 144B, would have to be taken into account and it would not be proper, looking at the prescribed procedure with strong undercurrent to have hearing on a request after notice, to say that petitioner would have opportunity pursuant to section 144C in the present matter, would intercept operation of the scheme contained under section 144B.*

IT IS SETTLED LAW THAT WHERE EXERCISE OF A POWER RESULTS IN CIVIL CONSEQUENCES TO CITIZENS, UNLESS THE STATUTE SPECIFICALLY RULES OUT THE APPLICATION OF NATURAL JUSTICE, THE RULES OF NATURAL JUSTICE WOULD APPLY.

17. This Court is further of the view that where an action entails civil consequences, like in the present matter, observance of natural justice would be warranted and unless the law specifically excludes the application of natural justice, it should be taken as implanted into the scheme. The settled position in law is that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, the rules of natural justice would apply, including the right to personal hearing. Denial of such opportunity is not in consonance with the scheme of the Rule of Law governing our society. [See: ***Raghunath Thakur vs. State of Bihar & Ors., (1989) 1 SCC 229***]. In fact, the opportunity to provide hearing before making any decision is considered to be a basic requirement in Court proceedings.

18. In ***C.B. Gautam vs. Union of India & Ors., (1993) 1 SCC 78***, the Supreme Court invoked the same principle and held that even though it was not statutorily required, yet the authority was liable to give notice to the

affected parties while purchasing their properties under Section 269-UD of the Act, namely, the compulsory purchase of the property. It was observed that though the time frame within which an order for compulsory purchase has to be made is fairly tight, yet urgency is not such that it would preclude a reasonable opportunity of being heard. A presumption of an attempt to evade tax may be raised in case of significant under valuation of the property but it would be rebuttable presumption, which necessarily implies that a party must have an opportunity to show cause and rebut the presumption. It was further observed that the very fact that an imputation of tax evasion arises where an order for compulsory purchase is made and such an imputation casts a slur on the parties to the agreement to sell lead to the conclusion that before such an imputation can be made against the parties concerned they must be given an opportunity to show cause that the under valuation in the agreement for sale was not with a view to evade tax. It is, therefore, all the more necessary that an opportunity of hearing is provided.

19. Subsequently, in ***Sahara India (Firm) vs. Commissioner of Income-tax, Central-I,*** reported in ***[2008] 169 Taxman 328 (SC),*** the Apex Court highlighted the necessity and importance of opportunity of pre-decisional hearing to an assesee and that too in the absence of any express provision. Infact, the requirement of following principles of natural justice was read into Section 142(2A) of the Income Tax Act following the earlier decisions of the Supreme Court in ***Swadeshi Cotton Mills vs. Union of India (1981) 1 SCC 664*** and ***C.B. Gautam vs. Union of India & Ors. (1993) 1 SCC 78***. Later on this principle was applied to other quasi-judicial and other tribunals and it is now clearly laid down that even in these actions, where the decision

of the authority may result in civil consequences, a hearing before taking a decision is necessary.

USE OF THE EXPRESSION "MAY" IN SECTION 144B (7)(VIII) IS NOT DECISIVE. WHERE A DISCRETION IS CONFERRED UPON A QUASI-JUDICIAL AUTHORITY WHOSE DECISION HAS CIVIL CONSEQUENCES, THE WORD "MAY" WHICH DENOTES DISCRETION SHOULD BE CONSTRUED TO MEAN A COMMAND. CONSEQUENTLY, THIS COURT IS OF THE VIEW THAT REQUIREMENT OF GIVING AN ASSESSEE A REASONABLE OPPORTUNITY OF PERSONAL HEARING IS MANDATORY.

20. The non-obstante clause and the use of expression 'shall be made' in Section 144B(1) creates a mandatory obligation upon the respondent/Revenue to follow the prescribed procedure. This Court is also of the view that the use of the expression "may" in Section 144B (7)(viii) is not decisive. It is settled law that having regard to the context, the expression "may" used in a statute has varying significance. In some contexts, it is purely permissive, whereas in others, it may make it obligatory upon the person invested with the power to exercise it. The word "may" is capable of meaning "must" or "shall" in the light of the context. In fact, where a discretion is conferred upon a quasi judicial authority whose decision has civil consequences, the word "may" which denotes discretion should be construed to mean a command. In ***State (Delhi Admn.) vs. I.K. Nangia & Anr., (1980) 1 SCC 258***, the Supreme Court has held as under:-

> *"15. …There can be no doubt that this implies the performance of a public duty, as otherwise, the scheme underlying the section would be unworkable. The case, in our opinion, comes within the dictum of Lord Cairns in Julius v. Lord Bishop of Oxford:*
>
> > *There may be something in the nature of the thing empowered to be done, something in the object for which it is*

> *to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.*

The Explanation lays down the mode in which the requirements of Section 17(2) should be complied with. Normally, the word 'may' implies what is optional, but for the reasons stated, it should in the context in which it appears, mean 'must'. There is an element of compulsion. It is a power coupled with a duty. In Maxwell on Interpretation of Statutes, 11th Edn. at p. 231, the principle is stated thus:

> *Statutes which authorise persons to do acts for the benefit of others or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall, if they think fit', or, 'shall have power', or that 'it shall be lawful" for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition.*

Though the company is not a body or authority, there is no reason why the same principle should not apply. It is thus wrong to suggest that the Explanation is only an enabling provision, when its breach entails in the consequences indicated above. It is not left to one's choice, but the law makes it imperative. Admittedly, M/s Ahmed Oomer Bhoy had not at the material time nominated any person, in relation to their Delhi branch. The matter is, therefore, squarely covered by Section 17(1)(a)(ii).

21. This Court is further of the view that a quasi judicial body must normally grant a personal hearing as no assessee or litigant should get a

feeling that he never got an opportunity or was deprived of an opportunity to clarify the doubts of the assessing officer/decision maker. After all confidence and faith of the public in the justness of the decision making process which has serious civil consequences is very important and that too in an authority/forum that is the first point of contact between the assessee and the Income Tax Department. The identity of the assessing officer can be hidden/protected while granting personal hearing by either creating a blank screen or by decreasing the pixel/density/resolution.

22. Consequently, this Court is of the view that the word "may" in Section 144B(viii) should be read as "must" or "shall" and requirement of giving an assessee a reasonable opportunity of personal hearing is mandatory.

THE CLASSIFICATION MADE BY THE RESPONDENTS/REVENUE BY WAY OF A CIRCULAR DATED 23RD NOVEMBER, 2020 IS NOT LEGALLY SUSTAINABLE. AN ASSESSEE HAS A VESTED RIGHT TO PERSONAL HEARING AND THE SAME HAS TO BE GIVEN, IF AN ASSESSEE ASKS FOR IT.

23. The argument of the respondent/Revenue that personal hearing would be allowed only in such cases which involve disputed questions of fact is untenable as cases involving issues of law would also require a personal hearing. This Court is of the view that the classification made by the respondents/Revenue by way of the Circular dated 23rd November, 2020 is not legally sustainable as the classification between fact and law is not founded on intelligible differentia and the said differentia has no rational relation to the object sought to be achieved by Section 144B of the Act.

24. Also, if the argument of the respondent/Revenue is accepted, then this Court while hearing an appeal under Section 260A (which only involves a

substantial question of law) would not be obliged in law to grant a personal hearing to the counsel for the Revenue!

25. Consequently, this Court is of the opinion that an assessee has a vested right to personal hearing and the same has to be given, if an assessee asks for it. The right to personal hearing cannot depend upon the facts of each case.

CONCLUSION

26. For the aforesaid reason, the impugned final assessment order and impugned notice (both dated 27th November, 2021) issued by respondent No.3 to the petitioner are set aside and the matter is remanded back to the Assessing Officer who shall issue a Show Cause Notice and a draft assessment order and thereafter pass a reasoned order in accordance with law. With the aforesaid direction, the present writ petition along with pending application stands disposed of.

MANMOHAN, J

NAVIN CHAWLA, J

JANUARY 14, 2022
AS/js

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19176 of 2021

==========

VAGEESH UMESH JAISWAL

Versus

STATE OF GUJARAT

==========

Appearance:
KUNTAL A PARIKH(7757) for the Petitioner(s) No. 1
MR. UTKARSH SHARMA, LD. ASST. GOVERNMENT PLEADER/PP(99) for the Respondent(s) No. 1
NOTICE NOT RECD BACK(3) for the Respondent(s) No. 2

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 06/01/2022

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs;

> *"(a) That this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, direction or order quashing and setting aside the impugned order dated 15.11.2021 (Annexure-A) passed by the Respondent No.2 and*
>
> *(b) That this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, direction or order quashing and setting aside the notice dated 11.10.2021 (Annexure-E) issued by the Respondent No.2, and*
>
> *(c) That this Hon'ble Court be pleased to issue a*

Writ of mandamus or any other appropriate writ, direction or order quashing and setting aside the action of blocking of input tax credit (Annexure-B) by the Respondents;and

(d) This Hon'ble Court be pleased to issue writ of mandamus or any other appropriate writ, direction or order directing the Respondents to unblock/release the input tax credit, and

(e) Pending notice, admission and final disposal of this petition, this Hon'ble Court by way of interim relief be pleased to direct the respondent authorities to restore the registration of the petitioner with effect from 01.07.2017 and to unblock/release the input tax credit of Rs.32,75,288/-; and

(f) Pending notice, admission and final disposal of this petition, this Hon'ble Court by way of interim relief stay the recovery and any other coercive action in pursuance of the impugned order dated 15.11.2021 (Annexure-A) passed by the Respondent No.2; and

(g) Ex-parte ad-interim relief in terms of Prayer-9(e) and 9(f) be granted; and
(h) for costs; and

(I) That this Hon'ble Court be pleased to grant such other and further relief/s as are deemed just and proper in the facts and circumstances of this case."

2. The facts, giving rise to this writ application, may be summarized as under;

2.1 The writ applicant is a proprietor of a proprietary firm running in the name of M/s. All Metals and is engaged in the business of trading of aluminum round bars, steel

tubes, pipes etc. The proprietary firm is registered under the Gujarat Value Added Tax Act, 2003. On 17th March, 2021, the premises of the writ applicant was searched by the Asst. Commissioner of DGGI (Directorate General of Goods & Services Tax Intelligence), Ahmedabad. In the course of the search, the officer seized various documents like purchase invoices, ledger copies etc. It appears that, thereafter, the respondent No.2 issued a show-cause notice in the Form GSTREG-17/31 [Rule 22(1)] of the Rules, which reads thus;

"Reference Number:ZA241021046852Z

Date:11.10.2021

To,
Registration Number (GSTIN/Unique ID):24AHZPJ6810B/ZD
Vageesh Jaiswal
B-2, Puspak Estate, Gujarat Bottling Road, Rakhial, Ahmedabad, Gujarat, 380023.

Show cause notice for Cancellation of Registration

Whereas on the basis of information which has come to my notice, It appears that your registration is liable to be cancelled for the following reasons;

1. Issue any invoice or bill without supply of goods and/or service in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilization of input tax credit or refund of tax.

You are hereby directed to furnish a reply to the notice within seven working days from the date of service of this notice.

You are hereby directed to appear before the undersigned on 18.10.2021 at 11:00

if you fail to furnish a reply within the stipulated date or fail to appear for personal hearing on the appointed date and time, the case will be decided ex parte on the basis of available records and on merits.

Please note that your registration stands suspended with effect from 11.10.2021.

Place: Gujarat
Date: 11.10.2021.

Nanjibhai Keshabhai Prajapati
Commercial Tax Officer
Ghatak 19 (Ahmedabad): Range-5,
Division-2:Gujarat"

2.2 To the aforesaid show-cause notice, the writ applicant filed its reply dated 18th October, 2021, which reads thus;

"To,
Commercial Tax Officer,
Ghatak 19 (Ahmedabad): Range-5: Division-2 Gujarat

Respected Sir,

Subject: Reply to Show Cause Notice for Cancellation of Registration in case of ALL Metals (Proprietor: VAGEESH JAISWAL), GSTN :24AHZPJ6810BIZD

Ref: Notice Reference Number: ZA241021046852Z dated 11-10-2021

As per the notice issued to us having following reason for the cancellation

“Issues any invoice or bill without supply of goods and/or services in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilization of input tax credit or refund of tax.”

We have been doing the business of supplying the steel on actual delivery terms only and we have not been involved in the issuance of any invoice or bill without supply of goods and or service. We need additional time of 10 days to submit the documentary evidence for delivery of goods since I was in Mumbai due to medical emergency of my sister (Attached herewith report of medical) and then traveled to Kolkata and returned to Ahmadabad as on 17-10-2021 at late night evening (Attached herewith travel tickets).

At outset I also mention the fact that my total credit of Rs. 32,75,288/- was already blocked for which no order was received to me for blocking the credit for the F.Y 2018-19.

I urge to share with me show cause notice has been issued based on which supplier name and GSTN who involved in Issues any invoice or bill without supply of goods and/or services, if any or base for issuing this show cause notice so that I can substantiate the reply in detailed and also, notice was issued for which period to substantiate the claim of proof of delivery of goods by sales made by us.

I also urge that my number has been suspended without providing the base and information pertaining to which year hence; I request to activate my number as suspension of the number leads to hardship for deliver the goods as on date and affecting to my business transaction.

We shall be glad to furnish further information or explanation, if any.

For,

All Metals

Vageesh Jaiswal,

(Proprietor)

Enclosure:-

01. Medical report of my sister;

02. My travel tickets from Ahmedabad to Mumbai with my spouse and Travel ticket from Mumbai to Kolkata and Kolkata to Ahmedabad."

2.3 In the reply to the show-cause notice, the writ applicant brought to the notice of the Commercial Tax Officer that the show-cause notice was as vague as anything as no details of the name of the supplier etc. had been furnished.

2.4 The Commercial Tax Officer proceeded to pass the final order, cancelling the registration in the form GSTREG-19 dated 15th November, 2021. The same reads thus;

"FORM GST REG-19
[See Rule 22(3)]

Reference Number:ZA241121046467U

To,
Vageesh Jaiswal,
B-2, Puspak Estate, Gujarat Bottling Road, Rakhial, Ahmedabad, Gujarat, 380023.

GSTIN/UIN:24AHZPJ6810BIZD

Application Reference No.(ARN):AA241021032559M

Order for Cancellation of Registration

This has reference to your reply dated 18.10.2021 in response to the notice to show cause dated 11.10.2021

Whereas the undersigned has examined your reply and submission made at the time of hearing and is of the opinion that your registration is liable to be cancelled for following reason(s);

1. DEALER IS ENGAGED IN BOGUS BILLING

The effective date of cancellation of your registration is 01.07.2017

Determination of amount payable pursuant to cancellation:

Accordingly, the amount payable by you and the computation and basis thereof is as follows;

The amount determined as being payable above are without prejudice to any amount that may be found to be payable you on submission of final return furnished by you.

You are required to pay the following amount on or before 25.11.2021 failing which the amount will be recovered in accordance with the provisions of the Act and Rules made thereunder.

Head	Central Tax	State Tax/UT Tax	Integrated Tax	Cess
Tax	0	0	0	0
Interest	0	0	0	0
Penalty	42923063	42923063	822183	0

Others	0	0	0	0
Total	42923063E7	42923063E7	822183,0	0.0

Place: Gujarat
Date: 15.11.2021

Nanjibhai Keshabhai Prajapati
Commercial Tax Officer
Ghatak 19 (Ahmedabad)"

2.5 The plain reading of the order, cancelling the Registration, would further indicate that there is a demand of Rs.8 Crore & Odd.

2.6 Being dissatisfied with the aforesaid order passed by the Commercial Tax Officer, cancelling the Registration, the writ applicant is here before this Court with the present writ application.

3. We have heard Mr. Mihir Joshi, the leaned senior counsel assisted by Mr. Kuntal Parikh, the learned counsel appearing for the writ applicant and Mr. Utkarsh Sharma, the learned AGP appearing for the State-respondents.

4. This litigation has really disappointed us and that too at the end of a tiring day. We are disappointed for two reasons; first the mode and manner in which the entire exercise has been undertaken by the Commercial Tax Officer in cancelling the registration and secondly the

vehemence with which the learned AGP has opposed this writ application despite serious shortcomings in the impugned action. When we pointed out to the learned AGP that the show-cause notice is as vague as anything, the learned AGP very vehemently maintained that the show-cause notice contains the minutest of the details on the basis of which the writ applicant could have given a proper and effective reply. The first thing we take notice of is that there are no reasons assigned in the show-cause notice. What has been done is mere incorporation of the provisions of Rule 21(b) of the Rules. If that is to be termed as reasons, then we are really left wondering as to how do we adjudicate such matters. In the final order, cancelling the registration, there is just one line stated "Dealer is engaged in bogus billing".

5. We inquired with the learned AGP that if such a show-cause notice would have been issued to him, how he would have replied in the absence of any basic information or details. Mr. Sharma submitted that the show-cause notice is in the proforma, i.e, Form GSTREG-17/31. In the show-cause notice, it has been brought to the notice of the writ applicant that he is engaged in bogus billing and that is sufficient for the writ applicant to understand what the authority is talking about.

6. We are sorry to say that the Commercial Tax Officer has not only cut a sorry figure for himself but has also

made a mockery of justice. He has also made a mockery of the provisions of law. If such is the understanding of the Commercial Tax Officer, then he does not deserve to remain in office even for a day. We are constrained to use some harsh words because this is a common feature. Everyday we come across matters of the present type and the officers are not ready to understand.

7. The whole object of issuing a show-cause notice is to make the recipient of the notice understand what the authority is trying to convey and what are the nature of the allegations. In the case on hand, when there are allegations of bogus billing, it was expected of the authority to at least furnish some information about such bogus billing. At this stage, Mr. Sharma submitted that along with the show-cause notice, there is always few documents attached which would indicate what the authority wants to convey about the bogus billing. It has been stated on oath not only in the memorandum of the writ application but even in the reply to the show-cause notice that except the show-cause notice, nothing else was furnished or nothing was attached to such show-cause notice.

8. A show cause notice has great significance in the adjudication proceedings for the mandatory compliance of the principles of natural justice . Show cause notice is a mandatory requirement for raising any demand under the

Act, 2017 except payment of interest u/s 50 and assessment of non filer of returns u/s 62 of the act. The SCN is the foundation on which the adjudicating authority has to build up its case. It is the document served on the taxable person asking him to explain with reason as to why a particular course of action should not be taken against him. It must be a speaking and well reasoned document. The issue of SCN is not only to make aware the taxable person against whom the action is intended to be taken but must contain brief facts of case and grounds relied upon for the proposed action and language in precision, the reading of which makes the person concerned understand the case that he has to defend. It should not be issued on assumptions and presumptions. The allegations and findings in the SCN should be supported by some documentary evidences.

9. The Supreme Court, in the case of ***Commissioner of C.Ex., Banglore vs. Brindavan Beverages (P) Ltd.***, Civil Appeal Nos. 3417-3425 of 2002 decided on 15.06.2007, has observed as under;

> *"The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various*

concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any."

10. At this stage Mr. Joshi pointed out that the input tax credit was also blocked in exercise of the powers under Rule 86A of the Rules. Let us assume for the moment that at the relevant point of time, the authority was justified, but the order has outlived its statutory life period of one year. In such circumstances, the blocking of the input tax credit also comes to an end.

11. In the result, this writ application succeeds and is hereby allowed. The impugned order, cancelling the registration is hereby quashed and set aside. As we have quashed and set aside the order, cancelling the registration on the ground of vague show-cause notice bereft of any material particulars, we leave it open to the authority to issue a fresh show-cause notice, if it intends to, but such fresh show-cause notice should contain all the necessary details and information about the alleged bogus billing to enable the assessee to file an effective reply to the same.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE,J)

Vahid

Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRESENT:
The Hon'ble JUSTICE T. S. SIVAGNANAM
AND
The Hon'ble JUSTICE ANANDA KUMAR MUKHERJEE

IA No.GA 2 of 2017 (Old No. GA 1186 of 2017)
In
ITAT 133 of 2017

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-4
VERSUS
M/S. STANDARD LEATHER PVT. LTD.

For the appellant : *Mr. Debasish Choudhury, Adv.*
Mr. Soumen Bhattacharya, Adv.

For the respondent : *Mr. Sukalpa Seal, Adv.*
Mr. Bhaskar Sengupta, Adv.

Heard on : January 7, 2022.

Judgement on : January 7, 2022.

T. S. SIVAGNANAM, J. : This appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (the Act, in brevity) is directed against the order dated 07.09.2016 passed by the Income Tax Appellate Tribunal, 'C' Bench, Kolkata (the Tribunal) in ITA No.2620/Kol/2013 for the assessment year 2010/11.

The Revenue has raised the following substantial questions of law for consideration:

(a) Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal, 'C' Bench was correct in holding that the assessee was entitled to deduction in respect of raw hide purchases made in cash exceeding Rs.20,000/- u/s 40A(3) of the Income Tax Act, 1961 ?

(b) Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal, 'C' Bench was correct in holding that the purchases were made from the persons covered by the provisions of Rule 6DD(e) of the Income Tax Rules, without having any material on record to warrant and corroborate such view ?

We have heard Mr. Debasish Choudhury, learned standing counsel appearing for the appellant/revenue and Mr. Sukalpa Seal, learned counsel appearing for the respondent/assessee.

The assessing officer while computing the assessment by an order dated 14.3.2013 under Section 143(3) of the Act proposed to disallow the expenses which have been incurred by the assessee for the purchase of raw hides and skins by non-account payee cheques. The show cause notice was issued to the assessee, who had submitted the reply, stating that their case would be covered under the circumstances mentioned in Rule 6DD of the Income Tax Rules. Apart from that the copies of the purchase bills, transport bills, transport permit given by the Government, sales tax way bills and other documents were produced by the assessee to prove the genuineness of the transaction of purchase of raw hides and skins from the producers, the assessing officer issued notices to some of those persons under Section 133(6) of the Act which

appear to have returned by the postal department with the endorsement 'not known'. Therefore, the assessing officer disbelieved the transaction and treated those documents to be bogus transaction and, accordingly, disallowed the said claim and accordingly, added back the said claim while computing the assessment. The assessee carried out the matter on appeal before the Commissioner of Income Tax (Appeals)-XII [CIT(A)]. All the records which were placed before the assessing officer were once again placed before the [CIT(A)] and submissions were made on the facts of the case. The [CIT(A)] further noted the factual position and accepted the case of the assessee. After noting the documents produced by the assessee to prove the genuineness of the transaction. Furthermore, the [CIT(A)] observed that merely because the sellers and the traders are merchants of hides and skins, they cannot be termed to be producers. Thus, taking note of the facts, the assessee's appeal was allowed by order dated 13.08.2013. Aggrieved by the same, the Revenue filed appeal before the Tribunal. The Tribunal re-examined the factual position and noted that the assessing officer has not brought on record to prove the fact anything contrary except the observation that some of the notices sent under Section 133(6) of the Act have returned with postal endorsement 'not known'. The tribunal observed that merely because some of the notices were returned with such endorsement, it cannot be inferred that the purchase was not made from producers. Furthermore, the tribunal noted that the assessee maintained day-to-day stock register of raw hides and skins and purchase of raw hides and skins were duly entered in the stock register. Furthermore, the tribunal noted that the there was no evidence available before the assessing officer to suggest that purchase was not made from the producers of raw hides and skins.

Furthermore, the tribunal noted from the tax audit report that the assessee has been maintaining day-to-day stock register and the quantity was clearly verifiable. Thus, the tribunal reappreciated the factual position. The tribunal also referred to the decision of the Hon'ble Supreme Court in *Attar Singh Gurumukh Singh –versus- Income Tax Officer* reported in *(1991) 191 ITR 667 (SC)*. The learned counsel for the appellant/Revenue also placed the said decision for our consideration. The said decision was rendered in a case where the validity of Section 40A (3) of the Act was challenged. The Hon'ble Supreme Court has rendered the following observation :

> *"The terms of section 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of section 40A (3) and rule 6DD that they are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions."*

From the above decision it is clear that the provisions of Section 40A(3) of the Act read with Rule 6DD of the Rules are intended to regulate business transaction and to prevent the use of unaccounted money. Further, it has been laid down that it is always open to the assessee to furnish documents to prove that the payment in the manner prescribed under Section 40A (3) of the Act was not practicable or would have caused genuine difficulty to the payee. In the case on hand, the tribunal has noted the fact and also taken a note of the contemporaneous documents produced by the assessee, namely, the sales tax bills, transport permits and other Government records to prove the genuineness of the transaction. Apart from that, the day-to-day stock register were also maintained which is noted in the tax audit report. Furthermore, the payments were made to the suppliers of the hides and skins and considering the nature of the trade, the [CIT(A)] and the tribunal agreed with stand taken by the assessee.

Learned counsel appearing for the respondent/assessee placed reliance on the decision of this Court in *Commissioner of Income Tax, Kolkata-XI –versus- CPL Tannery*. In the said decision, an identical case arose for consideration and relief was granted to the assessee. Thus, we find that the tribunal was right in affirming the order passed by the [CIT(A)] and dismiss the appeal filed by the Revenue. Accordingly, we find no grounds to interfere with the order passed by the tribunal.

In the result, the appeal is dismissed and the substantial questions of law are answered against the Revenue.

The application being IA No.GA 2 of 2017 (Old No.GA 1186 of 2017) for stay also stands dismissed.

(T. S. SIVAGNANAM, J.)

I agree.

(ANANDA KUMAR MUKHERJEE, J.)

s.pal/pkd

OD-50

IA No. GA/1/2019
In ITAT/104/2019
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, DURGAPUR
VERSUS
M/S. SINHOTIA METALS AND MINERALS PVT. LTD.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE ANANDA KUMAR MUKHERJEE

Date : 7th January, 2022

Appearance :-

Mr. P. K. Bhomick, Adv.
Mr. M. N. Bandopadhyay, Adv.
... For Appellant
Mr. S. M. Surana, Adv.
Mr. Bhaskar Sengupta, Adv.
... For Respondent

The Court : This appeal by the revenue under Section 260A of the Income Tax Act, 1961(the Act for brevity) is directed against the order dated 16th January, 2019 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (Tribunal) in ITA No. 889/Kol/2017 for the assessment year 2012-13. The revenue has raised the following substantial questions of law for consideration:

(a) Whether on the facts and circumstances of the case, the learned Tribunal on correct interpretation of law in Section 263 of the Income Tax Ac, 1961 set aside the revisional order and in holding that Principal C.I.T has not exercised its jurisdiction under Secton 263 of the Act himself?

(b) Whether on the facts and in the circumstances of the case the learned Income Tax Appellate Tribunal has erred in law in holding that the PCIT has exercised the jurisdiction under Section 263 at the instance of AO/JCIT which is a wrong interpretation as the PCIT after examining the case records has directed the JCIT to re-submit the proposal as per provision to explanation 2 to Section 263 of the Act?

We have heard Mr. P. K. Bhowmick, learned Standing Counsel appearing for the appellant/revenue and Mr. S. M. Surana, learned Counsel appearing for the respondent/assessee.

The contention of the revenue before us is that the Tribunal failed to appreciate that the Principal Chief Commissioner of Income Tax had directed the Joint Commissioner of Income Tax to re-submit the proposal after examining the records and after drawing satisfaction that the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue and the order of the Tribunal is not sustainable. It is further contended before us that the Principal Commissioner of Income Tax has not exercised the jurisdiction under

Section 263 of the Act at the instance of the Joint Commissioner of Income Tax and it is a wrong interpretation given by the Tribunal.

We have gone through the order passed by the Tribunal, wherein we find that the Tribunal has noted the decision of the co-ordinate Bench of the Tribunal in the case of M/s. Rapayan Udyog in ITA No.1073/Kol/2012, dated 28th October, 2018. After noting the said decision the Tribunal points out that the appellant department has not controverted the contents of the letter of the Joint Commissioner of Income Tax dated 18th August, 2016 and has recorded that the said letter clearly brings out that the PCIT has called for proposal from the JCIT/Assessing Officer to exercise jurisdiction under Section 263 of the Act. Therefore, the Tribunal concluded that the PCIT has not exercised jurisdiction under Section 263 of the Act himself, but he exercised jurisdiction at the instance of the Assessing Officer/JCIT, which is against the provisions of law.

The argument made by the learned Standing Counsel is that it is the PCIT who has exercised jurisdiction under Section 263 of the Act. From the order passed by the Tribunal we find that the department could not controvert the contents of the letter dated 18th August, 2016. If, according to the department, the contents of the letter were otherwise, then it is for the department to approach the Tribunal for necessary rectification or clarification and the correctness of the order of the Tribunal cannot be decided by us in an appeal

under Section 260A of the Act by bringing certain submissions which were never made before the Tribunal. Therefore, we are not inclined to interfere with the order passed by the Tribunal and accordingly, the appeal is dismissed. However, we leave it open to the appellant/department to approach the Tribunal for clarification or rectification of the order, if they are so advised.

The substantial questions of law are answered against the revenue.

With the dismissal of the appeal, the stay application (IA No. GA/1/2019) also stands dismissed.

(T.S. SIVAGNANAM, J.)

(ANANDA KUMAR MUKHERJEE, J.)

SN/mg
AR(CR)

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF NOVEMBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR

I.T.A.No.840/2018

BETWEEN :

1 . THE PR COMMISSIONER OF
INCOME TAX (EXEMPTIONS)
UNITY BUILDING ANNEXE
MISSION ROAD, BANGALORE-560 027

2 . DEPUTY COMMISSIONER OF
INCOME-TAX (EXEMPTION)
CIRCLE-1, BANGALORE-560027 ...APPELLANTS

(BY SRI E.I.SANMATHI, ADV.)

AND :

M/s ST. JOSEPH'S MONASTERY
NO.39, ST. JOSEPH'S
MONASTERY HOUSE
GUNJUR CARMELARAM ROAD
BANGALORE-560 035 ...RESPONDENT

(BY SRI A.SHANKAR, SENIOR ADV. A/W
SRI S.ANNAMALAI, ADV. APPOINTED AS AMICUS CURIE;
Ms. LAKSHMI MENON, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 27.06.2018 PASSED IN ITA NO.2893/BANG/2017, FOR THE ASSESSMENT YEAR 2013-2014 PRAYING TO (A) DECIDE

THE FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT. (B) SET ASIDE THE APPELLATE ORDER DATED 27.06.2018 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH, BENGALURU IN APPEAL PROCEEDINGS ITA NO.2893/BANG/2017 FOR ASSESSMENT YEAR 2013-2014.

THIS APPEAL COMING ON FOR HEARING, THIS DAY, ***S. SUJATHA, J.***, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act' for short) assailing the order of the Income Tax Appellate Tribunal, Bangalore Bench "C", Bengaluru, ('Tribunal' for short) dated 27.06.2018 passed in ITA No.2893/Bang/2017 relating to the Assessment Year 2013-14.

2. This appeal was admitted by this Court to consider the following substantial questions of law:-

> *"1. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the donation made to another*

trust is to be allowed as application in the light of the proviso to Section 11(1A) of the Act where a charitable or religious trust transferring a capital asset solely with a view to acquiring another capital asset for the use and benefit of the trust and utilized the capital gains arising from the transaction in acquiring a new capital asset, the amount of capital so utilized should be regarded as having been applied to the charitable or religious purpose of the trust?

2. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the conclusion drawn by assessing officer is not correct when the proviso of Section 11(1A) specifically provided for the condition under which such income are exempt from taxation. The proviso of Section 11(1A) commences with the words "for the purpose of sub section (1)" thereby leaving no room for Section 11(1) to operate in the absence of the conditions stipulated under Section 11(1)(a) not being fulfilled?

3. Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that inter-trust donation out of sale proceeds of lands is application of income of the

trust, not appreciating that the asset sold could represent corpus fund or accumulation under Section 11(a) or (b) of the Act and the inter-trust donation is prohibited under explanation to Section 11(2) of the Act.?"

3. The assessee is a religious and charitable Trust and society registered under Section 12A of the Act and has filed its return of income for the assessment year under consideration declaring 'nil' income after claiming exemption under Section 11 of the Act. The case was taken up for consideration and the assessment was concluded under Section 143(3) of the Act, wherein the taxable income was determined at Rs.27,66,73,445/- denying exemption under Section 11 of the Act claimed by the assessee. Being aggrieved, the assessee has preferred an appeal before the Commissioner of Income Tax (Appeals) and the same came to be allowed in part giving partial relief to the assessee. Being aggrieved, the Revenue has preferred

an appeal before the Tribunal, which came to be dismissed. Hence, this appeal by the Revenue.

4. Learned counsel appearing for the Revenue submitted that in terms of Section 11(1A) of the Act, where a charitable or religious trust transferring a capital asset solely with a view to acquiring another capital asset for the use and benefit of the trust and utilized the capital gains arising from the transaction in acquiring a new capital asset, the amount of capital so utilized should be regarded as having been applied for the religious and charitable purpose of the Trust. Having regard to this provision, the assessing officer has rightly held that the assessee is not entitled to exemption under Section 11 of the Act.

5. It was further submitted that the language employed in Section 11(1A) has to be interpreted harmoniously with Section 11(1) of the Act. On a conjoint reading of these provisions, the view of the

assessing officer cannot be held to be unjustifiable. However, the first appellate authority proceeded to allow the appeal in part and the Tribunal has grossly erred in dismissing the appeal filed by the Revenue ignoring this material aspect, inasmuch as application of Section 11(1A) of the Act to the facts of the case on hand.

6. Learned counsel appearing for the Revenue further submitted that the Tribunal has merely followed the order passed by the Coordinate Bench of the Tribunal in the case of ***Al Ameen Educational Society v. The Director of Income Tax (Exemptions), reported in (2012) 26 Taxman 25***, which was challenged by the Revenue before this Court in ITA.No.78/2013 and the same came to be dismissed relying on the Circular issued by the CBDT. Learned counsel thus argued that Explanation to Section 11(2) do prohibit inter-trust donations out of the sale proceeds of the immovable property of the charitable

trust. This aspect having not been properly appreciated by the Tribunal, the substantial questions of law raised herein require to be answered in favour of the Revenue and against the assessee.

7. Learned Senior Counsel Sri A.Shankar, who is appointed by this Court as an Amicus Curiae has justified the order of the Tribunal. Referring to the Circular Instructions of CBDT in Circular No.52, dated 30.12.1970, Circular No.72, dated 06.11.1972 with explanatory notes to the Finance Act, 1971, Circular No.8/2002 dated 27.08.2002 with the explanatory notes to the Finance Act, 2002. Leaned Senior Counsel submitted that the legislature has given statutory force to the circular instructions.

8. It was submitted that in order to give effect to Section 11(1A), inasmuch as investing the sale proceeds of a charitable institution to acquire another capital asset, a legal fiction has been created by Section

11(1A) to bring it on par with the provisions of Section 11(1)(a) for application of the charitable purposes. As specified in Section 11(1)(a) of the Act, income derived from the property held under the trust for charitable or religious purposes, to the extent to which such income is applied to such purposes in India and where such income is accumulated or set apart is not in excess of 15% income on such income from such property. Thus, in the light of this provision, application of income derived from the property, i.e., the sale proceeds of the property, is nothing but a capital gain and this income if applied to the object and purpose of the Trusts in India, Section 11(1A) benefit cannot be denied to the assessee. Further inviting attention of this Court to the Explanation thereof, learned Senior Counsel submitted that in the present case the sale proceeds of the property of the charitable trust was invested in acquiring a capital asset for the same assessment year and as such, there is no prohibition as contended by

the Revenue for the inter trust transfer and the same cannot be a ground for the department to deny benefit of Section 11(1A) of the Act. Our attention was drawn to the relevant paragraphs of Circular No.8/2002 and the notes of clauses of Finance Act, 2002.

9. Learned Counsel Smt Lakshmi Menon appearing for the assessee supporting the impugned orders placed reliance on the same Circulars referred to by the learned Senior Counsel. Learned counsel submitted that the said Circulars would clarify that, considering the application of 11(1A) vis-à-vis the investment of sale proceeds made by the charitable trust for acquiring another capital asset, Section 11(1A) has been inserted by Finance (No.2) Act, 1971 with retrospective effect from 01.04.1962. Learned counsel has drawn the attention of this Court to the Explanatory Notes of Finance (No.2) Act, 1971, wherein it has been stated that with a view to placing the administrative

instructions on a legal footing and removing the disadvantage to charitable and religious trust for the past as also the future, Section 11 has been amended by Section 5 of Finance (No.2) Act, 1971, by way of insertion of a new sub–section (1A). Learned counsel submitted that inter-se transfer of the sale proceeds made by the assessee - charitable trust to another charitable trust, cannot be construed as inadmissible under Section 11(2) read with Explanation thereof. In this regard, learned counsel submitted that exemptions claimed by the assessee is relating to the donations made from the income of the current year, wherein the capital asset was sold and such capital gain would certainly attract Section 2(24)(vi) of the Act to constitute 'income' for the purposes of the Income Tax Act. These aspects having been considered by the Tribunal in the judgment of **Al Ameen Educational Society**, supra, the Tribunal has rightly decided the issue in favour of the assessee and dismissal of the appeal filed against the

said order for want of monetary limits could not be considered as an opportunity for the department to pursue the issue against the assessee herein, more particularly, when the substantial question of law is not at all applicable to the facts of the present case. Thus, the learned counsel submitted that substantial question of law No.3 has no relevance to the facts of the present case and no adjudication on the said substantial question of law is required by this Hon'ble Court.

10. We have carefully considered the rival submissions of the learned counsel appearing for the parties and perused the material on record.

Section 11(1) (a) and (b) reads thus;

> *11. (1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income—*
>
> *(a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in*

India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen per cent of the income from such property;

(b) income derived from property held under trust in part only for such purposes, the trust having been created before the commencement of this Act, to the extent to which such income is applied to such purposes in India; and, where any such income is finally set apart for application to such purposes in India, to the extent to which the income so set apart is not in excess of fifteen per cent of the income from such property."

Section 11(1A) which was inserted by Finance (No.2) Act, 1971 with retrospective effect from 1.4.1962 reads thus;

"(1A) For the purposes of sub-section (1),—

(a) where a capital asset, being property held under trust wholly for charitable or religious purposes, is transferred and the whole or

any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the capital gain arising from the transfer shall be deemed to have been applied to charitable or religious purposes to the extent specified hereunder, namely:—

(i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of such capital gain;

(ii) where only a part of the net consideration is utilised for acquiring the new capital asset, so much of such capital gain as is equal to the amount, if any, by which the amount so utilised exceeds the cost of the transferred asset."

Section 11(2)

x x x x

Provided that x x x x

Explanation.—Any amount credited or paid, out of income referred to in clause (a) or clause (b) of sub-section (1), read with the Explanation to that sub-section, which is not applied, but is accumulated or set apart, to any trust or institution registered under

section 12AA or to any fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, shall not be treated as application of income for charitable or religious purposes, either during the period of accumulation or thereafter.

11. A comprehensive reading of Section 11(1) with Section 11(1A) would make it clear that Section 11(1A) has been inserted for the purpose of sub-section (1). Interpretation given by the assessing officer on the phrase "for the purpose of sub-section (1)" is wholly unsustainable for the reason that Section 11(1)(a) contemplates that the income derived from the property held under trust wholly for charitable or religious purpose to the extent to which such income is applied to such purposes in India, which is the first limb of Section 11(1)(a) and is relevant for deciding the issue on

hand, would necessarily indicate that such income which has been derived from the sale proceeds of the property held by the Trust wholly for charitable and religious purpose, if applied to such purpose in India, it shall not be included in the total income of the previous year of the trust in respect of such income. What is material is that such income should be applied for religious or charitable purposes in India to attract Section 11(1)(a) of the Act.

12. The relevant paragraph of the Circular No.52 dated 30.12.1970 is quoted hereunder for ready reference;

> "Under Section 11(1), a religious or charitable trust which accumulates its income in excess of 25 per cent of its total income of Rs.10,000, whichever is higher, is liable to pay tax on the income accumulated by it in excess of the said limit. In other words, such a trust has to apply at least 75 per cent of its total income, including any capital gains forming part of it during the relevant previous year, in order to be

entitled to exemption on the entire amount of its income. In this connection, a question was raised during the third meeting on the Direct Taxes Advisory Committee whether the capital gains arising to a trust from the sale of a capital asset belonging to it would be regarded as having been applied for the purposes of the trust, if the trust invested the amount received from the sale of the capital asset, including the capital gains realized, in acquiring another capital asset for the trust. This point has been considered and it has been decided that *where a religious or charitable trust transfers a capital asset forming part of the corpus of its property solely with a view to acquiring another capital asset for the use and benefit of the trust and utilizes the capital gains arising from the transaction in acquiring the new capital asset, the amount of capital gain so utilized should be regarded as having been applied for the religious or charitable* purposes of the trust within the meaning of Section 11(1)."

Similarly, relevant paragraph of Annex – Circular dated 15.05.1963, reads as under;

"Under Section 11(1), a religious or charitable trust which accumulates its income in excess of 25 per cent of its total income or Rs.10,000, whichever is higher, is liable to pay tax on the income accumulated by it in excess of the said limit. In other words, such a trust has to apply at least 75 per cent of its total income, including any capital gains forming part of it during the relevant previous year, in order to be entitled to exemption on the entire amount of its income. In this connection, a question was raised during the third meeting on the Direct Taxes Advisory Committee whether the capital gains arising to a trust from the sale of a capital asset belonging to it would be regarded as having been applied for the purposes of the trust, if the trust invested the amount received from the sale of the capital asset, including the capital gains realized, in acquiring another capital asset for the trust. This point has been considered and it has been decided that *where a religious or charitable trust transfers a capital asset forming part of the corpus of its*

property solely with a view to acquiring another capital asset for the use and benefit of the trust and utilizes the capital gains arising from the transaction in acquiring the new capital asset, the amount of capital gain so utilized should be regarded as having been applied for the religious or charitable purposes of the trust within the meaning of section 11(1)."

13. Paragraph 76 of Circular No.52 indicates that with a view to placing the aforesaid administrative instructions on a legal footing and removing the disadvantage to charitable and religious trusts for the past as also the future, section 11 has been amended, by section 5 of Finance (No.2) Act, 1971, by way of insertion of a new sub-section (1A).

14. Further, in paragraph 21.1 of Circular No.8/2002 dated 27.08.2002, it is clarified about the restriction on the application of the accumulated income of the charitable and religious trusts it is

categorically stated that through the Finance Act, 2002, an Explanation has been inserted below sub-section (2) of Section 11 so as to provide that any amount paid or credited out of income from property held under trust referred to in clause (a) or clause (b) of sub section (1), read with the Explanation to that sub-section, which is not applied, but is accumulated or set apart, to any trust or institution registered under section 12AA or to any fund or institution or trust or any university or other education institution or any hospital or other medical institution referred to in sub clause (iv) or sub clause (v) or sub clause (vi) or sub clause (via) of clause (23C) of section 10, either during the period of accumulation or thereafter, shall not be treated as application of income for charitable or religious purposes. Thus, payment to other trusts and institutions out of income from property held under trust in the year of receipt will continue to be treated as application of income. However, any such payment out

of the accumulated income shall not be treated as application of income and will be taxed accordingly.

15. Thus, the notes on clauses of Finance Act, 2002, further clarifies that payment to other trusts or institutions out of the income from property held under trust in the year of receipt, continued to be treated as application of income, however any such payment out of the accumulated income shall not be treated as application of income and will be taxed accordingly.

16. From the aforesaid, it cannot be disputed that Section 11(1A) of the Act was inserted by Finance (No.2) Act, 1971 with retrospective effect from 01.04.1962 to crystallize the law with reference to capital asset held under trust wholly for charitable or religious purpose gets transferred, the whole or any part of the net consideration is utilized for acquiring another capital asset to be so held. Keeping this aspect in mind, it appears the legislature intended the capital gain arising

from such transfer i.e., transfer of capital asset by the charitable trust and the sale proceeds utizlied for acquiring another capital asset shall be deemed to have been applied to charitable and religious purposes to the extent specified thereunder. A legal fiction has been created by Section 11(1A) to consider such transfer of capital asset and the investment of sale proceeds for acquiring another capital asset to be so held by the Trust as applied to charitable or religious purposes under Section 11(1)(a). At any stretch of imagination, this legal fiction created under Section 11(1A) cannot be considered as a proviso to carve out an exception to the main provision. It is in the background of the circular instructions, referred to supra, in order to give statutory force, this provision has been inserted. Thus, we are of the considered view that capital asset transferred by the charitable trust and utilized for acquiring another capital asset would alone cannot be the criteria for granting exemption under Section 11(1A) or in other words, no

denial could be made if the sale proceeds are transferred to another charitable trust. Such inter-se transfer between two charitable trusts being not disputed by the department, cannot be a ground to deny the benefit under Section 11(1A) of the Act. The sale proceeds need not always be invested in another capital asset to be held in the name of the charitable trust. There may be circumstances where a charitable trust is not applying for charitable or religious purposes to the extent to which such income has to be applied to such purpose in India directly and intends to invest in another capital asset to be so held by such charitable institutions. Certainly, it is not a circumstance involved herein. No doubt, the sale proceeds are transferred to another charitable and religious purpose, the same would necessarily come within the ambit of Section 11(1A). Hence, the finding of the Tribunal placing reliance on the judgment of **Al Ameen Educational Society**, supra, though has not reached finality on the merits of the case for want of monetary reliefs, the same

cannot be held to be invalid or illegal in view of the provisions of the Act as discussed above.

17. The Calcutta High Court in the case of **Commissioner of Income Tax v. East India Charitable Trust, reported in 206 ITR 152 (Cal)**, has held as under;

> *"18. In our view, by reason of the option exercised under the Explanation to Section 11 (1), the assessee is entitled to the benefit under Section 11 (1a) inasmuch as the definition of income as contained in Section 2 (24) of the Act includes capital gains as one of the species of income. That being so, the option as exercisable with regard to income should also avail to capital gains provided such option is exercised in writing before the expiry of the time allowed under Sub-section (1) of Section 139 for furnishing the return. Therefore, the amount of Rs. 7 lakhs utilised in acquiring fixed deposits with the Bharat Petroleum Corporation Ltd. and the Bharat Electronics Ltd. should also be*

allowed exemption under the said provision for the assessment year 1982-83."

18. It is also significant to note that the Coordinate Bench of this Court in the case of ***Commissioner of Income Tax v. Maria Social Service Society***, reported in ***(2018) 408 ITR 0462 (Karn)*** had considered the question relating to the return of income filed by the assessee and some foreign benefits received by the charitable trust and made over such remittance to another charitable trust which was newly constituted held to be not in contravention of the provisions of Section 11 of the Act as long as the subject matter of application of money is for the purpose of objects of the trust as envisaged under Section 11 and as such the said transfer could not be a ground for cancellation or rejection under Section 12AA of the Act.

19. This ruling of the Coordinate Bench, [one of us, SSJ was one of the member], would be applicable to

the facts of the case insofar as substantial questions of law No.3 raised by the revenue is concerned. In the facts and circumstances of the case, we are conscious that the said issue was neither dealt with by the assessing officer nor the appellate authority and further by the Tribunal. This question is raised for the first time before this Court, indeed it is not applicable to the facts of the case. Hence, the said substantial question of law No.3 does not arise for our consideration.

20. For the reasons aforementioned, we answer the substantial questions of law Nos.1 and 2 in favour of the assessee and against the Revenue.

In the result, the appeal stands dismissed.

SD/-
JUDGE

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JUDGE

nd

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF DECEMBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR

I.T.A.No.475/2016

BETWEEN :

1 . THE PR. COMMISSIONER OF INCOME TAX
C.R.BUILDING, ATTAVARA
MANGALURU-575 001

2 . THE ASST. COMMISSIONER OF
INCOME TAX, CIRCLE-1 (1),
C.R.BUILDING, ATTAVARA,
MANGALURU-575 001 ...APPELLANTS

(BY SRI K.V.ARAVIND, ADV.)

AND :

SMT.SAROJINI M. KUSHE
P.V.S. BEEDIES PVT. LTD.,
KODIALBAIL, MANGALURU-575 001
PAN: ADUPK 2615C ...RESPONDENT

(BY SRI A.SHANKAR, SENIOR COUNSEL A/W
SRI A.MAHESH CHOWDHARY, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 27.04.2016 PASSED IN ITA NO.989/BANG/2014, FOR THE ASSESSMENT YEAR 2011-2012 PRAYING TO 1.

FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. 2. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BENGALURU IN ITA NO.989/BANG/2014 DATED 27.04.2016 CONFIRMING THE ORDER OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE ASST. COMMISSIONER OF INCOME TAX, CIRCLE-1(1)(1), MANGALURU.

THIS APPEAL COMING ON FOR HEARING, THIS DAY, ***S. SUJATHA, J.***, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act' for short) challenging the order dated 27.04.2016 passed by the Income Tax Appellate Tribunal, Bangalore Bench "A", Bengaluru ('Tribunal' for short) in ITA No.989/Bang/2014 relating to the Assessment Year 2011-12.

2. This appeal was admitted by this Court to consider the following substantial question of law;

"Whether on the facts and circumstances of the case and in law, the Tribunal was right in holding that the guidance value is the sale consideration for computing capital gain when the terms and conditions of the agreement specify the value of consideration and when the provisions of section 48 specify the "full value of consideration" is received or accrued?"

3. The respondent – assessee is an individual deriving managerial remuneration from M/s PVS Beedies (P) Ltd. The assessee filed return of income for the assessment year under consideration declaring the total income of Rs.28,39,420/- and subsequently filed revised return of income declaring the income of Rs.1,02,10,700/- including an additional income of Rs.73,71,275/- on account of the capital gain.

4. The assessee had entered into a Joint Development Agreement ('JDA' for short) with M/s R&S Turnkey Contractors Private Limited for development of 84 cents of land. As per the JDA dated 21.10.2010, the

assessee was entitled to 30% of the total saleable super built up area. In the supplementary JDA dated 26.5.2011 the sharing ratio was revised to 26.89% and 73.11% between the assessee and the developer. The assessing officer had brought to tax Rs.5,68,19,443/- as capital gains by adopting cost of construction as sale consideration based on JDA between the assessee and M/s R&S Turnkey Contractors Private Ltd.

5. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) which came to be allowed directing the assessing officer to adopt fair market value basing on the Government records as deemed consideration for the purpose of calculation of capital gain. Being aggrieved by the order of the Commissioner of Income Tax (Appeals), the Revenue preferred an appeal before the Tribunal. The Tribunal placing reliance on the decision of its Coordinate Bench in the case of M/s ***Shankar Vittal***

Motor Co. Ltd., held that variation of the capital gain should be appropriate to adopt fair market value/asset as deemed consideration, but not the cost of construction, upholding the order of the Commissioner of Income Tax (Appeals). Hence, this appeal by the Revenue.

6. Learned counsel appearing for the Revenue argued that the Tribunal has grossly erred in holding that the guidance value has to be adopted for computing the capital gains when the terms and conditions of the agreement specify the value of consideration. Referring to Section 48 of the Act, it was argued that "full value of consideration" has to be interpreted with reference to cost of construction. Section 50C was also referred to. It was agued that Section 50D of the Act which has come into effect from 1.4.2013 is not applicable to the facts of the present case.

7. Learned Senior counsel representing the respondent – assessee submitted that for the assessment year under consideration, there is no provision in the Act which contemplates as to how full value of consideration has to be determined when an assessee entered into a JDA. Placing reliance on ***CIT v. B.C.Srinivasa Setty, reported in (1981) 128 ITR 294 (SC)*** submitted that there can be no capital gains arising on entering into JDA during the assessment year under consideration, as the Act does not contemplates the method of computation of capital gains. Alternatively, learned Senior Counsel submitted that the guidance value of the extent of land which is transferred to the developer, prevailing as on the date of transfer would be deemed to be consideration accrued to the assessee as on the date of the transfer. Referring to Section 50D of the Act it was submitted that where the value of the consideration is not ascertainable as on the date of the

transfer, as in the present case, the same market value of the capital asset shall be deemed to be the full value of consideration received or accruing as a result of such transfer. This provision indicates that the same is clarificatory in nature. Reliance was placed on ***CIT v. Podar Cement (P) Ltd., reported in (1997) 226 ITR 625 (SC)*** and ***CIT v. Vatika Township (P) Ltd, reported in (2014) 367 ITR 466 (SC).*** It is also argued that when the entire issue being revenue neutral, no addition is required.

8. We have carefully considered the rival submissions made by the learned counsel appearing for the parties and perused the material on record.

9. Section 45 of the Act reads thus:

> ***"Capital gains.***
>
> *45. (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise*

provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place."

Section 48 of the Act reads thus:

"Mode of computation.

48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :—

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto;

(iii) in case of value of any money or capital asset received by a specified person from a specified entity referred to in subsection (4) of section 45, the amount

chargeable to income-tax as income of such specified entity under that sub-section which is attributable to the capital asset being transferred by the specified entity, calculated in the prescribed manner:

Provided……"

10. On combined reading of these provisions, any profits or gains arising from the transfer of a capital asset with the exception as saved in Sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H shall be chargeable to income tax under the head capital gains and by legal fiction it is deemed to be the income of the previous year in which the transfer took place. The mode of computation as prescribed under Section 48 would indicate that the income chargeable under the head capital gains shall be computed by deducting the following amounts from the full value of consideration received or accrued as a result of the transfer of the capital asset. [1] expenditure incurred wholly or exclusively in connection with such transfer [2] cost of

acquisition of the asset and the cost of any improvement thereto. Special provision for full value of consideration in certain cases is dealt by Section 50C which reads as under:

> ***"Special provision for full value of consideration in certain cases.***
>
> *50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer:*
>
> ***Provided** ....."*

Section 50D of the Act reads thus;

"***Fair market value deemed to be full value of consideration in certain cases.***

50D. Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer."

11. Now the main controversy revolves around the determination of full value of consideration. The expression 'full value of consideration' has been dealt by the Hon'ble Supreme Court in the case of ***Commissioner Of Income-Tax, West V/s. George Henderson And Co. Ltd. [(1967) 66 ITR 622 (SC)]*** as under:

"It is manifest that the consideration for the transfer of capital asset is what the transferor receives in lieu of the asset he parts with, namely, money or money's worth and, therefore, the very asset transferred or parted with cannot be the consideration for the transfer. It follows that the expression "full consideration" in the main part of section 12B(2) cannot be construed as having a reference to the market value of the asset transferred but the expression only named the full value of the thing received by the transferor in exchange for the capital asset transferred by him. The consideration for the transfer is the thing received by the transferor in exchange for the asset transferred and it is not right to say that the asset transferred an parted with is itself the consideration for the transfer. The main part of section 12B(2) provides that the amount of a capital gain shall be computed after making certain deductions from the "full value of the consideration for which the sale, exchange or transfer of the capital asset is made". In case of a sale, the full value of the consideration is

the full sale price actually paid. The legislature had to use the words "full value of the consideration" because it was dealing not merely with sale but with other types of transfer, such as exchange, where the consideration would be other than money. If it is therefore held in the present case that the actual price received by the respondent was at the rate of Rs.136 per share the full value of the consideration must be taken at the rate of Rs.136 per share. The view that we have expressed as to the interpretation of the main part of section 12B(2) is borne out by the fact that in the first proviso to section 12B(2) the expression "full value of the consideration" is used in contradistinction with "fair market value of the capital asset" and there is an express power granted to the Income-tax Officer to "take the fair market value of the capital asset transferred" as "the full value of the consideration" and "fair market value of the capital asset transferred" and it is provided that if certain conditions are satisfied as mentioned in the first proviso to section 12B(2), the market value of the asset

transferred, though not equivalent to the full value of the consideration for the transfer, may be deemed to be the full value of the consideration. To give rise to this fiction the two conditions of the first proviso are : (1) that the transferor was directly or indirectly connected with the transferee, and (2) that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under section 12B. If the conditions of this proviso are not satisfied the main part of section 12B(2) applies and the Income-tax Officer must take into account the full value of the consideration for the transfer.

Fourthly, a related objection has been raised in Para 9 of your letter dated 02.06.2014. You have stated that, "full value of consideration cannot be construed as having a reference to the market value of the asset transferred.""

12. Learned counsel for the Revenue argued that Section 50C is applicable where the consideration is

less than the guidance value and as such the same is not applicable to the facts of the present case. Similarly, Section 50D is also not applicable which has come into force with effect from 01.04.2013; thus, cost of construction would be the appropriate mode. However, we are not inclined to accept the arguments of the Revenue in entirety for the reason that the entire issue is revenue neutral. The Tribunal has categorically observed that "even otherwise, if any capital gains to be accrued in favour of assessee after receiving the possession of the property, certainly that would also be subject to capital gains." It is thus clear that in the event the assessee were to dispose of the built up area, on any part thereof, after receipt of the same from the developer, it would have to necessarily pay tax on the capital gains in the year of such sale and the cost of such built up area to be reckoned for the purpose of indexation which would be proportionate to the fair market value of land. At this juncture, it would be

beneficial to refer to the judgment of the Hon'ble Apex Court in the case of ***Commissioner of Income-tax V/s. Excel Industries Ltd., [(2013) 358 ITR 295]*** wherein the Hon'ble Apex Court has observed thus:

> *"**32.** Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."*

Similarly, in the case of ***Commissioner of Income-tax V/s. Bilahari Investment [P.]. Ltd., [(2008) 215 CTR 201 (SC)]***, the Hon'ble Apex Court has observed thus:

> *"**20.** As stated above, we are concerned with assessment years 1991-1992 to 1997-1998. In the past, the Department had accepted the completed contract method and because of such acceptance, the assessees, in these cases, have followed the same method of accounting, particularly in the context of chit discount. Every assessee is entitled to arrange its affairs and follow the method of accounting, which the Department has earlier accepted. It is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method. Further, in the present cases, we find from the various statements produced before us, that the entire exercise, arising out of change of method from completed contract method to deferred revenue expenditure, is revenue*

neutral. Therefore, we do not wish to interfere with the impugned judgment of the High Court."

13. In the present case, Assessing Officer has adopted the rate of Rs.1600/- per square feet merely based on the letter given by the developer which is not supported with any particulars. It cannot be ruled out the possibility of the developer giving an inflated figure to suit his requirements in order to gain minimum tax on his profits by inflating his costs. As such, the basis for determination of full value of consideration by the Assessing Officer based on the letter of the developer cannot be appropriate. No doubt at the relevant period, no provision was available in cases where the consideration received or accruing as a result of transfer of a capital asset by an assessee is not ascertainable. Section 50D inserted by Finance Act, 2012 with effect from 01.04.2013 would throw some light on the said issue. As per the memorandum to Finance Bill, 2012,

the reasoning for inserting Section 50D of the Act is as under:

> *"Capital gains are calculated on transfer of a capital asset, as sale consideration minus cost of acquisition. In some recent rulings, it has been held that where the consideration in respect of transfer of an asset is not determinable under the existing provisions of the Income-tax Act, then, as the machinery provision fails, the gains arising from the transfer of such assets is not taxable.*
>
> *It is, therefore, proposed that where in the case of a transfer, consideration for the transfer of a capital asset(s) is not attributable or determinable then for purpose of computing income chargeable to tax as gains, the fair market value of the asset shall be taken to be the full market value of consideration."*

Even in terms of this provision, cost of construction would not be the appropriate method to arrive at the full market value of consideration.

14. In ***Seshasayee Steels [P.] Ltd., V/s. Assistant Commissioner of Income Tax, Company Circle VI[2], Chennai [(2020) 115 taxmann.com 5 (SC)]*** while considering the provision of Section 53 of the TP Act in the context of capital gains under the Income Tax Act, it has been held thus:

> *"**11.** In order that the provisions of Section 53A of the T.P. Act be attracted, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of Section 53A can be said to be attracted on the facts of a given case.*

12. *On a reading of the agreement to sell dated 15.05.1998, what is clear is that both the parties are entitled to specific performance. (See Clause 14)*

13. *Clause 16 is crucial, and the expression used in Clause 16 is that the party of the first part hereby gives 'permission' to the party of the second part to start construction on the land.*

14. *Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of Section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land. This being the case, Section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone."*

15. It was argued by the learned counsel for the assessee that when the scheme of the Act does not contemplate the method of computation, no capital gains could be computed, placing reliance on ***B.C.Srinivasa Setty*** supra. It appears to overcome this aspect, a machinery provision has been introduced by way of Section 50D of the Act. Though the said provision has come into effect from 1.4.2013, it certainly throws some light on the mode of computation under Section 48 of the Act. In the circumstances, we are of the considered opinion that the guidance value of the land or the guidance value of the building would be appropriate mode to determine the full value of consideration in the case of a transfer where consideration for the transfer of a capital asset is not attributable or determinable. Hence, guidance value adopted by the Tribunal cannot be faulted with.

16. Though the Tribunal in ***ITO, Ward-7(2), Bangalore V/s. N.S.Nagaraj [(2014) 52 Taxman 211]***, has held that full consideration would be the cost of construction incurred by the builder on the assessee's share of constructed area, because the assessee would receive the constructed area in view of the land share, the same not having been challenged, we are not inclined to subscribe to the same, for the reasons stated in the preceding paragraphs. Moreover, in that case, Commissioner of Income Tax [Appeals] has held that no capital gains accrues to the assessee on account of transfer of the asset. Having regard to the facts and circumstances of the case, the Tribunal having exercised its discretionary power adopted the guidance value of the land as the mode for determination of full value of consideration, the same being not perverse or arbitrary, we are not inclined to interfere with the impugned order.

17. As the issue relates to pure question of facts, no substantial question of law arises for our consideration.

Accordingly, appeal stands dismissed.

SD/-
JUDGE

SD/-
JUDGE

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF DECEMBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE S.RACHAIAH

I.T.A.No.254/2021

BETWEEN :

ANTONY PARAKAL KURIAN
AGED ABOUT 63 YEARS,
D 83, PRESTIGE OZONE,
WHITEFIELD MAIN ROAD,
VARTHUR KODI,
BANGALORE-560 066,
PAN: AFMPK 3991 B ...APPELLANT

(BY SRI SUDHEENDRA B.R., ADV.)

AND :

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-5(3) (1), BANGALORE,
BMTC BUILDING, 80 FEET ROAD,
KORAMANGALA 6TH BLOCK,
BENGALURU-560 095. ...RESPONDENT

(BY SRI K.V.ARAVIND, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 06.11.2020 PASSED IN ITA NO.1576/BANG/2018 AND THE ORDER DATED 22.06.2021 IN MP NO.163/BANG/2020 (ANNEXURE-F), FOR THE ASSESSMENT YEAR 2013-2014. PRAYING TO (A) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. (B) ALLOW THE APPEAL AND SET

ASIDE THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 06.11.2020 IN ITA NO.1576/BANG/2018 (ANNEXURE-E) AND THE ORDER OF THE TRIBUNAL DATED 22.06.2021 IN MP NO.163/BANG/2020 (ANNEXURE-F), FOR THE ASSESSMENT YEAR 2013-2014, TO THE EXTENT QUESTIONED HEREIN.

THIS APPEAL HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **S. SUJATHA, *J.***, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the assessee under Section 260A of the Income Tax Act, 1961 ('Act' for short) assailing the order dated 06.11.2020 passed in ITA No.1576/Bang/2018 as well as the order dated 22.06.2021 in MP No.163/Bang/2020 by the Income Tax Appellate Tribunal, "C" Bench, Bangalore ('Tribunal' for short) relating to the assessment year 2013-14 raising the following substantial questions of law:-

1. *Whether, on the facts and circumstances of the case and law applicable, the Tribunal was correct in law in remanding the matter to CIT (A) to decide eligibility of exemption under Section 54 in respect of repayment of housing loan of Rs.60 lakhs and Rs.90 lakhs by the appellant?*

2. *Whether, the finding of the Tribunal that exemption under section 54F is not allowable if the assessee is in possession of a residential house on the date of transfer of the original asset is irrelevant and contrary to the provisions of section 54F and hence perverse and contrary to law?*

3. *Whether, the reasoning of the Tribunal that even though residential house at HAL 2nd Stage, Kodihalli extension, Bangalore was gifted vide registered gift deed by the assessee to his son and wife on 3.1.2012, assessee will be in possession of the said house on 10.4.2012 being date of transfer of land, is irrelevant for the purpose of exemption under Section 54F and hence perverse and contrary to law?*

4. *Whether, the reasoning of the Tribunal that exemption claimed by the appellant under section 54 for residential house purchased in the name of wife of the appellant and the decision in the case of CIT v M J Sivani (2014) 46 taxmann.com 170 (Karnataka), for denying exemption under section 54F, is perverse and contrary to law?*

2. The assessee, a salaried person working in M/s IGUS India Private Limited, had filed a return of income showing the capital gains for the assessment year under consideration.

CLAIM OF THE ASSESSEE:

3. During the relevant assessment year, the assessee had sold the land of Angamaly, Kerala [original asset] to M/s. Fashion Jewellery vide sale deed dated 10.04.2012 for a consideration of Rs.60 Lakhs. Long term capital gains resulting from this transaction was claimed as eligible for exemption under Section 54F of the Act. The assessee claimed that on the date of sale of land i.e., 10.04.2012, he was the owner of only one residential house at Angamaly, Kerala; prior to 10.04.2012, the appellant invested in a residential house – Flat No.3E, 3rd Floor, E Block, Orchard Green, Domlur, Bangalore-560071 purchased in the name of his wife vide sale deed registered on 08.12.2011. Another

residential house owned by the assessee at HAL 2nd Stage, Kodihalli Extension, Bangalore was gifted by the appellant to his wife and son vide gift deed registered on 03.01.2012. The appellant purchased a land at Erumad, Tamil Nadu vide sale deed registered on 05.09.2012 for Rs.1.4 Crores and constructed a residential house thereon within three years from the date of transfer of land i.e., original asset. On these factual grounds, assessee claimed exemption under Section 54F of the Act on the entire capital gains from sale of land amounting to Rs.49,08,708/-.

4. The appellant sold a residential house at Angamaly, Kerala i.e., House property in favour of M/s. Fashion Jewellery for Rs.2.42 Crores vide sale deed registered on 08.10.2012. Capital gains amounting to Rs.2,23,47,434/- was claimed as an exemption under Section 54 of the Act and Rs.25 Lakhs is claimed as an exemption for making investment in REC bonds under Section 54EC of the Act. The contention of the appellant

was that out of the advance amount of Rs.50 lakhs received from M/s. Fashion Jewellery for sale of residential house at Angamaly, Kerala on 15.10.2011, sale deed was registered, an advance amount of Rs.40 Lakhs was made on 24.11.2011 for purchase of a residential house – Flat No.3E, 3rd Floor, E Block, Orchard Green, Domlur, Bangalore-560071. The assessee and his wife also applied for housing loan at Citibank for purchase of the said residential house. Rs.40 Lakhs was paid as advance and the balance amount of Rs.1.5 Crores was paid to Citibank loan and the sale deed for purchase of residential house was registered in the name of his wife on 08.12.2011. On receipt of the advance amount of Rs.1.5 Crores from M/s. Fashion Jewellery for sale of residential house at Angamaly, Kerala – sale deed registered on 08.10.2012, the assessee repaid housing loan to the extent of Rs.60 Lakhs on the very same day. The remaining housing loan was repaid by the assessee from his bank account.

5. The Assessing Authority denied the claim made under Section 54 and 54F of the Act and an order under Section 143(3) of the Act was passed by disallowing exemption claimed under Sections 54 and 54F of the Act amounting to Rs.1,98,47,434/- and Rs.49,08,708/- respectively. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), which came to be partly allowed, allowing the exemption partly under Section 54 to the extent of Rs.44,61,565/-, confirming the denial of exemption under Section 54F of the Act. On further appeal before the Tribunal, appeal under Section 54 of the Act came to be allowed inasmuch as the investment made in the name of the asssessee's wife but was remanded to CIT[A] regarding eligibility of Rs.60 lakhs and the payment towards the expenses claimed to the Assessing Officer. In the miscellaneous petition

eligibility of Rs.90 lakhs was also directed to be examined by the Commissioner of Income Tax [Appeals].

6. As regards payment towards stamp duty amounting to Rs.12,76,800/- paid by way of Demand Drafts from State Bank of India, Bangalore and City Bank, it has been observed that the Tribunal is not able to identify to whom these accounts belong to and accordingly, directed the assessee to file all requisite details before the Assessing Officer, who shall ascertain the payment and if such payments are found to be made by the assessee from his account, the benefit should be given to the assessee by permitting deduction under Section 54 of the Act. Claim of brokerage of Rs.5,00,000/- was disallowed. As regards the claim made under Section 54F of the Act, the same came to be rejected. M.P.No.163/Bang/2020 was preferred by the assessee, the same came to be allowed in part directing Commissioner of Income Tax [Appeals] to decide

regarding eligibility of Rs.90 lakhs also under Section 54 of the Act, rejecting the other contentions raised.

7. Learned counsel for the appellant/assessee would submit that the Tribunal has not given any finding regarding eligibility of the payment for housing loan of Rs.60.00 lakhs for exemption under Section 54 of the Act; the Tribunal has grossly erred in remanding the issue to the Commissioner of Income Tax (Appeals) to decide eligibility of payment of housing loan of Rs.60.00 lakhs and Rs.90.00 lakhs by the appellant even after recording the undisputed fact that the repayment of housing loan of Rs.60.00 lakhs and the balance sum was made by the appellant.

8. Learned counsel further argued that the Tribunal failed to appreciate the finding of the Commissioner of Income Tax (Appeals) that the assessee is no more the legal owner of the residential house at Kodihalli Extension, Bangalore. Placing reliance on the

proviso (a)(i) to Section 54F of the Act, it was argued that exemption under Section 54F shall not apply if the assessee owns more than one residential house, other than the new asset, on the transfer of the original asset.

9. Learned counsel argued that the assessee owns only one residential property i.e., property at No.541, Sy.No.405/24/3, Angamaly Municipality, Kerala and no other property on the date of transfer of the land i.e., on 10.04.2012. The assessee had gifted, by registered gift deed, the property at No.26, PID-74-6-26, HAL II Stage, Kodihalli Extension, Bangalore, to his wife on 03.01.2012 well before the transfer of land and thus he was no more a legal owner of the same on 10.04.2012. The residential house purchased in the name of his wife, vide registered sale deed dated 08.12.2011, was not owned by the assessee as on 10.04.2012 and these vital aspects have been lost sight of, by the Tribunal in denying exemption under Section

54F of the Act, relying on the Co-ordinate Bench decision of this Court in the case of ***CIT v M J Siwani***, ***[(2014) 56 taxmann.com 170]***, without appreciating that the said decision is not applicable to the case on hand.

10. Learned counsel for the Revenue submitted that the Tribunal has given a liberal interpretation to Section 54 of the Act in coming to a conclusion as regards the investment made by the assessee in a new asset purchased in the name of his wife is concerned that there is no requirement that investment should be made in the name of the assessee only. There being no substantial material to identify to whom the payment of stamp duty was made by the assessee, the matter was remanded to the Assessing Officer for verification of the facts, which cannot be found fault with. As regards Section 54F of the Act, it was argued that the assessee having claimed the benefit under Section 54 of the Act

on the premise that the investment was made by him in the new asset purchased in the name of his wife, cannot take a contradictory stand in respect of the claim made under Section 54F of the Act. The phrase "owns" employed in proviso (a)(i) of Section 54F(1) of the Act has to be interpreted analogous to Section 54 of the Act, no different analogy could be applied with respect to Section 54F of the Act.

11. We have carefully considered the rival submissions made by the learned counsel appearing for the parties and perused the material on record.

12. The undisputed facts are that the assessee sold a land at Angamaly, Kerala [original asset] to M/s. Fashion Jewellery vide sale deed dated 10.04.2012 for a consideration of Rs.60 Lakhs. The residential house at Angamaly, Kerala was sold in favour of M/s. Fashion Jewellery for Rs.2.42 Crores vide sale deed registered on 08.10.2012. The residential house owned by the

assessee at HAL 2nd Stage, Kodiahlli Extension, Bangalore was gifted by the appellant to his wife and minor son vide gift deed registered on 03.01.2012. The assessee invested the capital gains arising from the sale of the land in a residential house – Flat No.3E, 3rd Floor, E Block, Orchard Green, Bangalore – 560071 purchased in the name of his wife vide sale deed registered on 08.12.2011 [Rs.40 Lakhs paid as advance out of Rs.50 lakhs received as advance for sale of residential house, Rs.1.5 Crores paid through Citibank loan]. A residential house was constructed in the land purchased at Erumad, Tamil Nadu vide sale deed registered on 05.09.2012 within three years from the date of transfer of the land at Angamaly, Kerala.

13. Assessing Officer rejected the claim of the assessee for exemption of capital gains under Sections 54 and 54F of the Act as aforesaid. Commissioner of Income Tax [Appeals] accepted the contentions of the

assessee regarding the property at Kodihalli which was gifted through gift deed to the wife and son of the assessee prior to the transfer of the original asset. However, held that the investment in the new asset in the name of the wife of the assessee could be treated as investment made by the assessee only to the extent of Rs.40 lakhs and his ownership also in that proportion. Regarding the registration and other expenses claimed, an amount of Rs.4,61,565/- was allowed. Accordingly, the claim under Section 54 was restricted to Rs.44,61,565/-. The claim made under Section 54F of the Act was rejected.

14. On further appeal before the Tribunal by the assessee, the same was partly allowed holding that the total capital gains of Rs.2,23,47,434/- earned by the assessee from sale of original asset, a sum of Rs.1.00 Crore invested in purchase of the new asset that stands in the name of assessee's wife and a sum of Rs.25.00 lakhs invested in REC bonds regarding eligibility of

Rs.60 lakhs and Rs.90 lakhs under Section 54 requires to be decided by the Commissioner of Income Tax (Appeals).

15. Section 54 and Section 54F of the Act reads as under;

> ***"54.*** *(1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—*

xxxxxxx

54F. *(1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—*

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;

(b) xxxxxx

Provided *that nothing contained in this sub-section shall apply where—*

(a) the assessee,—

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or"

16. As regards the claim made under Section 54 of the Act, relating to the investment made by the assessee in a new asset purchased in the name of his wife is concerned, the Tribunal has extended the relief placing reliance on the Coordinate Bench decision of this Court in the case of ***DIT v. Mrs.Jennifer Bhide, (2012) 349 ITR 80 (Kar.)***. We have no reason to differ from the same.

17. Coming to the payments said to have been made by the assessee towards stamp duty by way of Demand Drafts, no adequate material being available to identify to whom these accounts belong to, the Tribunal has remanded the matter to the Assessing Officer to ascertain the payments, hence, no exception can be found with this finding of the Tribunal. Accordingly, we confirm the same.

18. As regards Section 54F of the Act is concerned, it is apt to refer to both the provisions i.e., Sections 54 and 54F of the Act. On a comparative study of these two provisions, it would indicate that Section 54 deals with profit on sale of property used for residence, whereas Section 54F of the Act deals with capital gain on transfer of certain capital assets not to be charged in case of investment for residential use. The proviso (a)(i) to Section 54F(1) of the Act makes a distinction from Section 54, inasmuch as the language employed, more particularly, the phrase "owns".

19. Section 27 of the Act defines "Owner of house property" for the purposes of Sections 22 to 26 of the Act. Sections 22 to 26 found in Chapter IV-C postulates the income from house property.

20. Section 27(i) is extracted hereunder for ready reference;

"***27.*** *For the purposes of Sections 22 to 26-*

> *(i) an individual who transfers otherwise than for adequate consideration any house property to his or her spouse, not being a transfer in connection with an agreement to live apart, or to a minor child not being a married daughter, shall be deemed to be the owner of the house property so transferred;*

21. This provision would not assist the Revenue to consider the assessee as the owner of the house property purchased in the name of his wife. Even otherwise, the provision makes it clear that it is defined only for the purposes of Sections 22 to 26 of the Act.

22. In the case of ***Jennifer Bhide,*** supra, this Court has held that to attract Section 54 as well as Section 54EC what is material is, the investment of sale consideration in acquiring the residential premises or constructing the residential premises or investing the amount in bonds set out in Section 54EC. Once the sale consideration is utilized for the purpose mentioned under Sections 54 and 54EC, the assessee is entitled to

the benefit of the said provisions. Thus, it has been categorically observed that the assessee cannot be denied the benefit of deduction under Section 54/54EC of the Act notwithstanding the fact that the assessee has purchased the property or invested the money in REC Bonds jointly with her spouse.

23. The relevant paragraph of ***Mrs.Jennifer Bhide*** supra, is quoted hereunder for ready reference:

> "*7. On a careful reading of section 54 as well as section 54EC on which reliance is placed makes it clear that when capital gains arise from the transfer of long-term capital asset to an assessee and the assessee has within the period of one year before or two years after the date on which the transfer took place purchases or has within a period of three years after the date of construction of residential house then instead of capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the provision made under the section*

which grants exemption from payment of capital gains as set out thereunder. Therefore in the entire section 54, the purchase to be made or the construction to be put up by the assessee, should be there in the name of the assessee, in not expressly stated. Similarly, even in respect of section 54EC, the assessee has at any time within a period of six months after the date of such transfer invested the whole or any part of the capital gains in the long-term specified asset then she would be entitled to the benefit mentioned in the said section. There also it is not expressly stated that the investment should be in the name of the assessee. Therefore, to attract section 54 and section 54EC of the Act, what is material is the investment of the sale consideration in acquiring the residential premises or constructing a residential premises or investing the amounts in bonds set out in section 54EC. Once the sale consideration is invested in any of these manner the assessee would be entitled to the benefit conferred under this provisions. In the absence of an express provision contained in these sections

that the investment should be in the name of the assessee only any such interpretation were to be placed, it amounts to the court introducing the said word in the provision which is not there. It amounts the court legislating when Parliament has deliberately not used those words in the said section. That is the view taken by the hon'ble Madras High Court and the hon'ble Punjab and Haryana High Court and we respectfully agree with the view expressed in the aforesaid judgments."

24. The object of Section 54F of the Act is to provide impetus to the house construction. The word 'assessee' under Section 54 of the Act having been given wide and liberal interpretation so as to include his legal heirs also by judicial pronouncements, it cannot be held Section 54F also should be construed liberally.

25. Insofar as the proviso (a)(i) to Section 54F(1) is concerned, the phrase "owns" plays a significant role. What is relevant is the assessee should not own more than one residential house, other than the new asset,

on the date of transfer of the original asset. This phrase "owns" is conspicuously absent in Section 54.

26. In our considered view, Section 54F of the Act which deals with capital gain and transfer of certain capital assets not to be charged in case of investment in residential house cannot be treated on par with Section 54. For qualifying for the exemption under Section 54F of the Act, what is mandatory is the investment to be made in residential house in the name of the assessee only. Section 54F encourages investment in a residential house. In the present case, indisputably, the property in Domlur is standing in the name of the assessee's wife as per the registered sale deed dated 08.12. 2011. For all practical purposes, and even as per Section 14 of the Hindu Succession Act, 1956, the property standing in the name of a female heir becomes her absolute property. The income derived by that property could be the income in the hands of the

assessee's wife under the Act. In our considered opinion, notwithstanding the property standing in the name of the assessee's wife was held to be eligible for exemption under Section 54 of the Act, while considering the exemption under Section 54F of the Act, the residential house purchased in the name of the assessee's wife cannot be construed as the property owned by the assessee. Excluding this property standing in the name of the assessee's wife, the property at Kodihalli bequeathed to the wife and son of the assessee being considered as justifiable by the Commissioner of Income Tax [Appeals] which has attained finality, what was owned by the assessee on the date of transfer of the original asset – land i.e., 10.04.2012, is the residential property in Angamaly, Kerala which is subsequently sold on 08.10.2012. The Tribunal has placed reliance on the Co-ordinate Bench ruling of this Court in the case of ***M.J.Siwani*** supra, to deny the exemption to the assessee under

Section 54F of the Act. In the said case, during the relevant assessment year, assessee therein sold their undivided interest in land to several purchasers. The assessees claimed deduction under Section 54 and 54F in respect of long term capital gain arising from the said sale of land. The Authorities observed that the assessees [therein] had two residential houses having one half share each therein on the date of sale of the land, thereby rejected assesses' claim. The Tribunal held that on date of sale of long term assets meant complete residential house and would not include shared interest in a residential house. On appeal by the Revenue before this Court, it was held that co-owner is the owner of a house in which he has share and that his right, title and interest is exclusive to that extent of his share and that he is the owner of the entire undivided house till it is partitioned. The right of a person, may be one half, in the residential house cannot be taken away without due process of law or it continues till there is a partition of

such residential house. With great respect, this judgment would not be of any assistance to the Revenue to deny the benefit to the assessee since there is no such co-ownership or share in the property of Domlur house by the assessee. Even Section 27 of the Act could be of little assistance to the Department since the said definition contemplated is only for the purposes of Section 22 to 26 of the Act. Thus, we cannot subscribe to the findings of the Tribunal confirming the order of the Authorities on this point.

27. For the reasons aforesaid, we set aside the order of the Tribunal as well as the Authorities impugned herein.

28. Hence, the following:

ORDER

i] Appeal is allowed in part.

ii] Substantial question of law No.1 is answered against the assessee and in favour of the revenue.

iii] Substantial questions of law 2 to 4 are answered in favour of the assessee and against the revenue.

iv] The assessee is entitled to the exemption under Section 54F of the Act subject to fulfilling other conditions.

v] Assessing Officer shall re-compute the income accordingly.

Sd/-
JUDGE

Sd/-
JUDGE

nd/NC.

Form No.[J2]

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRESENT:
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

ITA/270/2009

IA NO: GA/1/2009, (Old No.GA/2658/2009)

COMMISSIONER OF INCOME TAX [CENTRAL]-III, KOLKATA
VERSUS
GURU NANAK EDUCATIONAL TRUST

For the appellant: Mr. Radha Mohan Roy, Adv.,

For the responden t: Mr. J. P. Khaitan, Sr. Adv.,
Mr. S. Kejriwal, Adv.,
Ms. Swapna Das, Adv.,

Heard on : January 17, 2022.

Judgement on : January 17, 2022.

T.S. SIVAGNANAM, J. : This application has been filed to condone the delay of 42 days in filing the instant appeal.

Heard Mr. Radha Mohan Roy, learned senior standing counsel appearing for the appellant and Mr. Khaitan, learned senior counsel appearing for the respondent/assessee.

We are satisfied with the reasons assigned in the affidavit filed in support of the petition. Accordingly, the application for

condonation of delay, IA NO: GA/1/2009, (Old No.GA/2658/2009), is allowed and the same is disposed of accordingly.

This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 [the Act, in brevity] is directed against the order dated 20.03.2009 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata [the Tribunal] in ITA no.96/Kol/2009 for the assessment year 2006-07. The revenue has raised the following substantial questions of law for our consideration.

a. Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in holding that no proper opportunity was afforded to the assessee as required under section 12AA[3] of the Act ?

b. Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in holding that the issue of Capitation Fees was not raised by the Commissioner of Income Tax in his notice dated 30th December, 2008 while initiating the cancellation proceedings?

We have heard Mr. Radha Mohan Roy, learned senior standing counsel appearing for the appellant and Mr. Khaitan, learned senior counsel appearing for the respondent/assessee.

The short issue which falls for consideration in this appeal is whether the Commissioner of Income Tax, Central-III, Kolkata could have cancelled the registration granted to the appellant trust under

Section 12AA of the Act on 31.10.2005 on grounds which were not contained in the show cause notice dated 30.12.2008. The only allegation in the show cause notice was that the Commissioner on perusal of the accounts of the trust filed with the return for the assessment year 2006-07 found that the assessee trust has accepted donation amounting to Rs.25,000/- which has been shown as box collection. The Commissioner was of the opinion that this donation is an anonymous donation within the meaning of Section 115BBC of the Act. Therefore, the assessee trust was called upon to show cause as to why the registration could not be cancelled on the ground that the activities of the trust are not being carried on in accordance with the objects of the trust. The assessee submitted their explanation dated 31.12.2008 contending that in the financial year 2005-06 relevant to the assessment year 2006-07 the assessee trust received an amount of Rs.25,000/- as box collection and credited the same in the account as donation. It was further contended that the provisions of Section 115BBC of the Act are applicable only with effect from the assessment year 2007-08. Therefore, the assessee stated that all the activities of the trust are in accordance with the objects of the trust as mentioned in the deed of trust dated 05.08.1999. The Commissioner while proceeding to pass the order dated 31.12.2008 and cancelling the registration took into account certain issues which were not subject matter of the allegations in the show cause notice. The question was whether the Commissioner could have done so.

In our considered view, the Tribunal rightly took note of the facts and pointed out that the Commissioner exceeded his jurisdiction by making certain observations, which were not subject matter of allegations in the show cause notice. Thus, in our considered view, the Tribunal after noting the facts has granted relief to the assessee. Thus, we find no question of law much less substantial questions of law arising for consideration in this appeal. Accordingly, the appeal fails and is dismissed.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

pkd/S.Pal
AR(CR)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19804 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 19808 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 19815 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA **Sd/-**

and
HONOURABLE MS. JUSTICE NISHA M. THAKORE **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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HARSH DIPAK SHAH
Versus
UNION OF INDIA

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Appearance:
MR ABHISHEK M MEHTA(3469) for the Petitioner(s) No. 1
.... for the Respondent(s) No. 3
..... for the Respondent(s) No. 2,4
DS AFF.NOT FILED (N)(11) for the Respondent(s) No. 1
M R BHATT & CO.(5953) for the Respondent(s) No. 2,3,4
NOTICE NOT RECD BACK(3) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 04/01/2022

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ applications are interrelated and the parties are also the same, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. *"Governments are not run on mere bank guarantees. We notice that very often, some courts act as if furnishing bank guarantee would meet the ends of justice. No Governmental business or for that matter no business of any kind can be run on mere bank guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realize that interim orders are not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest"*. (Assistant Collector of Central Excise vs. Dunlop India Ltd. & Ors., 1985 (1) SCC 260)

3. The aforesaid are the observations of the Supreme Court relating to the tendency of the courts to grant

interim orders with great potential for public mischief for the mere asking. Such tendency was deprecated by the Supreme Court almost four decades back.

4. Having regard to the subject matter of the captioned writ applications, the Revenue wants us to keep the aforesaid observations of the Supreme Court in mind.

5. For the sake of convenience, the Special Civil Application No.19804 of 2021 is treated as the lead matter.

6. By this writ application under Article 226 of the Constitution of India, the writ applicant-assessee has prayed for the following reliefs;

> *"(A) Your Lordship may be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction quashing and setting aside the impugned order dated 8.12.2021 and 15.12.2021 passed by the respondent No.2 and to grant waiver of pre-deposit in the facts of the present case.*
>
> *(B) Your Lordship may be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction quashing and setting aside the impugned demand notices all dated 30.09.2021 for the years 2010-11 to 2020-21.*
>
> *(C) Your Lordships may be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction directing the Respondent No.2 to consider the*

request of the petitioner and not to insist on any pre-deposit for considering the stay of the recovery of the amount which is subject matter of appeal before the Respondent No.3.

(D) Pending hearing and final disposal of this petition, Your Lordships may be pleased to stay the operation and execution of the impugned order dated 8.12.2021 and 15.12.2021 passed by the Respondent No.2 and the demand notices all dated 30.09.2021 and to grant waiver of pre-deposit in the facts of the present case.

(E) Pending hearing and final disposal of this petition, Your Lordships may be pleased to direct the respondents including the Respondent No.2 or the other respondent authorities under the IT Act to refrain from taking any coercive action including any action under the Provisions of the IT Act against the petitioner, pending the appeals preferred before the Respondent No.3 or in respect of the assessment orders passed by the Respondent No.4 against the petitioner.

(F) Your Lordships may be pleased to grant ad-interim relief in terms of Para-11 (C) and 11(D).

(G) Your Lordships may be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction directing the Respondent No.2 to grant early hearing with respect to the pending appeals of the present petitioner without insisting for complying with the requirement of pre-deposit.

(H) Any other further relief/s as may deem fit in the facts of the case may also be granted."

7. The facts, giving rise to this litigation, may be summarized as under;

7.1 The writ applicant is one of the directors of the entities following under the Avani Group of Companies. The said group of companies operates from Vadodara and is engaged in the business of land and properties.

7.2 A search was conducted under Section 132 of the Income Tax Act, 1961 (for short “the Act, 1961”) on 23.01.2020 by the respondent No.4. The said search ultimately led to issue of a notice to the writ applicant herein under Section 153(A) of the Act, 1961 dated 09.12.2020 calling upon the writ applicant to furnish the return of income for the A.Y.2014-15 to 2019-2020.

7.3 The record reveals that separate notices were also issued under Section 153(A) of the Act by the respondent No.4 dated 09.12.2021 calling upon the writ applicant to furnish the return of income for the A.Y.2010-11 to 2013-14. For the A.Y.2020-21, notice came to be issued to the writ applicant by the respondent No.4 under Section 143(2) of the Act dated 17.06.2021. The respondent No.4, thereafter, issued questionnaire under Section 142(1) of the Act for all the aforesaid assessment years, i.e. 2010-11 to 2020-21. The respondent No.4, thereafter, proceeded to issue consolidated show-cause notices dated 23.09.2021 and 26.09.2021 respectively to the writ applicant calling upon the writ applicant to show-cause as to why the income should not be assessed by addition of the amount stated in the show-cause notice. The writ applicant responded to such show-cause notice by filing

his reply dated 27.09.2021.

7.4 The respondent No.4 proceeded to assess the income of the writ applicant by way of separate assessment orders dated 30.11.2021 for the A.Y.2010-11 to 2020-21 under Section 153(A) read with Section 143(3) of the Act followed by the notice of demand dated 30.09.2021 issued under Section 156 of the Act. The assessment orders passed by the respondent No.4 for A.Y.2010-11 to 2020-2021 came to be challenged by the writ applicant by filing appeals before the Commissioner of Income Tax (Appeals) under Section 246 of the Act.

7.5 The chart indicating the total demand raised and the 20% of the total demand as pre-deposit in all the three captioned writ applications is as under;

S.C.A. No.19804 of 2021

TOTAL DEMAND RAISED	*20% OF THE TOTAL DEMAND AS PRE-DEPOSIT FOR GRANT OF STAY AGAINST RECOVERY.*
Rs.373,20,42,319/- *(Rs. Three Hundred Seventy Three Crores Twenty Lakhs Forty Two Thousand Three Hundred & Nineteen Only)*	*Rs.74,64,08,464/-* *(Rupees Seventy Four Crores Sixty Four Lakhs Eight Thousand Four Hundred & Sixty Four Only)*

S.C.A. No.19815 of 2021

TOTAL DEMAND RAISED	*20% OF THE TOTAL DEMAND AS PRE-DEPOSIT FOR GRANT OF STAY AGAINST RECOVERY.*
Rs.14,81,66,768/- *(Rs. Fourteen Crores Eighty One Lakhs Sixty Six Thousand Seven Hundred & Sixty Six Only)*	*Rs.2,98,33,353/-* *(Rupees Two Crores Ninety Six Lakhs Thirty Three Thousand Three Hundred & Fifty Three Only)*

S.C.A. 19808 of 202

TOTAL DEMAND RAISED	*20% OF THE TOTAL DEMAND AS PRE-DEPOSIT FOR GRANT OF STAY AGAINST RECOVERY.*
Rs.14,75,62,603/- *(Rs. Fourteen Crores Seventy Five Lakhs Sixty Two Thousand Six Hundred & Three Only)*	*Rs.2,95,12,520/-* *(Rupees Two Crores Ninety Five Lakhs Twelve Thousand Five Hundred & Twenty Only)*

7.6 The writ applicant also preferred separate stay applications before the respondent No.4 with a prayer to stay the demand as raised for the assessment years under consideration.

7.7 The first order passed by the Principal Commissioner, IT (Central) Surat dated 08.12.2021 reads thus;

To, *Harsh Dipak Shah* *11/12, Charotar Society, Old Padra Road* *Vadodara, Gujarat* *India*	

PAN: ASGPS8965A	*Dated: 08.12.2021*	*DIN & Letter No: ITBA/COM/F/17/2021-22/1037618617(1)*

Sir / Madam/M/s,
Subject: Online service of orders-Letter

Sub:-Hearing on application of stay against recovery of demand raised u/s.153A r.w.s. 143(3) & 143(3) of the Act in your case for A.Y.2010-11 to A.Y.2020-2021 till the disposal of the 1st appeal-Reg.

Ref: Assessee letter dated 08.11.2021 received in this office on 10.11.2021.

Please refer to the above

2. In connection to above captioned subject, it is seen from the perusal of your letter dated 08.11.2021 that stay of demand has been sought on the ground that an appeal has been filed before CIT(A) against the Assessment Order passed in your case u/s. 153A r.w.s. 143(3) & 143(3) of the I.T.Act, 1961 (to be read as 'Act') pertaining to A.Y.2010-11 to A.Y.2020-2021 and a decision on the appeal is expected soon for the relevant assessment years. The aforesaid Assessment Order has resulted in raising demand in your case as tabulated below;

Sr. No.	Order under section of I.T.Act, 1961	A.Y.	Dt. of order	Assessed Income (In Rs.)	Demand Raised (in Rs.)
1.	153A r.w.s.143(3)	2010-11	30.09.2021	32756550	26424810
2.	153A r.w.s. 143(3)	2011-12	30.09.2021	180252060	139387164
3.	153A r.w.s.143(3)	2012-13	30.09.2021	56353980	25290654

4.	153A r.w.s.143(3)	2013-14	30.09.2021	276756870	186990485
5.	153A r.w.s.143(3)	2014-15	30.09.2021	222850340	133940038
6.	153A r.w.s.143(3)	2015-16	30.09.2021	356006740	227276710
7.	153A r.w.s.143(3)	2016-17	30.09.2021	507497030	279814290
8.	153A r.w.s.143(3)	2017-18	30.09.2021	1321171640	1568798260
9.	153A r.w.s.143(3)	2018-19	30.09.2021	412807900	436268606
10.	153A r.w.s.143(3)	2019-20	30.09.2021	409375481	421328404
11.	143(3)	2020-21	30.09.2021	306307820	286522898
			Total	4082136411	3732042319

Further, the stay of demand has been sought by you in your case against the demand raised in above mentioned assessment years which is considered as high pitch assessment by you.

3. Stay petitions of the assessee have to be considered as per the Instruction No.1914 F. No.404/72/93 ITCC dated 21.03.1996 and further modified with Instruction No.1914 dated 31.03.2017 as it overrides all other instructions and circulars on the subject. As per the Instruction No.1914 issued by CBDT on the matter, the stay cannot be allowed on the ground that appeal has been filed in the matter. Relevant portion of the instruction is quoted below:-

"C. GUIDELINES FOR STAYING DEMAND:

1. A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be sufficient reason to stay the recovery of demand. A few illustrative situation where stay could be granted are:-

i) if the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier; or

ii) If the demand in dispute has arisen because the

Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under jurisdiction the Assessing Officer is working), or

iii) If the high Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment."

4. After studying the facts of your case, it is seen that your case does not fall in any of the above categories. Assessment order passed in your case by the Assessing Officer (A.O.) for the year under consideration was after granting sufficient opportunities during the assessment proceedings and the A.O. after duly perusing and verifying the submissions made by you with details available on record and proper appreciation of details provided as well in view of relevant provisions of the Act had passed the Assessment Order. Hence, demand cannot be stayed specially in view of the fact that this instruction has been issued in supersession of all instruction of the subject. Though the demand is disputed but mere filing of 1st appeal before the CIT (A) cannot be valid reason for granting stay.

5. However, following the principle of natural justice, I am directed to give you an opportunity to be heard that why your stay application should not be rejected as you have not paid 20% of the above mentioned raised demand in view of the Board Instruction No.1914 dated 21.03.1996 & 31.07.2017. Further, it can be considered that you may be granted installments to pay 20% of the raised demand with detailed as under:-

Sr. No.	Order under section of I.T.Act, 1961	A.Y.	Dt. of order	Demand Raised (in Rs.)	Demand amount to be paid for each relevant assessment years being 20% of the raised

					demand scheduled below.
1.	153A r.w.s.143(3)	2010-11	30.09.2021	26424810	10% by 31.12.2021 and remaining 10% in 3 monthly equal installments starting from 15.01.2022, 15.02.2022 and 15.03.2022
2.	153A r.w.s. 143(3)	2011-12	30.09.2021	139387164	
3.	153A r.w.s.143(3)	2012-13	30.09.2021	25290654	
4.	153A r.w.s.143(3)	2013-14	30.09.2021	186990485	
5.	153A r.w.s.143(3)	2014-15	30.09.2021	133940038	
6.	153A r.w.s.143(3)	2015-16	30.09.2021	227276710	
7.	153A r.w.s.143(3)	2016-17	30.09.2021	279814290	
8.	153A r.w.s.143(3)	2017-18	30.09.2021	1568798260	
9.	153A r.w.s.143(3)	2018-19	30.09.2021	436268606	
10.	153A r.w.s.143(3)	2019-20	30.09.2021	421328404	
11.	143(3)	2020-21	30.09.2021	286522898	
			Total	3732042319	

If you follow the schedule payment as mentioned in above table then no action will be taken to recover the remaining demand till the end of the financial year or receipt of decision of CIT(A) whichever is earlier.

6. In this regard, I am directed to request you to submit your compliance in accordance of the details asked in para 5 above on or before 15.12.2021 by 11:30 AM, failing which your stay petition dated 08.11.2021 shall be rejected."

7.8 Thus, the writ applicant was asked to adhere to the scheduled payment as contained in Para-5 aforesaid. The writ applicant was also asked to submit his compliance of the above scheduled payment on or before 15.12.2021, failing which, the stay application would stand rejected. To the aforesaid, the writ applicant filed his reply dated 15.12.2021 stating as under;

"To,
The Principal Commissioner of Income Tax (Central Circle),
5th Floor,
Aayakar Bhavan,
Majura Gate, Surat,

Respected Sir,
Sub: Submission in connection with compliance to application for stay against recovery of demand raised u/s. 153A r.w.s. 143(3) & 143(3) of the Act for A.Y.2010-11 to A.Y.2020-2021.

Ref: ITBA/COM/F/17/2021-22/1037618617(1) dt. 08.12.2021.

PAN: ASGPS8965A

High pitch assessment was framed u/s. 153A r.w.s.143(3) of the Act on 30.09.2021 by the Deputy Commissioner of Income Tax, Central Circle-2, Vadodara in case of the assessee raising an astronomical demand of Rs.373,20,42,319/- in various years (A.Y.2010-11 to A.Y. 2020-21)

In order to get stay of recovery of demand, the assessee has filed a petition before assessing officer on 11.10.2021, however, without considering the facts and circumstances , he has rejected the request of the assessee to grant stay against recovery of demand vide his letter dated 02.11.2021 and has directed the assessee to pay 20% of demand, i.e, Rs.74,64,08,464/- immediately.

The assessee has further requested your honour to grant stay of demand until disposal of an appeal vide letter dt. 08.11.2021, however, your honour also has directed to the assessee to deposit 10% of total demand before 31.12.2021 and remaining 10% of demand before 15.03.2022, in equal monthly installment (Summary break up is as under)

Total Demand	20% of total demand	Direction to deposit tax on or before			
		31.12.2021	15.01.2021	15.02.2021	15.03.2021
373,20,42,319	74,64,08,464	37,32,04,232	12,44,01,411	12,44,01,411	12,44,01,411

Sir, first of all, it is mentioned that the assessing officer has framed the assessment without in-depth verification of the whole case. The impugned assessment order and demand is not only harsh but is also without due consideration to the facts of the case including the financial hardships being caused to the assessee and the fact that the said astronomical figure of Rs.74,64,08,464/- being 20% of the total demand of Rs.373,20,42,319/- is very difficult to deposit for the assessee on account of following reasons:

1. High Pitched Assessment:-

As already mentioned above, the AO has framed high pitched assessment in arbitrary manner and biased mind without considering the submissions/explanation and justification of the assessee. The action of the AO seems to be unreasonable and no any adverse action should be taken against the assessee for recovery of demand. Therefore, the assessee once again urges your honour to please keep the recovery of demand in abeyance till disposal of an appeal before first appellate authority.

2. Only Source of Income of Avani Petrochem Pvt. Ltd.

The assessee is a director of Avani Petrochem Pvt. Ltd and the only source of income of the assessee is Avani Petrochem Pvt. Ltd. The approx. turnover of Avani Petrochem Pvt. Ltd for F.Y.2020-21 is of Rs.125 Crore and therefore, it is apparent that income assessed for A.Y.2010-11 to A.Y.2020-21 to the tune of Rs.408 Crore, which his 4 times higher than the

aggregate turnover, seems to be unrealistic and unreasonable.

3. Stereo-type order

Looking at the whole assessment, it seems that the assessing officer has passed stereo-type order with outright rejection of the stand of the assessee which is absolutely illegitimate.

4. Adverse impact on financial affairs on account of COVID-19

Due to COVID-19 pandemic, the financial affairs of the business are adversely affected across the globe. The assessee has also faced countless barriers during last 2 years. The assessee is trying to come out from it, however, recovery proceedings may again affect the assessee very badly.

Sir, in brief, it is practically very difficult for the assessee to pay huge demand as directed by your honour vide letter dated 08.12.2021. Even the installments granted by your honour are huge in quantum.

In view of the above, the assessee requests your to grant stay against recovery of outstanding demand considering the high pitched assessment made in case of the assessee. Further, the assessee also requests your honour to direct the AO not to take any coercive actions against the assessee for recovery of demand, till the disposal of the appeal. Once the appeal is disposed off, the assessee would discharge his obligations, if any, arising on account of disposal, in favour of the department.

We shall be grateful if the stay against the demand is granted.

Thanking You,

Yours Faithfully,"

7.9 Thus, the writ applicant prayed for waiver of 20% of the pre-deposit essentially on four grounds (i) high pitched assessment (ii) only source of income through Avani Petrochem Pvt. Ltd. (iii) stereo type order passed by the Principal Commissioner and (iv) adverse effect on the financial affairs due to the Covid-19 pandemic.

7.10 We take notice of the fact that the total demand raised is to the tune of Rs.373,20,42,319/-. 20% of the said amount towards pre-deposit comes to Rs.74,64,08,464/-.

7.11 The aforesaid reply of the writ applicant dated 15.12.2021 did not find favour with the respondent No.2 herein and vide order dated 17.12.2021 disposed of the stay application. The order dated 17.12.2021 reads thus;

To, *Harsh Dipak Shah* *11/12, Charotar Society, Old Padra Road* *Vadodara, Gujarat* *India*	

PAN: ASGPS8965A	*Dated: 17.12.2021*	*DIN & Letter No: ITBA/COM/F/17/2021-22/1037913180(1)*

Sir / Madam/M/s,

Subject: Online service of orders-Letter

Sub:-Your application of stay against recovery of demand raised u/s.153A r.w.s. 143(3) & 143(3) of the Act in your case for A.Y.2010-11 to A.Y.2020-21 till the disposal of the 1st appeal-Reg.

Ref:-(i) Reply of assessee submitted to 15.12.2021.

(ii) This office letter dated 08.12.2021 issued for hearing on stay petition.

(iii) Assessee's stay application dated 08.11.2021 received in this office on 10.11.2021.

Please refer to the above

In regard to the above captioned subject, you have submitted reply to this office on 15.12.2021 in response to the letter issued to you dated 08.12.2021 for the necessary compliance called for on your stay petition dated 08.11.2021 which was scheduled for hearing on 15.12.2021 in this office at 12:30 PM. Vide the letter dated 08.12.2021 you were requested to pay the 20% of the outstanding demand in your case in easy installments in order to grant stay from the recovery of balance outstanding demand in accordance with the Board's Instruction No.1914 F.No.404/72/93 ITCC dated 21.03.1996 and further modified with Instruction No.1914 dated 31.03.2017. However, you have shown your disagreement to pay the 20% of the demand raised in your case quoting the reasons discussed below:-

(i) High Pitched Assessment:-Assessee has taken the contention that during the assessment proceeding for the year under consideration, the DCIT, Central Circle-2, Vadodara (AO) had made high pitched assessment in arbitrary manner and biased mind without considering the submissions/explanation and justification of the assessee.

(ii) Only source of income of M/s. Avani Petrochem

Pvt. Ltd.- Assessee has taken the contention that the assessee is the Director of M/s. Avani Petrochem Pvt. Ltd which is the only source of income. The turnover of the company for F.Y.2020-21 was Rs.125 Crore and therefore, it is apparent that income assessed for A.Y.2010-11 to A.Y.2020-21 to the tune of Rs.408 Crore which is 4 times higher than the aggregate turnover seems to be unrealistic and unreasonable.

(iii) Stereo-type Order:- Assessee has taken the contention that the AO has passed stero-type orders without outright rejection of the stand of the assessee which is absolutely illegitimate.

(iv) Adverse impact on financial affairs on account of COVID-19:- Assessee has taken the contention that due to Covid-19 pandemic, the financial affairs of the business are adversely affected across the globe and recovery proceedings may again affect the assessee adversely.

3. in respect of reasons quoted in above para 2(i), 2(ii) & 2(iii), it is stated that same are not applicable as they are merely pertaining to the matter discussed during the assessment proceedings. Assessment order passed in your case by the AO for the year under consideration was after granting sufficient opportunities during the assessment proceedings and the AO after duly perusing and verifying the submissions made by you with details available on record and proper appreciation of details provided as well in view of relevant provision of the Act has passed the Assessment Order.

Further, the reason quoted in para 2(iv) above cannot be accepted as the Government has introduced various facilities to the business men in order to overcome the pandemic effect on financial status. Further, in para-(ii) above you yourself have admitted that the turnover of the company is above 100 crores in last financial year of 2020-21 which clearly indicates that the business of your company

is in progressive mode. It is also pertinent to mention that only claim of financial crunch has been made without any evidence submitted in support of such claim.

4. As discussed vide this office letter dated 08.12.2021 issued to you, it is to bring to your notice again that your case does not fall in any of the categories discussed below:-

"C. GUIDELINES FOR STAYING DEMAND:

1. A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be sufficient reason to stay the recovery of demand. A few illustrative situation where stay could be granted are:-

i) if the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier; or

ii) If the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under jurisdiction the Assessing Officer is working), or

iii) If the high Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment."

5. Hence, demand cannot be stayed especially in view of the fact that this instruction has been issued in supersession of all instruction of the subject. Though the demand is disputed but mere filing of 1st appeal before the CIT(A) cannot be a valid reason for granting stay. Therefore, your request to grant stay on the entire amount of outstanding demand in your case for the relevant years under consideration is not found to be valid in nature.

6. In view of above reasons, your stay petition dated 08.11.2021 cannot be accepted, further you are requested to pay 20% of the outstanding demand in order to avail stay on the remaining amount as per the instruction No.1914 F. No.404/72/93-ITCC dated 31.07.2017. However, you are still with the option to pay the 20% of the outstanding demand in your case as detailed below:-

Sr. No	*Order under section of I.T.Act, 1961*	*A.Y.*	*Dt. of order*	*Demand Raised (in Rs.)*	*Demand amount to be paid for each relevant assessment years being 20% of the raised demand scheduled below.*
1.	*153A r.w.s.143(3)*	*2010-11*	*30.09.2021*	*26424810*	*10% by 31.12.2021 and remaining 10% in 3 monthly equal installments starting from 15.01.2022, 15.02.2022 and 15.03.2022*
2.	*153A r.w.s. 143(3)*	*2011-12*	*30.09.2021*	*139387164*	
3.	*153A r.w.s.143(3)*	*2012-13*	*30.09.2021*	*25290654*	
4.	*153A r.w.s.143(3)*	*2013-14*	*30.09.2021*	*186990485*	
5.	*153A r.w.s.143(3)*	*2014-15*	*30.09.2021*	*133940038*	
6.	*153A r.w.s.143(3)*	*2015-16*	*30.09.2021*	*227276710*	
7.	*153A r.w.s.143(3)*	*2016-17*	*30.09.2021*	*279814290*	
8.	*153A r.w.s.143(3)*	*2017-18*	*30.09.2021*	*1568798260*	
9.	*153A r.w.s.143(3)*	*2018-19*	*30.09.2021*	*436268606*	
10.	*153A r.w.s.143(3)*	*2019-20*	*30.09.2021*	*421328404*	
11.	*143(3)*	*2020-21*	*30.09.2021*	*286522898*	
			Total	*3732042319*	

6.1 If you follow the schedule payment as mentioned in above table then no action will be taken to recover the remaining demand till the end of the financial year or receipt of decision of CIT(A) whichever is earlier.

6.2 If no compliance of tax payment is received from you as scheduled above, then you would be treated as assessee deemed to be in default and the AO would be within his rights to make all possible recovery proceedings as per I.T. Act 1961 against you to collect the outstanding demand.

6.3 Your stay application is accordingly disposed off.

Charanjeet Singh Gulati
PCIT (Central), Surat

Copy to:-

1. The Addl. CIT, Central Range, Vadodara for monitoring the payment of demand.

2. The DCIT, CC-2, Vadodara for recovery proceeding if payment schedule of demand is not followed.

Charanjeet Singh Gulati
PCIT (Central), Surat"

7.12 Being dissatisfied with the aforesaid, the writ applicant is here before this Court with the present writ application.

Submissions on behalf of the writ applicant:-

8. Mr. Tushar Hemani, the learned counsel appearing for the writ applicant vehemently submitted that the two impugned orders dated 8.12.2021 and 17.12.2021 respectively are erroneous in law as those could be said to have been passed mechanically without any proper

application of mind. He would submit that 20% of the assessed amount comes to Rs.74,64,08,464/- and to insist such payment is as good as dismissing the appeal without any adjudication. In other words, the submissions of Mr. Hemani is that the respondent No.2, while considering grant of stay could not have mechanically directed deposit of 20% of the amount in question, more particularly, when the amount constituting 20% by itself is an astronomical figure.

9. Mr. Hemani laid much emphasis on the fact that the case on hand is one of high pitched assessment. It is approximately 100 times of the returned income and in view of this fact alone, the writ applicant is entitled to a stay of the notices towards recovery.

10. Mr. Hemani would submit that the tendency of making high pitched assessments by the Assessing Officers is not something unknown and quite often it has caused serious prejudice to the assessee leading to a serious miscarriage of justice. At times, such high pitched assessments by the Assessing Officers may even result into insolvency or closure of the business if such power was to be exercised only in a pro-revenue manner.

11. Mr. Hemani would submit that the parameters which should be kept in mind while considering the grant of stay of disputed demand are (i) the existence of a prima facie case (ii) financial stringency and (iii) balance of

convenience. He would submit that the financial stringency would include within its ambit the question of “irreparable injury” and “undue hardship” as well. It is only upon an application of the three factors as aforesaid that the Assessing Officer can exercise discretion for the grant or rejection, wholly or in part of a request for stay of the disputed demand.

12. Mr. Hemani submitted that the respondent No.2 is guided by the CBDT circulars/instructions issued time to time. Such circulars and instructions are in the nature of guidelines and are issued to assist the Assessing Authority in the matter of grant of stay and cannot substitute or override the basic tenets to be followed in the consideration and disposal of the stay applications. Mr. Hemani invited the attention of this Court to Para-4 of the impugned order dated 17.12.2021, wherein the respondent No.2 has referred and relied upon an office letter dated 08.12.2021 providing guidelines for staying the demand. The argument of Mr. Hemani is that the respondent No.2 has looked into only one such letter for being guided as regards the stay of demand. He would argue that the error on the part of the respondent No.2 is writ large as reflected in para-5 of the impugned order wherein it is stated that the office letter dated 08.12.2021 supersedes all earlier instructions issued by the CBDT on the subject. This, according to Mr. Hemani, is something erroneous.

13. Mr. Hemani took us through the various circulars and notifications on the subject. He invited our attention first to the Instruction No.96 dated 21.08.1969. Thereafter, he took us through the Instruction No.1914 dated 02.12.1993 followed by the office memorandum dated 29.02.2016 and 31.07.2017 respectively and also the Circular No.14 (XL-35) of 1995 dated 11.04.1995. Mr. Hemani would submit that to ignore all the aforesaid circulars and notifications and stick only to one office order dated 08.12.2021 was a big mistake on the part of the respondent No.2.

14. Mr. Hemani brought to our notice that the assessment order has been challenged before the Commissioner of Appeals essentially on the following grounds;

> *"(i) The respondent department. i.e., neither Investigating Wing nor Respondent No.4 have taken statement of person Shri Ashwin Shah who was maintaining all the records (rough pages/notings/documents) and said Shri Ashwin Shah has also filed an affidavit clearly mentioning all the notings and workings to be mere rough scribblings with no authenticity and the same cannot be taken to be the basis for income additions.*
>
> *(ii) Investigation wring has submitted its report to the Respondent No.4 before one and half year, however, the Respondent No.4 could not conduct any independent inquiry (Cross examination of parties) during the whole assessment proceedings which clearly shows that assessment has been framed merely on the basis of assumptions, conjecture and*

surmises.

(iii) The respondent No.4 has issued show-cause notice to the petitioner on 23.09.2021, i.e, merely one week before 30.09.2021 (time barring date for completion of assessment) which shows that the petitioner was deliberately not given any time or sufficient/reasonable time or opportunity to justify the transactions or furnish requisite explanation.

(iv) On perusal of the notices issued u/s. 142(1), it is evident that the Respondent No.4 has not called for the details in respect of various transactions, however, all of those transactions were covered in show cause notice and the petitioner was asked to furnish explanation which again clearly shows breach of principles of natural justice.

(v) On perusal of the assessment orders, it can be verified that the Respondent No.12 has added several transactions are such which were added at one place and the addition for the same transaction was made at other. This has caused duplication of additions and ultimately the respondent No.4 has conducted high pitched assessment.

(vi) The assessment for all the assessment years (from A.Y.2010-11 to A.Y.2018-19) have been concluded by the assessing officer after in depth scrutiny and the assessing officer did not comment adversely anywhere in the assessment order regarding transactions. Still, the Respondent No.4 has concluded the post search assessment covering all the transactions for which assessments u/s.143(3) were completed in earlier period and that too without any basis and or justification.

(vii) That the respondent No.4 has made replication/ duplication leading to dual addition in several transactions which has led to the assessment going more than 100 times the returned income. The recovery sought to be made by way of the

assessment orders is nothing but inflated transactions which have no basis in law.

(viii) That the petitioner has negative income/losses and a copy of the unaudited/provisional profit and loss and balance sheet showing loss to the extent of Rs.4 Crores up till 31.03.2021 is annexed hereto and marked as Annexure-K.

(ix) That the entire conclusion had been drawn by the respondent No.4 on the basis of material seized from the one Ashwinbhai which was in the form of a diary wherein rough notes were maintained. The said Ashwinbhai Shah also filed an affidavit with the respondent No.4 stating that the said rough scribbles had no connection with the actual transactions. Such being the situation, the respondent No.4 did not even bother to take the statement of said Ashwinbhai Shah nor put him for cross examination during the entire proceedings. Solely on the basis of unsubstantiated notes which has led to the huge additions in the assessment order making the said assessment orders high pitched. Annexed hereto and marked as Annexure-L is a copy of the affidavit filed by Shri Ashwinbhai Shah and his wife Chhayaben Ashwinbhai Shah."

15. Mr. Hemani, in support of his aforesaid submissions, has placed reliance on the following case laws;

Sr. No.	List of Judgments	Citations
1.	The Abraham Memorial Education Trust vs. The Deputy Commissioner of Income Tax, Bengaluru	MANU/KA/1124/2019
2.	Soul vs. Deputy Commissioner of Income Tax	(2008) 220 CTR (Del.) 211
3.	Flipkart India Pvt. Ltd. vs. Assistant Commissioner of Income Tax	(2017) 295 CTR (Kar.) 149
4.	Taneja Developers & Infrastructure Ltd. vs. Asst. Commissioner of Income Tax	MANU/DE/0352/2009
5.	Bhupendra Murji Shah vs. Deputy	MANU/TN/3920/2018

	Commissioner of Income Tax	
6.	Kalaignar Tv Pvt. Ltd. vs. Assistant Commissioner of Income Tax	MANU/TN/3920/2018
7.	Vodafone M-Pesa Ltd. vs. Principal Commi. Of Income Tax	MANU/MH/2302/2018
8.	Aarti Sponge and Power Ltd. vs. Assistant Commi. Of Income Tax (Chhattisgarh High Court)	Writ Petition No.59/2018 (judgment dt. 10.04.2018)
9.	Vimalkumar Agarwal & Ors. vs. Principal Commi. Of Income Tax	MANU/CG/0119/2018
10.	KEC International Ltd. vs. B.R. Balkrishnan & Ors.	MANU/MH/0496/2001
11.	J.R. Tantia Charitable Trust vs. Deputy Commi. of Income Tax	(2011) 245 CTR (Raj.) 162
12.	Valvoline Cummins Ltd. vs. Deputy Commi. Of Income Tax	(2008) 217 CTR (Del.) 292
13.	N. Jegatheesan vs. Deputy Commi. Of Income Tax	(2015) 64 Taxmann.com 339 (Madras)

16. In such circumstances, referred to above, Mr. Hemani prays that there being merit in his writ application, the same may be allowed and the precondition of deposit of 20% of the total demand may be waived or stayed till the final disposal of the appeal which has been filed by the writ applicant before the Commissioner of Appeals under Section 251 of the Act.

Submissions on behalf of the Revenue:-

17. On the other hand, Mr. M.R. Bhatt, the learned senior counsel appearing for the Revenue has vehemently opposed this writ application submitting that no error, not to speak of any error of law, could be said to have been

committed by the respondent No.2 in declining to waive 20% of the pre-deposit amount in exercise of his discretion under Section 220(6) of the Act.

18. Mr. Bhatt would submit that the respondent No.2 could be said to have passed the impugned order of grant of conditional stay by keeping in mind all the relevant considerations and once such an order is passed in exercise of his discretionary power, this Court, in exercise of its writ jurisdiction, should be loath to interfere with the same. Mr. Bhatt would argue that the CBDT Instructions No.95 dated 21.08.1969, on which, reliance is placed on behalf of the writ applicant is no more in force as the same stood superseded by the Instruction No.1914 dated 28.07.2020. Mr. Bhatt laid much emphasis on the fact that pursuant to the search operations, the assessments were carried out which resulted into substantial tax demands. This is one major factor which Mr. Bhatt wants this Court to keep in mind vis-a-vis the argument of the writ applicant as regards the high pitched assessment. To put it succinctly, the argument of Mr. Bhatt is that just because the amount of the returned income assessed is huge, that by itself, will not be sufficient to say that it is a case of high pitched assessment. If during the search operations, cogent and convincing material is collected pointing out towards the dubious role played by the assessee as also the various doubtful financial transactions, at times the amount towards the returned

income that may be determined may be huge, but that by itself, would not make it a case of high pitched assessment.

19. Mr. Bhatt further submitted that the powers analogous to Section 220(6) of the Act are also with the First Appellate Authority, namely, the CIT (Appeals). In other words, the powers to grant stay can be implied as inherent power of the First Appellate Authority, namely, the CIT (Appeals). Mr. Bhatt would submit that the writ applicant may not press this writ application with liberty to file appropriate application before the First Appellate Authority, namely, CIT (Appeals) and pray for an appropriate relief so far as the recovery of the demand is concerned pending the final disposal of the appeal filed by the writ applicant.

20. Mr. Bhatt, in support of his aforesaid submissions, has placed reliance on the following case laws;

(i) ***Karmvir Builders vs. Principal Commissioner of Income Tax (Central)***, (2020) 113 taxmann.com 139 (SC);

(ii) ***Sporting Pastime India Ltd. vs. Assistant Registrar, Chennai***, (2020) 122 taxmann.com 44 (Madras);

(iii) ***Gorlas Infrastructure (P.) Ltd. vs. Principal***

Commissioner of Income Tax, (2021) 130 taxmann.com 378 (Telangana);

21. In such circumstances, referred to above, Mr. Bhatt prays that there being no merit in the present writ application, the same may be rejected.

ANALYSIS

22. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the writ applicant is entitled to any relief as prayed for in the present writ application.

23. Section 220 lays down the procedure for collection and recovery of the tax. Section 220 falls in Chapter-XVII.

24. Sub-section (3) of Section 220 reads thus;

> *"(3) Without prejudice to the provisions contained in sub- section (2), on an application made by the assessee before the expiry of the due date under sub- section (1), the Assessing Officer may extend the time for payment or allow payment by installments, subject to such conditions as he may think fit to impose in the circumstances of the case."*

25. Sub-section (4) of Section 220 reads thus;

> "*(4) If the amount is not paid within the time limit under sub- section (1) or extended under sub-*

section (3), as the case may be, at the place and to the person mentioned in the said notice the assessee shall be deemed to be in default."

26. The plain reading of sub-section (4) as above would indicate that if the amount is not paid within the time limit under sub-section (1) or within the extended time limit under sub-section (3), as the case may be, the assessee would be deemed to be in default. A legal fiction of being deemed to be in default has been provided in the statute.

27. Sub-section (6) of Section 220 reads thus;

"(6) Where an assessee has presented an appeal under section 246, [the Assessing] Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of."

28. The plain reading of the above sub-section would indicate that if the assessee has presented an appeal against the final order of assessment under Section 246 of the Act, it would be within the discretion of the Assessing Officer subject to such conditions that he may deem fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal so long as the appeal remains undisposed of. What is discernible from the aforesaid is that once the final order of assessment has passed, determining the liability of the assessee to pay a particular

amount and such amount is not paid within the time limit as prescribed under sub-section (1) to Section 220 or during the extended time period under sub-section (3) as the case may be, then the assessee, because of the deeming fiction, would be deemed to be in default. Therefore, even if the assessee prefers an appeal challenging the assessment order before the Commissioner of Appeals as the First Appellate Authority, he would still be treated as an assessee deemed to be in default because mere filing of an appeal would not automatically lead to stay of the demand as raised in the assessment order. It is in such circumstances that the assessee has to make a request before the authority concerned for appropriate relief for grant of stay against such demand pending the final disposal of the appeal. This relief which the assessee seeks is within the discretion of the authority. In other words, the authority may grant such stay conditionally or unconditionally or may even decline to grant any stay. However, the exercise of such discretion has to be in a judicious manner. Such exercise of discretion cannot be in a arbitrary or mechanical manner.

29. The aforesaid leads us to consider what parameters should be kept in mind by the authority concerned while considering the request of the assessee for stay of the demand. For the time being, we put aside all the instructions and circulars issued by the CBDT over a

period of time. Undoubtedly, all such instructions and circulars are in the form of guidelines which the authority concerned is supposed to keep in mind. Such instructions/ circulars are issued to ensure that there is no arbitrary exercise of power by the authority concerned or in a given case, the authority may not act prejudicial to the interest of the Revenue. However, when it comes to grant of a discretionary relief like stay of demand, it is but obvious that the four basic parameters need to be kept in mind (i) prima facie case (ii) balance of convenience (iii) irreparable injury that may be caused to the assessee which cannot be compensated in terms of money and (iv) whether the assessee has come before the authority with clean hands.

30. The power under Clause (6) of Section 220 is indeed a discretionary power. However, it is one coupled with a duty to be exercised judiciously and reasonably (as every power should be), based on relevant grounds. It should not be exercised arbitrarily or capriciously or based on matters extraneous or irrelevant. The Income-tax Officer should apply his mind to the facts and circumstances of the case relevant to the exercise of the discretion, in all its aspects. He has also to remember that he is not the final arbiter of the disputes involved but only the first amongst the statutory authorities. Questions of fact and of law are open for decision before the two appellate authorities, both of whom possess plenary powers. In exercising his

power, the Income-tax Officer should not act as a mere tax-gatherer but as a quasi-judicial authority vested with the power of mitigating hardship to the assessee. The Income-tax Officer should divorce himself from his position as the authority who made the assessment and consider the matter in all its facets, from the point of view of the assessee without at the same time sacrificing the interests of the Revenue. Says Viswanatha Sastri J. in Vetcha Sreemmamurthy v. ITO [1956] 30 ITR 252 (AP) (at pages 268 and 269):

> "*The Legislature has, however, chosen to entrust the discretion to them. Being to some extent in the position of judges in their own cause and invested with a wide discretion under Section 45 of the Act, the responsibility for taking an impartial and objective view is all the greater. If the circumstances exist under which it was contemplated that the power of granting a stay should be exercised, the Income-tax Officer cannot decline to exercise that power on the ground that it was left to his discretion. In such a case, the Legislature is presumed to have intended not to grant an absolute, uncontrolled or arbitrary discretion to the Officer but to impose upon him the duty of considering the facts and circumstances of the particular case and then coming to an honest judgment as to whether the case calls for the exercise of that power.*"

31. Being a matter of discretion, it is not possible to strait-jacket or lay down the principles on which the discretion is to be exercised. The question as to what are the matters relevant and what should go into the making of the decision by the Income-tax Officer in such

circumstances has been explained by D. N, Sinha J. (in the context of the corresponding provisions of the Wealth-tax Act) in Aluminium Corporation of India Ltd. v. C. Balakrishnan [1959] 37 ITR 267 (Cal). The learned Judge states (at pages 269 and 270):

> "*A judicial exercise of discretion involves a consideration of the facts and circumstances of the case in all its aspects. The difficulties involved in the issues raised in the case and the prospects of the appeal being successful is one such aspect. The position and economic circumstances of the assessee is another. If the officer feels that the stay would put the realisation of the amount in jeopardy, that would be a cogent factor to be taken into consideration. The amount involved is also a relevant factor. If it is a heavy amount, it should be presumed that immediate payment, pending an appeal in which there may be a reasonable chance of success, would constitute a hardship. The Wealth-tax Act has just come into operation. If any point is involved which requires an authoritative decision, that is to say, a precedent, that is a point in favour of granting a stay. Quick realisation of tax may be an administrative expediency, but by itself it constitutes no ground for refusing a stay. While determining such an application, the authority exercising discretion should not act in the role of a mere tax-gatherer.*"

32. In the case on hand, unfortunately, the respondent No.2 has not considered anything and has just mechanically declined to grant relief as prayed for by the writ applicant. When the writ applicant pointed out to the respondent No.2 that the case on hand is one of high pitched assessment, the same came to be dismissed by

the respondent No.2 by merely saying that the issue has been discussed threadbare during the assessment proceedings. In other words, the finding recorded by the respondent No.2 is that the assessment order came to be passed by the Assessing Officer after granting sufficient opportunities and after due consideration of all the relevant aspects of the matter and, therefore, the issue of high pitched assessment need not be considered. The findings recorded in para-3 of the order dated 17.12.2021 are not appealing to us at all. The matter has not been considered by the respondent No.2 in its proper perspective. Many times in the over zealousness to protect the interest of the Revenue, the authorities render their discretionary orders susceptible to the complaint that those have been passed without any application of mind. We fail to understand what is so magical in the figure of 20%. To balance the equities, the authority may even consider directing the assessee to make a deposit of 5% or 10% of the assessed amount as the circumstances may demand as a pre-deposit. The “High Pitched Assessment” means where the income determined and assessment was substantially higher than the returned income. For example, twice the returned income or more.

33. In the aforesaid context, we may look into the decision of the Madras High Court in the case of ***N. Jegatheesan vs. Deputy Commissioner of Income Tax, Non Corporate Circule-2,*** reported in (2016) 388 ITR 410 (Mad.), wherein the Court observed in Para-14 as

under;

> *"High Pitched Assessment? means where the income determined and assessment was substantially higher than the returned income, say twice the later amount or more, the collection of the tax in dispute should be kept in abeyance till the decision on the appeal provided there were no lapses on the part of the assessee. In the instant case, the assessment in question in the pending appeal before the Commissioner of Income Tax (Appeals) is a High Pitched Assessment, because the petitioner has submitted his return for the accounting period, that is 01.04.2011 to 31.03.2012 for the assessment year 2012-2013 as Rs.4,91,680/- including agricultural income of Rs.45,00,000/-. But, the respondent having formed adverse opinion, as set out in the assessment order dated 31.3.2015, negativing agricultural income, made additions to the tune of Rs.55,00,000/-. Thereby, adding admitted income of Rs.4,91,680/- with addition of Rs.55,00,000/-, the respondent arbitrarily without providing opportunity of cross-examination contrary to the powers invested on him under the fiscal statute, arrived total income as Rs.59,91,680/-. Thereby, the respondent determined income on assessment substantially higher than the returned income of Rs.4,91,680/-, by way of 14 times, made assessment arriving total income of Rs.59,91,680/-. Therefore, the assessment made by the respondent is a High Pitched Assessment."*

34. In context with the high pitched assessment, we may also refer to a decision of the Delhi High Court in the case of ***Soul vs. Deputy Commissioner of Income Tax***, reported in (2010) 323 ITR 305 (Delhi), wherein a Division Bench of the High Court observed in Para-9 as under;

"Having considered the arguments advanced by the learned Counsel for the parties, we are of the view that although Instruction No. 1914 of 1993 specifically states that it is in super-session of all earlier instructions, the position obtaining after the decision of this Court in Valvoline Cummins Ltd. (supra) is not altered at all. This is so because para No. 2(A) which speaks of responsibility specifically indicates that it shall be the responsibility of the AO and the TRO to collect every demand that has been raised "except the following", which includes "(d) demand stayed in accordance with the paras B and C below". Para B relates to stay petitions. As extracted above, Sub-clause (iii) of para B clearly indicates that a higher/superior authority could interfere with the decision of the AO/TRO only in exceptional circumstances. The exceptional circumstances have been indicated as - "where the assessment order appears to be unreasonably high pitched or where genuine hardship is likely to be caused to the assessee". The very question as to what would constitute the assessment order as being reasonably high pitched in consideration under the said Instruction No. 96 and, there, it has been noted by way of illustration that assessment at twice the amount of the returned income would amount to being substantially higher or high pitched. In the case before this Court in Valvoline Cummins Ltd. (supra) the assessees income was about eight (8) times the returned income. This Court was of the view that was high pitched. In the present case, the assessed income is approximately 74 times the returned income and obviously, this would fall within the expression "unreasonably high pitched".

35. We may also look into a Division Bench decision of the Delhi High Court in the case of ***Valvoline Cummins Limited vs. Deputy Commissioner of Income Tax & Ors***., reported in (2008) 307 ITR 103 (Delhi), wherein

Justice Madan B. Lokur, as His Lordship than was, in identical set of facts, observed as under;

> *"39. Learned Counsel for the assessed also took us to the merits of the assessment order with a view to show that prima facie the demand was unreasonable in as much as the assessed was not given a proper hearing before the assessment order was framed. We are not inclined to delve into this issue because that is a matter which has to be decided by the CIT (A) but we may note (for the purposes of only deciding this writ petition) that there is substance in the contention of the assessed that the assessment order is extremely harsh.*
>
> *40. It may be recalled that the returned income of the assessed was Rs. 7.25 crores, but the assessed income is Rs. 58.68 crores, which is almost 8 times the returned income. In this regard, learned Counsel has drawn our attention to Instruction No. 96 dated 21st August, 1969 issued by the CBDT, which deals with the framing of an assessment which is substantially higher than the returned income. The relevant portion of the Instruction reads as follows:*
>
> > *1222. Income determined on assessment was substantially higher than returned income Whether collection of tax in dispute is to be held in abeyance till decision on appeal*
> >
> > *1. One of the points that came up for consideration in the 8th meeting of the Informal Consultative Committee was that income-tax assessments were arbitrarily pitched at high figures and that the collection of disputed demands as a result thereof was also not stayed in spite of the specific provision in the matter in Section 220(6).*
> >
> > *2. The then Deputy Prime Minister had observed as under:*

...where the income determined on assessment was substantially higher than the returned income, say, twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeals, provided there were no lapse on the part of the assessed.

3. The Board desire that the above observations may be brought to the notice of all the Income-tax Officers working under you and the powers of stay of recovery in such cases up to the stage of first appeal may be exercised by the Inspecting Assistant Commissioner/Commissioner of Income-tax.

41. A perusal of paragraph 2 of the aforesaid extract would show that where the income determined is substantially higher than the returned income, that is, twice the latter amount or more, then the collection of tax in dispute should be held in abeyance till the decision on the appeal is taken. In this case, as we have noted above, the assessment is almost 8 times the returned income. Clearly, the above extract from Instruction No. 96 dated 21st August, 1969 would be applicable to the facts of the case.

42. Learned Counsel for the assessed has drawn our attention to several decisions of various High Courts which have interpreted the aforesaid Instruction in the way that we have read it. Some of these decisions are N. Rajan Nair v. Income Tax Officer and Anr. , Mrs. R. Mani Goyal v. Commissioner of Income Tax and Anr. and I.V.R. Construction Ltd. v. Assistant Commissioner of Income Tax and Anr. .

43. Under the circumstances, we are of the view that the assessed would, in normal course, be entitled to an absolute stay of the demand on the basis of the above Instruction."

36. The Madras High Court, in the case of ***Mrs. Kannammal vs. Income-tax Officer-Ward-1(1), Tripura***, reported in (2019) 103 taxmann.com 364 (Madras) had the occasion to look into all the instructions/ circulars issued by the CBDT over a period of time and considering those, held as under;

> *"7. The parameters to be taken into account in considering the grant of stay of disputed demand are well settled – the existence of a prima facie case, financial stringency and the balance of convenience. 'Financial stringency' would include within its ambit the question of 'irreparable injury' and 'undue hardship' as well. It is only upon an application of the three factors as aforesaid that the assessing officer can exercise discretion for the grant or rejection, wholly or in part, of a request for stay of disputed demand.*
>
> *8. In addition, periodic Instructions/Circulars in regard to the manner of adjudication of stay petitions are issued by the Central Board of Direct Taxes (CBDT) for the guidance of the Departmental authorities. The one oft-quoted by the assessee is Office Memorandum F.No.1/6/69/-ITCC, dated 21.08.1969 that states as follows:*
>
> > *'1. One of the points that came up for consideration in the 8th Meeting of the Informal Consultative Committee was that income-tax assessments were often arbitrarily pitched at higher figures and that the collection of disputed demand as a result thereof was also not stayed in spite of the specific provision in the matter in s. 220(6) of the IT Act, 1961.*
> >
> > *2. The then Deputy Prime Minister had observed*

as under :

".....Where the income determined on assessment was substantially higher than the returned income, say twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeal provided there were no lapses on the part of the assessees."

3. The Board desire that the above observations may be brought to the notice of all the Income-tax Officers working under you and the powers of stay of recovery in such cases up to the stage of first appeal may be http://www.judis.nic.in exercised by the Inspecting Assistant Commissioner/Commissioner of Income-tax.'

9. Thereafter, Instruction No.1914 was issued by the CBDT on 21.03.1996 and states as follows:

1. Recovery of outstanding tax demands [Instruction No. 1914 F. No. 404/72/93 ITCC dated 2-12-1993 from CBDT] The Board has felt the need for a comprehensive instruction on the subject of recovery of tax demand in order to streamline recovery procedures. This instruction is accordingly being issued in supersession of all earlier instructions on the subject and reiterates the existing Circulars on the subject.

2. The Board is of the view that, as a matter of principle, every demand should be recovered as soon as it becomes due. Demand may be kept in abeyance for valid reasons only in accordance with the guidelines given below :

A. Responsibility:

i. It shall be the responsibility of the Assessing Officer and the TRO to collect every demand that has been raised, except the following: (a)

Demand which has not fallen due;(b) Demand which has been stayed by a Court or ITAT or Settlement Commission;(c) Demand for which a proper proposal for write-off has been submitted;(d) Demand stayed in accordance with paras B & C below.

ii. Where demand in respect of which a recovery certificate has been issued or a statement has been drawn, the primary responsibility for the collection of tax shall rest with the TRO. iii. It would be the responsibility of the supervisory authorities to ensure that the Assessing Officers and the TROs take all such measures as are necessary to collect the demand. It must be understood that mere issue of a show cause notice with no follow- up is not to be regarded as adequate effort to recover taxes. B. Stay Petitions:

i. Stay petitions filed with the Assessing Officers must be disposed of within two weeks of the filing of petition by the tax- payer. The assessee must be intimated of the decision without delay.

ii. Where stay petitions are made to the authorities higher than the Assessing Officer (DC/CIT/CC), it is the responsibility of the higher authorities to dispose of the petitions without any delay, and in any event within two weeks of the receipt of the petition. Such a decision should be communicated to the assessee and the Assessing Officer immediately.

iii. The decision in the matter of stay of demand should normally be taken by Assessing Officer/TRO and his immediate superior. A higher superior authority should interfere with the decision of the AO/TRO only in exceptional circumstances; e.g., where the assessment order appears to be unreasonably high-pitched or http://www.judis.nic.in where genuine

hardship is likely to be caused to the assessee. The higher authorities should discourage the assessee from filing review petitions before them as a matter of routine or in a frivolous manner to gain time for withholding payment of taxes.

C. Guidelines for staying demand:

i. A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. A few illustrative situations where stay could be granted are: It is clarified that in these situations also, stay may be granted only in respect of the amount attributable to such disputed points. Further where it is subsequently found that the assessee has not co-operated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or court alters the above situation, the stay order may be reviewed and modified. The above illustrations are, of course, not exhaustive.

ii. In granting stay, the Assessing Officer may impose such conditions as he may think fit. Thus he may — a. require the assessee to offer suitable security to safeguard the interest of revenue; b. require the assessee to pay towards the disputed taxes a reasonable amount in lump sum or in instalments; c. require an undertaking from the assessee that he will co-operate in the early disposal of appeal failing which the stay order will be cancelled. d. reserve the right to review the order passed after expiry of a reasonable period, say up to 6 months, or if the assessee has not co-operated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations; e. reserve a right to adjust refunds arising, if any, against the demand.

iii. Payment by instalments may be liberally allowed

so as to collect the entire demand within a reasonable period not exceeding 18 months.

iv. Since the phrase "stay of demand" does not occur in section 220(6) of the Income-tax Act, the Assessing Officer should always use in any order passed under section 220(6) [or under section 220(3) or section 220(7)], the expression that occurs in the section viz., that he agrees to treat the assessee as not being default in respect of the amount specified, subject to such conditions as he deems fit to impose.

v. While considering an application under section 220(6), the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order.

D. Miscellaneous:

i. Even where recovery of demand has been stayed, the Assessing Officer will continue to review the situation to ensure that the conditions imposed are fulfilled by the assessee failing which the stay order would need to be withdrawn.

ii. Where the assessee seeks stay of demand from the Tribunal, it should be strongly opposed. If the assessee presses his application, the CIT should direct the departmental representative to request that the appeal be posted within a month so that Tribunal's order on the appeal can be known within two months.

iii. Appeal effects will have to be given within 2 weeks from the receipt of the appellate order. Similarly, rectification application should be decided within 2 weeks of the receipt t hereof. Instances where there is undue delay in giving effect to appellate orders, or in deciding rectification applications, should be dealt with very strictly by the CCITs/CITs.

3. The Board desires that appropriate action is taken in the matter of recovery in accordance with the above procedure. The Assessing Officer or the TRO, as the case may be, and his immediate superior officer shall be held responsible for ensuring compliance with these instructions.

4. This procedure would apply mutatis mutandis to demands created under other Direct Taxes enactments also.'

10. Instruction 1914 was partially modified by Office Memorandum dated 29.02.2016 taking into account the fact that Assessing Officers insisted on payment of significant portions of the disputed demand prior to grant of stay resulting in extreme hardship for tax payers. Thus, in order to streamline the grant of stay and standardize the procedure, modified guidelines were issued which are as follows:

'*.....*

(A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in pars (B) hereunder.

(B) In a situation where,

(a) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court /or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,

(b) the assessing officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr. CIT/ CIT, who after considering all relevant facts shall decide the quantum/ proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.'

11. Instruction 1914 was further modified by Office Memorandum bearing number F.No.404/72/93 – ITCC dated 31.07 2017 as follows:

'*OFFICE MEMORANDUM F. No. 404/72/93-ITCC dated 31.07.2017 Subject: Partial modification of Instruction No. 1914 dated 21.3.1996 to provide for guidelines for stay of demand at the first appeal stage. Reference: Board's O.M. of even number dated 29.2.2016 Instruction No. 1914 dated 21.3.1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.*

Vide O.M. N0.404/72/93-ITCC dated 29.2.2016 revised guidelines were issued in partial modification of instruction No 1914, wherein, inter alia, vide para 4(A) it had been laid down that in a case where the outstanding demand is disputed before CIT(A), the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand unless the case falls in the category discussed in para (B) thereunder. Similar references to the standard rate of 15% have also been made in succeeding paragraphs therein.

2. The matter has been reviewed by the Board in the light of feedback received from field authorities. In view of the Board's efforts to contain over pitched assessments through several measures resulting in fairer and more reasonable assessment orders, the standard rate of 15% of the disputed demand is found to be on the lower side. Accordingly. it has been decided that the standard rate prescribed in O.M. dated 29.2.2016 be revised to 20% of the disputed demand, where the demand is contested before CIT(A). Thus all references to 15% of the disputed demand in the aforesaid O.M dated 29.2.2016 hereby stand modified to 20% of the disputed demand. Other guidelines contained in the O.M. dated 29.2.2016 shall remain unchanged.

These modifications may be immediately brought to the notice of all officers working in your jurisdiction for proper compliance.'

12. The Circulars and Instructions as extracted above are in the nature of guidelines issued to assist the assessing authorities in the matter of grant of stay and cannot substitute or override the basic tenets to be followed in the consideration and disposal of stay petitions. The existence of a prima facie case for which some illustrations have been provided in the Circulars themselves, the financial stringency faced by an assessee and the balance of convenience in the matter constitute the 'trinity', so to say, and are indispensable in consideration of a stay petition by the authority. The Board has, while stating generally that the assessee shall be called upon to remit 20% of the disputed demand, granted ample discretion to the authority to either increase or decrease the quantum demanded based on the three vital factors to be taken into consideration.

13. In the present case, the assessing officer has merely rejected the petition by way of a non-speaking order reading as follows:

> *'Kindly refer to the above. This is to inform you that mere filing of appeal against the said order is not a ground for stay of the demand. Hence your request for stay of demand is rejected and you are requested to pay the demand immediately. Notice u/s.221(1) of the Income Tax Act, 1961 is enclosed herewith.'*

14. The disposal of the request for stay by the petitioner leaves much to be desired. I am of the categoric view that the Assessing Officer ought to have taken note of the conditions precedent for the grant of stay as well as the Circulars issued by the CBDT and passed a speaking order. Of course the petition seeking stay filed by the petitioner is itself cryptic. However, as noted by the Supreme Court in the case of Commissioner of Income tax vs Mahindra Mills, ((2008) 296 ITR 85 (Mad)) in the context of grant of depreciation, the Circular of the Central Board of Revenue (No. 14 (SL- 35) of 1955 dated April 11, 1955) requires the officers of the department 'to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs. .... Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other.....'. Thus, notwithstanding that the assessee may not have specifically invoked the three parameters for the grant of stay, it is incumbent upon the assessing officer to examine the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency, if any and arrive at the balance of convenience in the matter."

37. The following is discernible from the above referred judgment of the Madras High Court;

(a) The Board has, while stating generally that the assessee shall be called upon to remit 20% of the disputed demand, granted ample discretion to the authority to either increase or decrease the quantum demanded based on the three vital factors to be taken into consideration, i.e. prima facie case, balance of convenience and irreparable injury.

(b) Notwithstanding that the assessee may not have specifically invoked the three parameters, referred to above, for the grant of stay, it is incumbent upon the assessing officer to examine the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency, if any, and arrive at the balance of convenience.

38. The principles relating to the exercise of discretion by an authority are expounded in various decisions of the Supreme Court. We may refer to few decisions.

39. In the case of ***Sant Raj and Anr. v. O.P. Singla and Anr.***: *(1985) 2 SCC 349,* the Supreme Court dealt with the matter as regards the discretion of the Labour Court to award compensation in lieu of reinstatement and observed as under;

> *"4.....Whenever, it is said that something has to be done within the discretion of the authority then that something has to be done according to the rules of*

reason and justice and not according to private opinion, according to law and not humor. It is to be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself.....Discretion means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary, vague and fanciful....." (emphasis in bold supplied)"

40. In the case of ***Reliance Airport Developers (P) Ltd. v. Airports Authority of India and Ors***. *(2006) 10 SCC 1*, the Supreme Court, with reference to various pronouncements pertaining to the legal connotations of 'discretion' and governing principles for exercise of discretion observed, inter alia, as under: -

"30. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection: deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons."

41. In the case of ***U.P. State Road Transport Corporation and Anr. v. Mohd. Ismail and Ors.***: *(1991) 3 SCC 239*, while dealing with the case of non-exercise of discretion by the authority, the Supreme Court expounded on the contours of discretion as also on limitations on the powers of the Courts when the matter is

of the discretion of the competent authority, in the following terms: -

> *"12. The High Court was equally in error in directing the Corporation to offer alternative job to drivers who are found to be medically unfit before dispensing with their services. The court cannot dictate the decision of the statutory authority that ought to be made in the exercise of discretion in a given case. The court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. The court could only command the statutory authority by a writ of mandamus to perform its duty by exercising the discretion according to law. Whether alternative job is to be offered or not is a matter left to the discretion of the competent authority of the Corporation and the Corporation has to exercise the discretion in individual cases. The court cannot command the Corporation to exercise discretion in a particular manner and in favour of a particular person. That would be beyond the jurisdiction of the court.*
>
> *13. In the instant case, the Corporation has denied itself the discretion to offer an alternative job which the regulation requires it to exercise in individual cases of retrenchment. ……It may be stated that the statutory discretion cannot be fettered by selfcreated rules or policy. Although it is open to an authority to which discretion has been entrusted to lay down the norms or rules to regulate exercise of discretion it cannot, however, deny itself the discretion which the statute requires it to exercise in individual cases. ……*
>
> *xxx xxx xxx*
>
> *"15…….Every discretion conferred by statute on a holder of public office must be exercised in furtherance of accomplishment of purpose of the*

power. The purpose of discretionary decision making under Regulation 17(3) was intended to rehabilitate the disabled drivers to the extent possible and within the abovesaid constraints. The Corporation therefore, cannot act mechanically. The discretion should not be exercised according to whim, caprice or ritual. The discretion should be exercised reasonably and rationally. It should be exercised faithfully and impartially. There should be proper value judgment with fairness and equity....."

(emphasis in bold supplied)

42. *In the case of* **Assistant Commissioner (CT) LTU, Kakinada and Ors. v. Glaxo Smith Kline Consumer Health Care Limited**, 2020 SCC OnLine SC 440, the Supreme Court expounded on the principles that the Constitutional Courts, even in exercise of their wide jurisdictions, cannot disregard the substantive provisions of statute while observing, inter alia, as under: -

"12. Indubitably, the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties.

Even while exercising that power, this Court is required to bear in mind the legislative intent and not to render the statutory provision otiose."

43. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is

essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

44. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

45. The mandate of Parliament in sub-section (6) seems to be that the lower Assessing Officer should abide by and being bound by the decision of the appellate authority, should normally wait for the fate of such appeal filed by the assessee. Therefore, his discretion of not treating the assessee in default, conferred under sub-section (6) should ordinarily be exercised in favour of assessee, unless the overriding and overwhelming reasons are there to reject the application of the assessee under Section 220(6) of the Act. The application under Section 220(6) of

the Act cannot normally be rejected merely describing it to be against the interest of Revenue if recovery is not made, if tax demanded is twice or more of the declared tax liability. The very purpose of filing of appeal, which provides an effective remedy to the assessee is likely to be frustrated, if such a discretion was always to be exercised in favour of revenue rather than assessee.

46. We are of the view that the authorities should keep in mind the following parameters while deciding a stay application preferred by an assessee pending appeal to the First Appellate Authority. These are the parameters as laid down by the Bombay High Court in the case of ***Kec International Ltd. vs. B.R. Balakrishnan,*** (2001) 251 ITR 158/119 Taxman 974;

a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order far exceeds the returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial

difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

(d) The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.

47. Before we close this matter, we deem fit to draw the attention of one and all to the following observations made by the Supreme Court in the case of ***The Income Tax Officer, III Mangalore vs. M. Damodar Bhat,*** reported in AIR 1969 SC 408.

> *"We proceed to consider the next question arising in this appeal, viz., whether the High Court was right in taking the view that the Income Tax OffiCer did not properly exercise the statutory discretion in issuing the impugned notice with regard to the first item, viz., tax for the assessment year 1960-61 amounting to]Rs. 7,056.15. It was argued on behalf of the respondent that there was an appeal pending with the Appellate Assistant Commissioner against the order of assessment and therefore it was incumbent upon the Income Tax Officer to exercise the statutory discretion properly under s. 220 (6) of the new Act in treating the assessee as being in default. The finding of the High Court is that the Income Tax Officer "was*

not shown to have applied his mind to any of the facts relevant to the proper exercise of his discretion". In our opinion, the finding of the High Court cannot be upheld, because the respondent has not alleged in his writ petition any specific particulars in support of his, case that the Income Tax Officer has exercised his discretion in an arbitrary manner. In paragraph 12(b) of the writ petition the respondent had merely said that "the order of the Income Tax Officer made under s. 220 was arbitrary and capricious". No other particulars were given by the respondent in his writ petition to show in what way the order was arbitrary or capricious. In the counter- affidavit the allegations of the respondent have been denied in this respect. We are of opinion that in the absence of specific particulars by the respondent in his writ petition it is not open to the High Court to go into the question whether the Income Tax Officer has arbitrarily exercised his discretion. In the result we hold that the respondent is unable to substantiate his case that the impugned notice is in any way defective with regard to item no. 1 i.e., tax for the assessment year 1960-61 amounting to Rs. 7,056.15."

48. Thus, what is sought to be conveyed by the Supreme Court is that the writ applicant, in the memorandum of his writ application, must furnish specific particulars in support of his case that the Income-tax Officer has exercised his discretion in arbitrary manner. It is just not sufficient to make an averment in the memorandum of the writ application that "the order of the Income-tax Officer made under Section 220 is arbitrary and capricious". In the absence of specific particulars by the writ applicant in his writ application, the High Court should not go into the question whether the Income Tax Officer has arbitrarily exercised his discretion.

49. For the foregoing reasons, the Special Civil Application No.19804 of 2021 deserves to be allowed and the same is, accordingly, allowed. Consequently, the impugned orders passed by the respondent No.2 are set aside and the respondent No.2 is directed to consider the application filed by the writ applicant under Sections 220(3) and 220(6) respectively of the I.T. Act afresh in conformity with all the CBDT instructions and the parameters laid as above by providing an opportunity of being heard to the writ applicant and pass orders in accordance with law preferably within a period of two weeks from the date of the receipt of the writ of this order.

50. So far as the other two connected writ applications are concerned, we decline to interfere having regard to the quantum of the amount involved in both the matters. However, we leave it open for the writ applicants of both the said writ applications to file an appropriate application seeking appropriate relief before the First Appellate Authority, i.e, the CIT (Appeals). We are saying so because such powers to grant stay can be implied as inherent power of the First Appellate Authority. The powers of the Appellate Authorities are indisputably concurrent and co-extensive with that of the Assessing Authority but wider and superior in nature. Section 251 of the Act clearly stipulates that in disposing of an appeal, the CIT (Appeals) can confirm, reduce, enhance or annul the assessment. Section 251 (1) (c) of the Act further provides that in other

cases, he may pass such orders in appeal as he thinks fit. These words harmoniously read, definitely mean that powers of appellate authorities under the Act are wide enough. Such powers could not be intended to be drained out or rendered meaningless, if the power to grant stay against the recovery of disputed demand is to be taken away from the first appellate authority. Such implied, necessary and inherent power must necessarily be read into these provisions conferring the powers upon the appellate authority to modify the impugned assessment order in any manner. In specific terms, the first appellate authority can even enhance the taxable income, while he has the power to reduce or completely set at naught the assessment. The words "as he thinks fit" in Section 251 (1) (C) are not redundant, as no such redundancy can be attributed to the Parliament. Therefore, mere absence of words "power to grant stay" in Section 251 of the Act cannot mean that such powers are specifically excluded from the jurisdiction of the first appellate authority. [See Maheshwari Agro Industries vs. Union of India, (2012) taxmann.com 68 (Raj.)]

51. With the aforesaid, all the three writ applications stand disposed of.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE,J)

Vahid

IN THE HIGH COURT FOR THE STATE OF TELANGANA, HYDERABAD

* * * *

W.P.No.25827 of 2019

Between:

The Sirpur Paper Mills Limited & Another

Petitioners

VERSUS

Union of India & Two Others

Respondents

JUDGMENT PRONOUNCED ON: 18.01.2022

HON'BLE SRI JUSTICE UJJAL BHUYAN
AND
HON'BLE DR.JUSTICE CHILLAKUR SUMALATHA

1.	**Whether Reporters of Local newspapers may be allowed to see the Judgments?**	**:**	**Yes**
2.	**Whether the copies of judgment may be Marked to Law Reporters/Journals?**	**:**	**Yes**
3.	**Whether His Lordship wishes to see the fair copy of the Judgment?**	**:**	Yes

_____

UJJAL BHUYAN, J

* HON'BLE SRI JUSTICE UJJAL BHUYAN
AND
HON'BLE DR.JUSTICE CHILLAKUR SUMALATHA

\+ W.P.No.25827 of 2019

% 18.01.2022

\# **Between:**

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Union of India & Two Others

Respondents

! Counsel for Petitioner : Sri S.Niranjan Reddy

^ Counsel for the respondents : Ms.Mamatha Chowdary

<GIST:

> HEAD NOTE:

? Cases referred

[1] 2018 SCC OnLine SC 984
[2] W.P.No.8560 of 2018 decided by this Court on 26.07.2018
[3] (2020) 8 SCC 531
[4] W.P.No.14798 of 2021 decided by this Court on 03.09.2021
[5] (2021) 9 SCC 657
[6] (2017) SCC OnLine Delhi 12759
[7] (2000) 5 SCC 694

THE HON'BLE SRI JUSTICE UJJAL BHUYAN
AND
THE HON'BLE DR. JUSTICE CHILLAKUR SUMALATHA

W.P.No.25827 OF 2019

JUDGMENT AND ORDER:
(*Per* Hon'ble Sri Justice Ujjal Bhuyan)

Heard Mr. S.Niranjan Reddy, learned senior counsel for the petitioners and Ms.Mamatha Chowdary, learned counsel for the respondents.

2 By filing this petition under Article 226 of the Constitution of India, petitioners seek quashing of notices dated 22.09.2019, 21.10.2019 and 30.10.2019 issued by respondent Nos.2 and 3 for the assessment year 2017-18 as being illegal and *non-est* and further seek a direction to the said respondents not to reopen their claims which were settled in insolvency proceedings.

3 Petitioner No.1 is a company incorporated under the Companies Act, 1956 and is engaged in the business of paper manufacturing. Similar is the status of petitioner No.2.

4 M/s. Rama Road Lines and others had filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) as operational creditor for initiating corporate insolvency resolution process of petitioner No.1. The said application was admitted on 18.09.2017 by the National Company Law Tribunal (briefly, 'the Tribunal' hereinafter). By virtue of order of the Tribunal, Section 13 of IBC came into play

and moratorium was ordered. As per Section 21 of the IBC, a committee of creditors was constituted from amongst the financial creditors of the corporate debtor i.e. petitioner No.1.

5 Thereafter, the resolution professional made a public announcement on 25.09.2017 inviting claims from all the creditors. It is stated that respondents did not submit claims before the resolution professional. As part of the resolution process, prospective resolution applicants were invited to present their resolution plans for the corporate debtor i.e. petitioner No.1. Petitioner No.2 as the resolution applicant submitted its resolution plan on 12.02.2018, which was thereafter revised pursuant to discussions held with the committee of creditors. The said resolution plan was revised from time to time as sought for by the creditors. The final resolution plan was submitted by petitioner No.2 on 30.04.2018. The same was approved by the committee of creditors and it was approved by the Tribunal, vide its order dated 19.07.2018.

6 According to the petitioners, respondent No.2 had ample opportunity to submit claims before the resolution professional. But it failed to do so. Be that as it may, the resolution plan as approved by the Tribunal vide order dated 19.07.2018, dealt with the various claims made against the corporate debtor i.e. petitioner No.1. As per the approved resolution plan, the total claim of the operational creditors of the corporate debtor was

quantified at Rs.95.71 crores and the payment as per the resolution plan was fixed at Rs.9.50 crores.

7 Petitioner No.1 had filed return for the assessment year 2017-18 on 17.10.2018. Thereafter respondent No.2 issued notice dated 22.09.2019 under Section 143(2) of the Income Tax Act, 1961 (briefly, 'the Act' hereinafter) read with Rule 12E of the Income Tax Rules, 1962 (briefly, 'the Rules' hereinafter). Responding to the said notice, petitioner No.1 stated in the letter dated 14.10.2019 that as the resolution plan has been approved by the Tribunal, all proceedings and claims arising from dues prior to approval of resolution plan stood discharged by virtue of Section 31(1) of the IBC. In addition, petitioner No.1 also informed respondent No.2 that the factory remained closed from September 2014 onwards due to severe financial crisis; it was also stated that there were no sales and purchase transactions recorded during the assessment year 2017-18.

8 Without considering the reply of petitioner No.1, respondent No.3 again sent notice under Section 142(1) of the Act on 22.10.2019 calling upon petitioner No.1 to furnish the accounts for the assessment year 2017-18 as well as details regarding its immovable assets. This was followed by another notice issued by respondent No.3 on 30.10.2019.

9 Aggrieved thereby, the present writ petition has been filed seeking the reliefs as indicated above.

10 It is contended that Income Tax Department i.e. respondent No.2 is an operational creditor of the corporate debtor i.e. petitioner No.1. As a consequence of approval of the resolution plan under Section 31(1) IBC, the resolution plan is binding on the corporate debtor as well as on the creditors and other stakeholders involved in the resolution plan. The rights/claims of respondent No.2 are well protected under IBC. Therefore, respondent No.2 cannot exercise an independent right after an order is passed by the Tribunal approving the resolution plan.

11 Reference has also been made to a Government of Telangana order dated 21.03.2018 whereby and whereudner benefits were extended to petitioner No.2 for revival of petitioner No.1. It was stated therein that Government dues are to be settled proportionately with the dues of other operational creditors. Reliance has also been placed upon Clause 7.5 (c) of the resolution plan which states that upon approval of the resolution plan by the Tribunal all dues under the Act in relation to any period prior to the completion date shall stand extinguished and the corporate debtor shall not be liable to pay any such amount. All notices proposing to initiate any proceedings against the corporate debtor in relation to the period prior to the date of the order of the Tribunal and pending on that day shall stand abated and shall not be proceeded against. Post the order of the Tribunal, no reassessment /

refund or any other proceedings under the Act shall be initiated on the corporate debtor in relation to the period prior to acquisition of control by the resolution applicant.

12 Petitioners have asserted that the impugned notices dated 22.09.2019, 21.10.2019 and 30.10.2019 for the assessment year 2017-18 in relation to period prior to the date of approval of the resolution plan, would no longer be maintainable in view of the resolution plan.

13 Petitioners have further referred to and relied upon the provisions of Section 238 of the IBC which says that provisions of IBC shall have an overriding effect over all other laws.

14 This Court by order dated 20.12.2019 stayed the operation of the notices dated 22.09.2019, 21.10.2019 and 30.10.2019 till the next date of hearing, which order has been continued from time to time.

15 Petitioners have filed an additional affidavit. It is stated that return of income for the assessment year 2017-18 was filed on 07.11.2017 by the resolution professional on behalf of petitioner No.1. In the said return loss of Rs.15,49,43,866-00 was shown and refund of Rs.11,47,698-00 on account of tax deduction at source (TDS) was claimed.

16 Resolution plan of petitioner No.2 in relation to petitioner No.1 was approved by the Tribunal on 19.07.2018. Referring to Clause 7.5 of the resolution plan, it is stated that the said

clause specifically provides that there would be no further claims binding on the petitioners subsequent to the completion date, particularly, in the context of the Act.

17 Even so, vide notice dated 02.10.2018 issued by the Deputy Commissioner of Income Tax, Centralized Processing Centre (CPC), Bangalore, it was informed that there was some arithmetical error in the original return filed by petitioner No.1 for which petitioner No.1 was required to file revised return. On verification it was found that while computing the income under the head 'business or profession', interest income of Rs.97,28,737-00 was reduced to be reflected under the head 'income from other sources'. However, the same was not shown under the head 'income from other sources'

18 Since this was purely an arithmetical error and as petitioner No.1 agreed to the stand of the Deputy Commissioner of Income Tax, CPC, the same was corrected by filing revised return on 17.10.2018. In the revised return, petitioner No.1 reduced the loss figure by Rs.97,28,737-00 and claimed loss of Rs.14,52,15,129-00 (Rs.15,49,43,866-00 less Rs.97,28,737-00). Besides the above, there were no other changes in the revised return.

19 Petitioner No.1 informed the Deputy Commissioner of Income Tax, CPC on 01.11.2018 that the mistake in the original return was rectified in the revised return. However, respondent

No.3 issued the first impugned notice under Section 143 (2) of the Act.

20 Fundamental grievance of the petitioners is that by way of the impugned notices, several issues are being reopened. Reiterating that rights / claims of respondent No.2 are to be seen in the context of the IBC and that respondent No.2 cannot exercise an independent right after resolution plan is approved by the Tribunal, petitioners seek quashing of the impugned notices.

21 Respondent No.3 has filed counter affidavit. At the outset, respondent No.3 has questioned maintainability of the writ petition since the impugned notices were issued in exercise of the statutory jurisdiction vested with respondent No.3. The resolution plan sought to be relied upon by the petitioners is neither applicable nor binding upon the respondents. Respondent Nos.2 and 3 are neither operational creditors nor involved in the making of the resolution plan.

22 Since petitioners are seeking to establish that by way of carry forward of accumulated losses and unabsorbed depreciation of approximately Rs.377.00 crores for the assessment year 2017-18 to be set up against future profits and the refund of approximately Rs.11,47,608-00 for the assessment year 2017-18, answering respondent is entitled to undertake proceedings which would establish the veracity and correctness of such claims.

23 Impugned notice dated 22.09.2018 was issued electronically pursuant to an automated Computer Aided Scrutiny Selection (CASS) for limited scrutiny of the return filed by the petitioner on 17.10.2018 with respect to investment, business loss etc. The subsequent notices dated 21.10.2019 and 30.10.2019 were issued by the third respondent under Section 142 of the Act. Thus the impugned notices are in accordance with the Act, within jurisdiction and maintainable.

24 As petitioner No.1 was a loss-making entity no tax was payable and consequently no monies remain recoverable so as to require any claim to be made by respondent No.3 *vis-à-vis* petitioner No.1. Therefore, there was no requirement for the respondents to submit any claim before the resolution professional. As respondent Nos.2 and 3 have no claim against petitioner No.1 and are not operational creditors, contentions advanced by the petitioners on the presumption that Income Tax Department i.e. respondent No.2 is an operational creditor are totally misplaced. There is no debt or dues payable by the petitioners to the respondents and therefore respondent Nos.2 and 3 are not operational creditors. Further, respondents did not receive any notice of the resolution plan and were not granted an opportunity to participate in the formulation of the resolution plan. Hence the resolution plan cannot be said to be binding on respondent Nos.2 and 3.

25 The proceedings, in connection with which the impugned notices were issued, are to assess the claims of the petitioners against the Revenue by way of carry forward of accumulated losses and unabsorbed depreciation amounting to Rs.377-00 crores which are sought to be set off against future profits of petitioner No.1. Hence the same is not covered by the resolution plan.

26 Without prejudice to the above, it is contended that since the assessment pertains to benefits sought to be claimed the present income tax proceedings would not be barred as they relate to future profits and not to dues prior to approval of the resolution plan. Clause 7.5 of the resolution plan is with respect to claims and liabilities against petitioner No.1/ corporate debtor and hence not applicable. Impugned notices pertain to scrutiny of the return of income filed on 17.10.2018 subsequent to the date of approval of the resolution plan i.e. 19.07.2018.

27 It is contended that the resolution plan cannot override or supersede statutory requirements. Any provision in the resolution plan contrary to or inconsistent with the statute would need to yield to such statutory prescriptions. Finally it is contended that respondent No.3 is not an operational creditor. The resolution plan was not put to the notice of respondent No.3 who never participated nor was involved in the making of such plan. However, without prejudice to such stand taken, it

is contended that the resolution plan only seeks to restrict the proceedings where claims are made against the corporate debtor. No such claims have been made by respondent No.3 against petitioner No.1.

28 In the circumstances respondent No.3 seeks dismissal of the writ petition.

29 In the rejoinder affidavit petitioners have reiterated their contentions made in the writ petition as well as in the additional affidavit.

30 It is stated that on a conjoint reading of Section 5 (20) and Section 5 (21) of the IBC it is evident that respondent No.2 is an operational creditor of petitioner No.1. It is a settled legal position that once a resolution plan is approved by the Tribunal and the corporate debtor has complied with the obligations under the resolution plan, all the prior dues and proceedings would stand extinguished. Thus any claim on the petitioners for the past period prior to approval of resolution plan stood discharged by virtue of Section 31 of IBC. However, this would not take away the right of the petitioner to make claims against the respondents by way of set off of carry forward of accumulated losses and unabsorbed depreciation for the past period against profits of future years. Thus petitioner is entitled and eligible to claim set off of brought forward losses including unabsorbed depreciation against future profits and

consequently eligible to refund for the assessment year 2017-18.

31 Putting the matter in perspective it is stated that the original return of income for the assessment year 2017-18 was filed on 07.11.2017. For the reasons indicated this was revised by petitioner No.1 on 17.10.2018. Therefore, the contention of the answering respondent that the return of income was filed by petitioner No.1 on 17.10.2018 after the date of order of the Tribunal is incorrect. The revised return of income was in relation to the past period which the answering respondent has no legal mandate to reopen by virtue of the resolution plan.

32 In the circumstances it is reiterated that impugned notices dated 22.09.2019, 21.10.2019 and 30.10.2019 are beyond jurisdiction, in contravention of the resolution plan and therefore are liable to be set aside and quashed.

33 Learned counsel for the petitioners has submitted a brief synopsis and list of dates mentioning therein the chronology of events. He submits therefrom that M/s. Rama Road Lines and other operational creditors had filed an application under Section 9 of the IBC for insolvency resolution of Petitioner No.1, which was admitted by the Tribunal on 18.09.2017. Moratorium was ordered and committee of creditors of the corporate debtor was constituted. When resolution professional made public announcement on 25.09.2017 inviting claims from all the creditors of the corporate debtor i.e. petitioner No.1,

respondent i.e. Income Tax Department did not submit its claim. On 07.11.2017 the resolution professional filed income tax return on behalf of the corporate debtor for the assessment year 2017-18. Petitioner No.2 submitted resolution plan in respect of the corporate debtor on 12.02.2018. However, following discussions with the committee of creditors, revised / final resolution plan was submitted by petitioner No.2 on 30.04.2018. Resolution plan submitted by petitioner No.2, as revised, was approved by the committee of creditors and thereafter by the Tribunal on 19.07.2018. When respondent No.3 pointed out arithmetical error in the return filed on 07.11.2017 by issuing notice under Section 143 (1) (a) (ii) of the Act on 02.10.2018, petitioner No.1 filed revised return on 17.10.2018 accepting the error. This was followed by the impugned notices dated 22.09.2019, 14.10.2019 and 21.10.2019 under Sections 143(2) and 142 (1) of the Act.

34 Learned counsel for the petitioners has referred to Sections 5 (20) and 5 (21) of IBC to contend that Income Tax Department would be construed to be an operational creditor and the tax dues would be construed to be an operational debt. Referring to the provisions of sub-Section (1) of Section 31 IBC, he submits that once a resolution plan as approved by the committee of creditors is approved by the adjudicating authority, all concerned including the Income Tax Department would be bound by the resolution plan. Learned counsel for

the petitioners has referred to the resolution plan, more particularly, to Clause 7.5 (c) thereof to contend that all existing income tax dues would stand extinguished and all notices proposing to initiate any proceeding against the corporate debtor in relation to the period prior to the date of the Tribunal's order would stand abated. Income Tax Department cannot proceed on the basis of the impugned notices. If there is any doubt on this count, Section 238 IBC makes it abundantly clear that provisions of the IBC would prevail over the Act.

35 However, learned counsel for the petitioners referring to Clause 17.7(c) of the resolution plan submits that notwithstanding the binding nature of the resolution plan as approved by the Tribunal, it would not come in the way of the petitioners to raise claims against the respondents by way of set off of carry forward of accumulated losses and unabsorbed depreciation for the past period against profits of future years including entitlement to refund.

36 In support of his submissions, learned counsel for the petitioners has placed reliance on the following decisions:

i) **Principal Commissioner of Income Tax Vs. Monnet Ispat & Energy Limited**[1],

ii) **Leo Edibles & Fats Limited Vs. Tax Recovery Officer**[2],

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[1] **2018 SCC OnLine SC 984**

iii) **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta**[3] ,

iv) **Shree Raghav Ispat (India) Private Limited vs. State of Telangana**[4],

v) **Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited**[5]**,**

vi) **Principal Commissioner of Income Tax Vs. Monnet Ispat and Energy Limited**[6].

37 In response, Ms. Mamatha Chowdary, learned standing counsel for the Income Tax Department submits that there is no substance in the contentions advanced on behalf of the petitioners. The impugned notices have been issued under Sections 143 (2) and 142 (1) of the Act. As per those notices, petitioner No.1 has only been called upon to produce documents or furnish information in relation to its claim of carry forward of losses. There is nothing in the impugned notices which can be said to be in conflict with or in contravention of the resolution plan as approved. Therefore, the writ petition challenging the said notices is liable to be dismissed.

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[2] W.P.No.8560 of 2018 decided by this Court on 26.07.2018
[3] (2020) 8 SCC 531
[4] W.P.No.14798 of 2021 decided by this Court on 03.09.2021
[5] (2021) 9 SCC 657
[6] (2017) SCC OnLine Delhi 12759

38 Without prejudice to the above contention, learned counsel for the respondents submits that there is no 'operational debt' of petitioner No.1 towards the respondents. Therefore, respondents cannot be construed to be operational creditor within the meaning of Section 5 (20) IBC. Since there are no dues to be paid by the petitioner to the Income Tax Department, Clause 7.5 of the resolution plan would not be applicable and cannot be construed to be binding on the respondents. In any view of the matter, Clause 7.5 (c) only states that assessments and notices issued prior to approval of the resolution plan would stand abated and prohibits reassessment or revision. It does not bar or prohibit initiation of any proceeding post the approval date of the Tribunal.

39 Insofar the present case is concerned, petitioner No.1 filed revised return on 17.10.2018 and it was only in connection with the revised return that the impugned notices were issued for furnishing evidence / information for a limited scrutiny of the revised return. She points out that the revised return was filed on 17.10.2018 after approval of the resolution plan on 19.07.2018.

40 Learned counsel for the respondents submits that contrary to the contention of the petitioners, what the petitioners are seeking by way of the revised return is carry forward of accumulated losses and unabsorbed depreciation to be set off against future profits. This has to be verified and an

assessment has to be made without which the benefit of carry forward may not be available to the petitioner. Therefore, learned counsel for the respondents would contend that there is no inconsistency between the resolution plan and by extension IBC with the impugned notices and the Act. Therefore, question of Section 238 IBC having overriding effect is redundant. She has also referred to the provisions of Section 79 of the Act prior to its substitution with effect from 01.04.2020. Referring to the said provision, more particularly, to the third proviso thereof, she submits that the provision contained in Section 79 providing for carry forward and set off of losses subject to the conditions stipulated therein would be applicable to petitioner No.1.

41 She further submits that the impugned notices have been issued by the respondents in exercise of their statutory powers and well within their jurisdiction. Filing of the writ petition is nothing but an attempt to prevent the respondents from discharging their statutory duty. Therefore, the writ petition is liable to be dismissed.

42 Submissions made by learned counsel for the parties have received the due consideration of the Court.

43 Before adverting to the facts of the present case, it would be apposite to deal with those provisions of the IBC, which are relevant to the present case.

44 The Insolvency and Bankruptcy Code, 2016 (already referred to as 'the IBC') is an act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India and for matters connected therewith and incidental thereto.

45 To understand the essence of the IBC it is important to examine the statement of objects and reasons of IBC which reads as under:

> **Statement of Objects and Reasons:-** There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delay in resolution, therefore, the proposed legislation.
>
> 2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters concerned therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Enforcement Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives.

45.1 Thus, the core objective for introduction of IBC appears to be to provide an effective legal framework for timely resolution of insolvency and bankruptcy proceedings which would support development of credit markets while encouraging entrepreneurship. At the same time, IBC seeks to balance the interest of all the stakeholders in the payment of dues. It thus seek to improve the ease of doing business, facilitating more investments, in the process leading to higher economic growth and development.

46 'Board' has been defined under Section 3 (1) to mean the Insolvency and Bankruptcy Board of India established under sub-Section (1) of Section 188. Part II comprises of Section 4 to Section 77 spanning over 7 chapters. As per Section 4, Part II shall apply to matters relating to insolvency and liquidation of

corporate debtors where the minimum amount of default is one lakh rupees.

47 Certain expressions relevant for Part II are defined in Section 5. As per Section 5 (1), 'Adjudicating Authority' for the purposes of Part II shall mean National Company Law Tribunal (Tribunal) constituted under Section 408 of the Companies Act, 2013. "Liquidation Commencement Date" has been defined under sub-Section (17) of Section 5 to mean the date on which proceedings for liquidation commences. Section 5 (20) defines 'Operational Creditor' to mean a person to whom such debt is owed and includes any person to whom such debt has been legally assigned or transferred. On the other hand, 'Operational Debt' has been defined under sub-Section (21) of Section 5 to mean or claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. As per Section 5 (26), "resolution plan" means a plan proposed by a resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. Explanation below sub-Section (26) clarifies that a resolution plan may include provisions for restructuring of the corporate debtor including by way of merger, amalgamation and demerger. Section 5 (27) defines a 'resolution professional' to mean an insolvency professional

appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional.

48 As per Section 6, where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor, by filing necessary application before the adjudicating authority.

49 Section 30 provides for submission of resolution plan by a resolution applicant to the resolution professional which has to confirm to the requirements as provided in sub-Section (2). Under sub-Section (3), the resolution professional shall present such resolution plan to the committee of creditors for its approval. Be it stated that the committee of creditors is constituted under Section 21 of IBC comprising of financial creditors of the corporate debtor. As per sub-Section (4), the committee of creditors may approve the resolution plan by a voting of not less than 66% of the voting share of financial creditors after duly considering its feasibility and viability. Once the resolution plan is approved by the committee of creditors, the resolution professional shall submit the same to the adjudicating authority under sub-Section (6).

50 Section 31 deals with approval of resolution plan. As per sub-Section (1), if the adjudicating authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements of sub-Section (2) of Section 30, it shall

by order approve the resolution plan. Once the resolution plan is so approved by the adjudicating authority, it shall be binding on the corporate debtor and its employees, members, creditors including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

51 Distribution of assets and the order of priority are dealt with in Section 53. Sub-Section (1) of Section 53 starts with a non-obstante clause. It says that notwithstanding anything to the contrary contained in any law enacted by the Parliament or by any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the order of priority and within such period and in such manner as prescribed thereunder. Section 53 is extracted hereunder:

> **53. Distribution of assets:-** (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely-
>
> a) the insolvency resolution process costs and the liquidation costs paid in full;
>
> b) the following debts which shall rank equally between and among the following-
>
> (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
>
> (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;
>
> c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

d) financial debts owed to unsecured creditors;

e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interests;

f) any remaining debts and dues;

g) preference shareholders, if any; and

h) equity shareholders or partners, as the case may be.

52 Thus from the above, we find that any amount due to the Central Government and to the State Government in respect of the whole or any part of the period of two years preceding the liquidation commencement date is placed at Sl.No.5 in order of priority.

53 Finally, Section 238 IBC says that provisions of IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Thus, provisions of IBC will override other laws.

54 While on the IBC, we may refer to some of the judgments which may have a bearing on the present dispute.

55 In **Dena Bank Vs. Bhikhabhai Prabhudas Parekh & Co**[7], Supreme Court has held that income tax dues being in the nature of crown debts do not take precedence over secured

[7] **(2000) 5 SCC 694**

creditors who are private persons. It has been explained that the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. Thus, the common law doctrine of priority of Crown debts would not extend to providing preference to Crown debts over secured private debts.

56 Following the above, Delhi High Court in **Principal Commissioner of Income Tax Vs. Monnet Ispat and Energy Limited,** (2017) SCC OnLine Delhi 12759, disposed of the Income Tax Appeals filed by the Revenue in view of admission of insolvency resolution application by the Tribunal against the assessee which prohibited institution of suits or continuation of pending suits or proceedings against the assessee. It was held that the above prohibition would cover the appeals filed by the Revenue against orders of the Income Tax Appellate Tribunal in respect of the tax liability of the assessee. While disposing of the appeals as such, liberty was granted to the Revenue to revive the appeals subject to further orders of the Tribunal. This order of the Delhi High Court has been affirmed by the Supreme Court in **Principal Commissioner of Income Tax Vs. Monnet Ispat and Energy Limited** (1 supra). Supreme Court has held that in view of Section 238 of IBC, it is obvious that it

will override anything inconsistent contained in any other enactment including the Income Tax Act. Reference was made to its earlier decision in **Dena Bank** case (4 supra).

57 Supreme Court in **Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta** (3 supra) was examining various questions as to the role of resolution applicants, resolution professionals, committee of creditors and jurisdiction of the adjudicating authority. Adverting to Section 31 (1) of the IBC, it has been held that once a resolution plan is approved by the committee of creditors, it shall be binding on all the stakeholders including guarantors. Explaining the rationale behind this, it is stated that this is to ensure that the successful resolution applicant starts running the business of corporate debtor on a fresh slate as it were. Elaborating further, it has been held that a successful resolution applicant cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up throwing into uncertainty amounts payable by a prospective resolution applicant. It has been explained as under:

> For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution Applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who successfully takes over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate

> debtor. This the successful resolution Applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.

58 Finally in **Ghanashyam Mishra** case (5 supra) the question before the Supreme Court was as to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is approved by the adjudicating authority under Sub-Section (1) of Section 31 of IBC? The further question before the Supreme Court was as to whether after approval of the resolution plan by the adjudicating authority, a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceeding for recovery of dues from the corporate debtor which are not part of the resolution plan approved by the adjudicating authority?

59 After elaborate discussion, Supreme Court held that any debt in respect of payment of dues arising under any law for the time being in force including the ones owed to the Central Government or any State Government, or any local authority which does not form a part of the approved resolution plan shall stand extinguished. Clarifying further it has been held that once a resolution plan is approved by the adjudicating authority, all such claims /dues owed to the State / Central Government or any local authority including the tax authorities who were not part of the resolution plan shall stand extinguished. It has been held as follows:

> 95. In the result, we answer the questions framed by us as under:
>
> (i) That once a resolution plan is duly approved by the Adjudicating Authority under Sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;
>
> (ii) x x x x
>
> (iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval Under Section 31 could be continued.

60 Having discussed the relevant provisions of IBC and some of the leading judgments, we may now advert to the resolution plan.

61 As already discussed above, the resolution plan for petitioner No.1 as submitted by petitioner No.2, after due discussions with the committee of creditors and after being revised came to be approved by the Tribunal, vide order dated 19.07.2018. By the said order, Tribunal noted that the resolution plan as approved by the committee of creditors had taken into account the concessions given by the Government of Telangana, further observing that revival of the corporate debtor would enhance the interest of all the stakeholders and the economic condition of the area. Thus taking into account the finding that the resolution plan is in accordance with sub-Section (2) of Section 30 IBC, Tribunal being the adjudicating

authority approved the same declaring that the resolution plan would be binding on all stakeholders.

62 While at the resolution plan, what is of relevance is the portion dealing with the amount due to the Government or governmental authorities. This is dealt with in Clause 7.5. Sub-Clause (c) deals specifically with regard to the dues under the Act. Clause 7.5 (c) of the resolution plan being relevant is extracted hereunder:

> Upon approval of this Resolution Plan by the NCLT, all dues under the provisions of Income Tax Act, 1961, including taxes, duty, penalties, interest, fines, cesses, unpaid tax deducted at source / tax collected at source, whether admitted or not, due or contingent, whether part of above claim of income tax authorities or not, asserted or unasserted, ctystallised or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, in relation to any period prior to the Completion Date, shall sand extinguished and the Corporate Debtor shall not be liable to pay any amount against such demand. All assessments / appellate or other proceedings pending in case of the Corporate Debtor, on the date of the order of NCLT relating to the period prior to that date, shall stand terminated and all consequential liabilities, if any, stand abated and should be considered to be not payable by the Corporate Debtor in relation to the period prior to the date of NCLT order and pending on that date shall stand abated and should not be proceeded against. Post the order of the NCLT, no re-assessment / revision or any other proceedings under the provisions of the Income Tax Act shall be initiated on the Corporate Debtor in relation to period prior to acquisition of control by the Resolution Applicant and any consequential demand should be considered non-existing and as not payable by the Corporate Debtor. Any proceedings which were kept in abeyance in view of the insolvency process or otherwise shall not be revived post the order of NCLT.
>
> The Corporate Debtor shall be entitled to carry forward the unabsorbed depreciation and accumulated losses and to utilize such amounts to set off future tax obligations.

63 From a perusal of the above, what the above Clause provides for is that all dues under the Act whether asserted or unasserted, crystallized or uncrystallized, present or future in relation to any period prior to the completion date shall stand extinguished and the corporate debtor shall not be liable to pay any amount against such demand. All assessments or other proceedings relating to the period prior to the completion date

shall stand terminated and all consequential liabilities would stand abated. It further clarifies that all notices proposing to initiate any proceeding against the corporate debtor in relation to the period prior to the date of the Tribunal's order and pending on that date shall stand abated and should not be proceeded against. Post the order of the Tribunal, no re-assessment or revision or any other proceeding under the Act shall be initiated on the corporate debtor.

64 We may also refer to Clause 17.7 of the resolution plan which provides for tax and stamp duty exemptions. Sub-Clause (c) says that the corporate debtor shall be entitled to carry forward the unabsorbed depreciation and accumulated losses and to utilize such amounts to set off future tax obligations. Sub-Clause (c) of Clause 17.7 reads as under:

> "The Corporate Debtor shall be entitled to carry forward the unabsorbed depreciation and accumulated losses and to utilize such amounts to set off future tax obligations."

65 Adverting to the facts of the present case, it is seen that the date of approval of the resolution plan by the Tribunal is 19.07.2018. For the assessment year 2017-18, the resolution professional on behalf of the corporate debtor had filed the return of income on 07.11.2017. In that return of income, the corporate debtor disclosed loss of Rs.15,49,43,866-00 and claimed refund of Rs.11,47,698-00 on account of TDS. Thus the return was filed prior to approval of the resolution plan. After approval of the resolution plan by the Tribunal on

19.07.2018, Deputy Commissioner of Income Tax, CPC, Bangalore, issued notice dated 02.10.2018 to the corporate debtor stating that there was some arithmetical error in the return of income which needed to be corrected. Corporate debtor i.e. petitioner No.1 found on verification that interest income of Rs.97,28,737-00 was not disclosed under the head "income from other sources" though it has reduced while computing the income under the head 'business or profession'. Therefore, petitioner No.1 filed a revised return on 17.10.2018 whereby the loss figure was reduced by the quantum of interest income. Accordingly the loss figure was revised at Rs.14,52,15,129-00 {Rs.15,49,43,866-00 (-) Rs.97,28,737-00}. Subsequently by letter dated 01.11.2018 petitioner No.1 informed the Deputy Commissioner of Income Tax, CPC, Bangalore, that the arithmetical mistake in the return was rectified in the revised return.

66 It was thereafter that the impugned notices came to be issued. Let us now examine the contents of the impugned notices.

67 As per the first notice dated 22.09.2019 issued under Section 143 (2) of the Act, petitioner No.1 was informed that there are certain issues which need further clarification for which the return of income has been selected for limited scrutiny under CASS. The issues were mentioned as under:

i. Investments / Advances / Loans
ii. Business loss.

68 Petitioner No.1 responded by letter dated 14.10.2019 stating that in view of the resolution plan, the said notice dated 22.09.2019 would no longer be maintainable. Notwithstanding the same, the subsequent notices were issued on 21.10.2019 and 30.10.2019 under Section 142 (1) of the Act. Petitioner No.1 was called upon to furnish amongst others the following information:

i. Brief note on nature of business activities carried on during the previous year 2016-17,

ii. Certified statement of computation of total income, audited financial statements etc.,

iii. Details of Directors,

iv. Reconciliation statement for difference in gross receipts shown in the books of account with that in the TDS certificates,

v. Details of bank accounts,

vi. Complete details of debtors,

vii. Complete details of immovable assets,

viii. Explanation as to why total income including exempted income shown in the return is significantly low compared to the assessee's disclosure of substantial amount of losses, advances, investment in shares.

69 From the above, it is evident that Income Tax authorities are seeking information for the purpose of making assessment for the assessment year 2017-18 as the return of the corporate debtor (petitioner No.1) has been taken up for scrutiny under CASS. The assessment year 2017-18 (previous year 2016-17) covers the period prior to approval of the resolution plan by the Tribunal on 19.07.2018. Clause 7.5 (c) as extracted and discussed above, bars all notices to initiate any proceeding

against the corporate debtor in relation to the period prior to the date of the Tribunal's order, clarifying that such notices would stand abated. All assessment proceedings relating to the period prior to the completion date would stand terminated with all consequential liabilities being abated. That apart, as per paragraph No.17.7 (c) of the resolution plan, the corporate debtor is entitled to carry forward the unabsorbed and accumulated losses and to utilize such amounts to set off future tax obligations.

70 From the tone and tenor of the impugned notices what is evident is that respondents are seeking to pass assessment order under Section 143 (3) of the Act since the case of petitioner No.1 was selected for limited scrutiny under CASS. However, the period of the assessment order would be a period covered by the resolution plan. We have already noticed that petitioner No.1 through the resolution professional had filed return of income prior to order of the Tribunal approving the resolution plan. When arithmetical mistake was pointed out by the Income Tax Department, post such approval, petitioner No.1 carried out the correction and submitted revised return lowering the figure of loss sustained by petitioner No.1. Such a revised return cannot be construed as a fresh return filed by the petitioner No.1 since it is a continuation of the return of income filed earlier. In view of Clause 7.5 (c) of the resolution plan, as approved by the Tribunal and in view of the decisions

of the Supreme Court in **Committee of Creditors of Essar Steel India Limited** (3 supra) and **Ghanashyam Mishra** (5 supra), the claim of the Income Tax Department which is outside the resolution plan would stand extinguished.

71 Insofar carry forward of losses and adjustments against future profits are concerned, the same is provided by Clause 17.7 (c) of the resolution plan. However, as and when such carry forward and set off is claimed by the petitioner in future, i.e. beyond the period covered by the resolution plan, the Income Tax Department would be entitled to verify such claim and pass appropriate order. But for the period covered by the resolution plan, it cannot carry out any scrutiny or carry out assessment in respect of the corporate debtor. To that extent, the impugned notices cannot be justified.

72 Regarding reliance placed by learned standing counsel on Section 79 of the Act, in our view the same is misplaced. The said provision as it stood prior to its substitution with effect from 01.04.2020 would not be applicable as it relates to the future consequences of carry forward and set off of losses of a company where change in the shareholding takes place pursuant to a resolution plan approved under the IBC. What the resolution plan provides and which is in conformity with the law laid down by the Supreme Court is that on and from the date of approval of the resolution plan by the Tribunal, the same would prevail over the claims of the Income Tax

Department and such claims which are outside the resolution plan for the period covered by the resolution plan would stand extinguished. The impugned notices seek to initiate assessment proceedings under Section143 (3) of the Act for a period which is squarely covered by the resolution plan as approved by the Tribunal.

73 In the circumstances, impugned notices dated 22.09.2019, 21.10.2019 and 30.10.2019 being wholly unsustainable in law are hereby set aside and quashed.

74 Writ petition is accordingly allowed. However, there shall be no order as to costs. Miscellaneous petitions if any pending in this writ petition shall stand closed.

UJJAL BHUYAN, J

Dr.CHILLAKUR SUMALATHA, J

Date: 18.01.2022.

L.R. Copy be marked
B/o Kvsn

IN THE INCOME TAX APPELLATE TRIBUNAL GAUHATI BENCH, "VIRTUAL HEARING" AT KOLKATA

(समक्ष)श्री पी. एम.जगताप,उपाध्यक्ष **एवं** श्री ए.टी. वर्की,न्यायिक सदस्य)

[Before Shri P.M. Jagtap, Vice President (KZ) & Shri A. T. Varkey, JM]

I.T.A. Nos.126 to 131/GAU/2020

Assessment Year: 2011-12 to 2015-16 & 2017-18

ACIT, Circle-1, Guwahati	Vs.	Goldstone Cements Ltd., Meghalaya (PAN: AADCG2870Q)
Appellant		Respondent

&

C.O. Nos.03 to 08/Gau/2020
In I.T.A. Nos.126 to 131/GAU/2020

Assessment Years: 2011-12 to 2015-16 & 2017-18

Goldstone Cements Ltd., Meghalaya	Vs.	ACIT, circle-1, Guwahati
Cross Objector		Respondent

Date of Hearing	22.10.2021
Date of Pronouncement	10.12.2021
For the Revenue	Shri Amit Kumar Pandey, JCIT, Sr. DR
For the Assessee/Cross Objector	Shri Akkal Dudhwewala, AR

ORDER

Per Bench:

All these appeals preferred by the Revenue and cross objections filed by the assessee are against the common order of Ld. CIT(A)-2, Guwahati dated 18-03-2020 for AYs 2011-12 to 2015-16 & 2017-18. Since the issues involved were common, all the appeals were heard together. Both the parties also argued them together raising similar contentions on these issues. Accordingly, for the sake of brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the facts of the case in brief. The assessee is a company incorporated in the year 2007. The assessee was jointly promoted by M/s Gangwal Group, M/s More Group and M/s UFM Group for setting up cement factory at State of Meghalaya having a capacity of 2040 TPD. In connection therewith, these three (3) promoter groups had infused capital into the assessee company across all the years through the *aegis* of their group bodies corporate and individuals. The said cement plant was finally commissioned in July 2016 and the commercial production commenced in FY 2016-17. Search u/s 132 of the Income Tax Act 1961 (herein after referred to as the Act) was conducted against the M/s Goldstone Group, on 12-12-2017 (AY 2018-19). Ordinarily, having regard to the date of search, the AO was within his jurisdiction to issue notices u/s 153Aof the Act in respect of six assessment years preceding the assessment year of search i.e. in the present case search took place in AY 2018-19, so, ordinarily the AO was empowered u/s. 153A of the Act to reopen six preceding assessment years preceding the searched assessment year and those AY's were AYs 2012-13 to 2017-18.However, in this case, the AO further in exercise of powers conferred under fourth proviso to Section 153A of the Act, which was inserted by Finance Act 2017 w.e.f. 01.04.2017, also reopened the seventh year, i.e. AY 2011-12, which was beyond six assessment years but within ten assessment years. All the notices were issued u/s 153A of the Act on 11-09-2019. It was pointed out that, prior to the date of search, the income-tax assessment u/s 143(3) of the Act for AY 2011-12 had been completed on 28-03-2013. Accordingly, the assessment for AY 2011-12 being not-pending on the date of search, did not abate consequent to the search as per second proviso to section 153A of the Act. And also, since the returns of income for these assessment years (hereinafter in short 'AYs') AYs 2012-13, 2013-14, 2014-15 & 2015-16 were filed on 30-03-2013, 24-10-2013, 22-11-2014 & 29-03-2016 respectively, and undisputedly the time limit for issuance of notices u/s 143(2) of the Act for all these years had expired as on the date of search on 12.12.2017. Accordingly, these AY's i.e. AY 2012-13 to AY 2015-16 were also **unabated,** since they were not pending before the Income Tax Authority on the date of search. With regard to AY 2017-18, it was pointed out that, the return of income was filed on 31-10-2017 and therefore, the time limit for issuance of notice u/s 143(2) of the Act had not expired on the

date of search i.e. 12-12-2017.Hence, AY 2017-18 was pending before the AO on the date of search and consequently, AY 2017-18 was an **abated** assessment year. Therefore, except AY 2017-18, all the other AYs 2011-12, 2012-13, 2013-14, 2014-15 & 2015-16 were unabated assessments.

3. The AO issued identical questionnaire u/s 142(1) of the Act on 29-09-2019 for all these AY's, inter alia, requiring the assessee to furnish page-wise explanations of the documents and material seized during the course of search, which was complied with by the assessee vide replies dated 18-11-2019 and 04-12-2019. In the meanwhile, the assessee vide letter dated 04-11-2019 raised specific objections before the AO regarding reopening of AY 2011-12,which fell beyond six assessment years as discussed (supra) (hereinafter referred to as the '*seventh assessment year*'). The assessee requested the AO to provide the relevant seized material regarding income escaping assessment for AY 2011-12 (seventh assessment year) and especially the details of the undisclosed/unaccounted '*assets*' discovered during search for which the assessment of AY 2011-12was being reopened in terms of fourth proviso to Section 153A of the Act. The AO overruled the objection through the order sheet noting dated 04.11.2019, and evasively refused to provide the same. In the same order sheet noting dated 04-11-2019, a detailed common notice was issued by the AO to the assessee, which has been extensively reproduced at Pages 4 to 9 of the assessment orders for all the years that has been reopened u/s. 153A of the Act. The questionnaire *inter alia* included details/information sought for, regarding the share capital raised by the assessee across all these years. Pursuant thereto, the assessee filed details of the share subscribers to show their respective identity, creditworthiness as well as the genuineness of the share subscriptions received from them. The AO thereafter made independent enquiries from the share subscriber's u/s 133(6) of the Act. It is noted by the AO in the assessment order that, all the notices were complied with and that statements of key persons/directors were also recorded by him. The AO thereafter issued a show cause notice (SCN) dated 27-12-2019 requiring the assessee to explain as to why the following amounts of share capital and premium raised by the company in AYs 2011-12 to 2017-18 should not be added as unexplained cash credit u/s 68 of the Act.

Asst Year	Amount (in Rs)
2011-12	5,38,35,000
2012-13	3,01,00,000
2013-14	11,85,00,000
2014-15	22,22,99,970
2015-16	1,79,99,995
2016-17	1,01,99,989
2017-18	34,69,54,848

4. In response, the assessee furnished detailed explanation along with supporting documents which are available at Pages 207 to 335 of the paper-book. The AO however was not agreeable to the submissions made by the assessee. According to the AO, the electronic seized material marked as GCL-HD-1 revealed that the share capital of the assessee company were subscribed to by three major promoter groups viz., UFM Group, Mayur Ply (More) Group and M.P. Jain (Gangwal) Group. The AO stated that the very mention of group-wise capital in this material was itself incriminating, which showed that the monies were routed by these groups through shell entities to invest in the assessee company. The AO in the assessment orders also relied on certain selective portions of the statements given by alleged entry operator, Mr. S.K. Agarwal dated 13-12-2017 & 06-05-2018 to conclude that few of the companies, which had subscribed to the share capital of the assessee, were shell entities. The AO also set out three flow charts in the assessment orders and named them cash trails, which according to him, corroborated his conclusion that the assessee had routed its unaccounted monies in the guise of share application monies. The AO thereafter discussed the source of funds of each of these share subscribers and held that the transactions regarding the raising of share capital with them, was not acceptable as genuine. The AO accordingly added all the amounts mentioned in his show cause notice as unexplained cash credit u/s 68 of the Act in all AYs 2011-12 to 2017-18. Aggrieved by the order of the AO, the assessee preferred an appeal before the Ld. CIT(A).

5. Since the assessment orders for all the AYs were verbatim same and even the assessee had furnished common submissions, and even the Ld. CIT(A) disposed off all the appeals by the impugned consolidated order dated 18-03-2020. The Ld.CIT(A) observed that except AY 2017-18, the assessments for all other AYs 2011-12 to 2016-17 were unabated being not pending on the date of search as per second proviso to section 153A of the Act (*which fact is undisputed*). According to him, in these unabated assessments, additions made by the AO u/s. 153A of the Act could have been made only if they were supported or backed-up by incriminating material found in the course of search, or otherwise these concluded assessments could not be disturbed. In support of this proposition, the Ld. CIT(A) relied on several decisions of the Hon'ble High Courts, viz., PCIT vs Kurule Paper Mills Pvt. Ltd. (380 ITR 571), PCIT vs Saumya Construction Pvt. Ltd. (387 ITR 529), Jai Steel (India) vs ACIT (259 ITR 281), CIT vs Kabul Chawla (380 ITR 573) and others. The Ld. CIT(A) thereafter examined the contents of GCL-HD-1, the image of which has been reproduced by him at Pages 144 to 145 of the First Appellate Order, and which according to the AO, constituted the purported '*incriminating material*' found in the course of search. The Ld. CIT(A),after analyzing and examining the same, held that this document (GCL-HD-1) was a secretarial compliance report which was filed by the assessee with the Registrar of Companies along with Form MGT-7 (*Annual Return*) giving the shareholding pattern of the company. According to Ld. CIT(A), this report was a regular business document and the contents therein were not of incriminating nature at all. The Ld. CIT(A) thus concluded that the additions made in the AYs 2011-12 to 2016-17 were not based on any material which can be stated to be '*incriminating material*' and therefore deleted the additions made in these unabated assessments on the strength of the case laws referred (supra). As regards AY 2017-18, [*unabated assessment year being pending on the date of search*] the Ld. CIT(A) examined in detail, the information and documents furnished by the two shareholders, M/s Orchid FinleasePvt. Ltd. & M/s Shantidham Marketing Pvt. Ltd. and also the Assessee company and thereafter concluded that both these shareholders were genuine and they had substantiated their respective *source of source* of funds. According to Ld. CIT(A), all the three ingredients *viz*., *identity, creditworthiness* and

genuineness of these two shareholders were established and therefore he deleted the addition made in AY 2017-18 on its merits.

6. Aggrieved by the order of Ld. CIT(A), the Revenue is in now in appeal before us in all the AY's except AY 2016-17.The assessee has also filed Cross Objections in all these AY's. The grounds taken by the assessee and Revenue are summarized below:

Revenue's Grounds of Appeal

Sl. No.	Grounds	2011-12	2012-13	2013-14	2014-15	2015-16	2017-18
(i)	On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.	1	1	1	1	1	1
(ii)	That the Ld. CIT(A) erred in facts and in law in deleting the addition made u/s 68 of the IT Act 1961 by the Assessing Officer u/s 143(3)/153A and hence the impugned order of the Ld. CIT(A) is liable to be quashed and the order of the Assessing Officer be restored.	2	2	2	2	2	2
(iii)	That the Ld. CIT(A) erred in facts and in law in holding that the additions were not based on any incriminating seized material as it is clearly evident from the Order of the Assessing Officer that the additions were based on seized electronic material marked as GCL-	3	3	3	3	3	-

	HD-1 seized during the course of search.						
(iv)	Whether the Ld. CIT(A) is justified in holding that the assessee M/s Shantidham Marketing Pvt. Ltd. was found to be examined u/s 143(3) of the Act for AY 2017-18 by its own AO and findings of AO are not based on any evidence or material on record and are merely in the nature of surmises, suspicion and conjecture without appreciating the facts contained in the first proviso to Section 68 which is effective from AY 2013-14, clearly cast onus on the assessee, prove the source in the hand of investor	-	-	-	-	-	3

Assessee's Grounds of Cross Objections

Sl. No.	**Grounds**	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**	**2017-18**
(i)	Ld. CIT(A) should have held that conditions specified in fourth proviso to Section 153A(1) were not complied and notice dated 11.09.2019 issued u/s 153A along with order dated 30.12.2019 u/s 153A/143(3) were without jurisdiction and void ab initio.	1	-	-	-	-	-

(ii)	LdCIT(A) should have held that the provisions of Section 153D of the Act were not complied with and the order passed u/s 153A/143(3) is bad in law.	2	1	1	1	1	1
(iii)	LdCIT(A) should have held that no interest can be charged u/s 234A of the Act.	3	2	2	2	2	5
(iv)	Ld CIT(A) erred in rejecting the assessee's contention that the order u/s 153A read with 143(3) was not issued in the prescribed ITBA Module as notified by the Board was void ab initio.	-	-	-	-	-	2
(v)	LdCIT(A) erred in not granting set off of business loss against the addition made in the assessment.	-	-	-	-	-	3
(vi)	LdCIT(A) erred in rejecting the assessee's contention that tax on the addition made in the assessment was to be computed at the normal rate and not at the rate prescribed in Section 115BBE of the Act.	-	-	-	-	-	4
(vii)	LdCIT(A) should have directed grant of credit of the seized cash of Rs.61.73 lacs by way of self-assessment tax for AY 2017-18.	-	-	-	-	-	6

7. We have heard both the parties and perused the material on record. After giving thoughtful consideration to the facts of the present case and the grounds raised by both parties and taking their consent, we have re-framed the issues/questions for our adjudication in the following sequence.

(A) Whether the AO had validly assumed jurisdiction to issue notice u/s 153A of the Act upon the assessee for AY 2011-12 in terms of the fourth proviso to Section 153A of the Act, read with Explanation 2 of the Act?

(B) Whether in absence of any incriminating material found in the course of search at the premises of the assessee, the additions/disallowances made in the assessments of the assessee which were unabated/non-pending on the date of search, could be held to be sustainable on facts and in law?

(C) Whether the Joint Commissioner of Income-tax, Guwahati had validly granted approval u/s 153D of the Act and therefore whether the consequent order passed u/s 153A/143(3) was sustainable in law or not ?

(D) Whether the assessee had discharged its onus of establishing the identity and creditworthiness of the share subscribers and substantiating genuineness of the transactions and therefore whether the additions made u/s 68 of the Act on account of share application monies received by the assessee was tenable on facts and in law i.e., on merits addition was sustainable or not?

(E) Whether the AO had rightly computed interest u/s 234A of the Act?

(F) Whether having regard to the fact that, the assessment order for AY 2017-18 was not issued by the AO under the prescribed ITBA Module but under the erstwhile ITD Module, the impugned order could be held to be ab-inito-void?

(G) Whether the addition/s made u/s 68 of the Act in AY 2017-18, if upheld, was eligible to be set off against current year's business loss of AY 2017-18 ?

(H) Whether the addition/s made u/s 68 of the Act in AY 2017-18, if upheld, was taxable at normal tax rates or at the higher tax rate prescribed u/s 115BBE of the Act?

(I) Whether the lower authorities had erred in not granting the benefit for set-off of seized cash by way of self-assessment tax in AY 2017-18?

8. We first proceed to answer the Question (A).

(A) Whether the AO had validly assumed jurisdiction to issue notice u/s 153A of the Act upon the assessee for AY 2011-12 in terms of fourth proviso to Section 153A of the Act read with Explanation 2 of the Act ?

[Ground No. 1 of Cross Objection of Assessee for AY 2011-12]

8.1 This ground is pertaining to AY 2011-12 i.e., the seventh assessment year preceding the searched assessment year. In this ground, the assessee has challenged the usurpation of jurisdiction by the AO u/s 153A of the Act without first satisfying the essential condition precedent prescribed in the fourth proviso to Section 153A read with Explanation 2 of the Act. Referring to the fourth proviso to Section 153A of the Act, the Ld. AR Shri Dudhwewala pointed out that the notice for re-assessment of AY 2011-12 which was beyond the period of six assessment years could have been issued only when the AO had in his possession any incriminating evidence which revealed that *income valued Rs. 50 lakhs or more represented in the form of asset* had escaped assessment. He pointed out that the term '*asset*' has been defined in Explanation 2 to the fourth proviso to Section 153A of the Act which states to include, (a) *immovable property being land or building or both*, (b) *shares & securities*, (c) *loans & advances* and (d) *deposits in bank account*. According to Shri Dudhwewala, therefore, the AO could not have usurped jurisdiction u/s 153A of the Act without having in his possession evidence/material which would reveal income valued Rs 50 lakhs or more, represented in the form of *asset* having escaped assessment in terms of the fourth proviso to Section 153A of the Act. Shri Dudhwewala pointed out that despite the specific request, the AO never provided to the assessee the details of the undisclosed/unaccounted '*asset*' which, if any, had been unearthed during search and had

resultantly escaped assessment. Shri Dudhwewala explained further on the scope of fourth proviso to Section 153A of the Act. According to him, the additional power given to the AO to reopen beyond six assessment years upto ten assessment years (7^{th} to 10^{th} AY's) were conferred by the Finance Act, 2017 w.e.f. 01.04.2017. However, according to him, this power can be exercised only on satisfaction of the *essential condition precedent* as specified in the fourth proviso to section 153A of the Act. Therefore, according to him, the invocation of jurisdiction under section 153A of the Act in respect of seventh to tenth assessment years were not automatic as is in the case of six assessment years preceding the year of search. If the AO wants to re-open the seventh to tenth assessment years, then he should be empowered to do so by legal/valid assumption of jurisdiction as per the fourth proviso to section 153A of the Act. So according to Shri Dudhwewala, the *jurisdictional fact* to be met under the fourth proviso to section 153A of the Act is that, the AO should have in his possession incriminating evidence/material which could reveal that income valued Rs. 50 lakhs or more represented in form of '*asset*' had escaped assessment. Only if, the AO had in his possession this *jurisdictional fact* i.e. undisclosed/unaccounted '*asset*' valued Rs. 50 lakhs or more, which was discovered during search, relating to seventh to tenth assessment years, that he can rightly invoke the jurisdiction to re-open the said assessment years, or otherwise the AO cannot reopen the assessment. [*Please note:- The contention of Ld. A.R. Shri Dudhwewala in respect of jurisdictional fact will be dealt in length (infra*)].Shri Dudhwewela further argued that, it is implied from a reading of fourth proviso to section 153A of the Act is that, when the Parliament in its wisdom has prescribed the existence/discovery of undisclosed *Asset* valued Rs.50 lakhs or more, as condition precedent for invoking jurisdiction, the Parliament has excluded discovery of other income escaping assessment not represented in the form of 'Asset' to assume jurisdiction under fourth proviso to Section 153A of the Act as well as even the *Asset* valued less than Rs 50 lakhs. He gave an illustration to make us understand as to what he wants to say. According to Shri Dudhwewala, if any unexplained or undisclosed *asset* is found in the course of search, which can be added or assessed u/s 69 or 69A or 69B of the Act, then only can the AO validly initiate proceedings u/s 153A for such relevant assessment years (7-10 AY's). However, in an event, if no undisclosed asset valued Rs. 50 Lakh or more is found, but there

happened to be other material/evidence of unexplained expenditure which can be assessed u/s. 69C or unexplained cash credits u/s. 68,which came to possession of the AO, but which are not in the nature of 'Asset', as defined in Explanation 2 to the fourth proviso to Section 153A of the Act, then in such an event, according to Shri Dudhwewala, the AO cannot invoke the jurisdiction under the fourth proviso to Section 153A of the Act and cannot issue notice for assessment of 7th to 10th AY's preceding the search. Further, according to him, even if un-disclosed Asset is found during search qua assessee for the extended AYs, still if its value is one rupee less than Rs 50 lakhs, then AO cannot invoke section 153A jurisdiction. So, according to him,the notice u/s 153A of the Act can be issued by the AO for seventh to tenth AY's only after valid assumption of jurisdiction as per the fourth proviso, and that can be done only after the AO has the essential *jurisdictional fact* in his possession. He argued that, in this present case, this essential jurisdictional fact (*undisclosed asset valued Rs. 50 lakhs or more*), was not in the possession of the AO when he invoked section 153A of the Act for the sevenths AY i.e. AY 2011-12, and therefore according to him, the AO could not have validly assumed jurisdiction and issued notice u/s 153A of the Act for AY 2011-12. It was therefore the contention of Shri Dudhwewala that, without satisfying the essential jurisdiction fact prior to the issuance of the notice u/s 153A of the Act, the AO's very action of issuance of notice u/s 153A was bad in law in as much as the AO did not have in his *possession* the jurisdictional fact to validly assume jurisdiction to re-open AY 2011-12and hence, he urged that the consequent order framed u/s 153A/143(3) for AY 2011-12 be held to be ab-initio void. Shri Dudhwewala, further pointed out to us that, even when the AO had ultimately framed the assessment for AY 2011-12, no addition was made by him in respect of undisclosed/unaccounted '*asset*', which according to him, further fortifies that the AO did not had in his possession the jurisdictional fact when he issued notice u/s 153A on 11.09.2019 (*refer page 106 of PB*) for AY 2011-12, either at the time of initiation or upon completion of the proceedings. So he wants us to quash the assessment order framed by the AO for AY 2011-12, being without any jurisdiction.

8.2 Per contra, the Ld. DR Shri Amit Kumar Pandey vehemently opposed the submission made by the Ld. A.R. of the assessee and contended that there was no

requirement in law for the AO to have pointed out the 'asset' to the assessee for which the *relevant assessment year 2011-12*being re-assessed u/s 153A read with fourth proviso to Section 153A of the Act. According to him, the phrase "*income represented in the form of asset"* was vast enough to encompass addition on account of unexplained cash credits which was added by the AO. According to him therefore, the AO rightly assumed jurisdiction u/s 153A of the Act for AY 2011-12 when he had the seized material in his possession and so, we should not disturb the validity of the order.

8.3. In his rejoinder, the Ld. AR Shri Dudhwewala urged that since there was no undisclosed asset in the instant case for AY 2011-12 (7th year) the 4th proviso to Section 153A of the Act would not apply and hence, the AO did not get jurisdiction to reopen the AY 2011-12. Shri Dudhwewala contended that when the jurisdiction to reopen the assessment for the AY 2011-12 i.e. the seventh 7th year is bad for non-satisfaction of essential jurisdictional fact, all the consequent action of AO (*in this case making addition of credit entries*) is null in the eyes of law. Alternatively, Shri Dudhwewala submitted that, when the condition precedent to reopen the 7th assessment year was *viz., the possession of material regarding undisclosed assets valued Rs. 50 lakhs or more*; and in the event the AO re-opens the 7th AY on the assumption that he is in possession of undisclosed asset, then when he frames the re-assessment the AO cannot make any other addition like in this case addition of credits u/s. 68 of the Act, without first making any additions on account of the *undisclosed asset*, on the strength of which he invoked/initiated jurisdiction u/s 153A of the Act. For this, he relied on the ratio laid down in the judgments of Bombay High Court in the case of Jet Airways (331 ITR 236) & Delhi High Court in the case of Ranbaxy Laboratories Ltd. vs. CIT (336 ITR 136), and by Calcutta High Court in M/s Infinity Info Tech in ITAT No 60 of 2014 G A no 1736 of 2914 dated 10 sept 2014, though rendered in the context of reopening u/s. 147 of the Act. So, according to him, looking from any angle, the addition made by the AO in AY 2011-12 is bad for want of jurisdiction. So, he pleads that the action of AO needs to be quashed.

8.4 Heard both the parties. In order to adjudicate the legal issue, let us have a look at the law relevant to this issue. It is noted that until the insertion of Section 153A of the Act by the Finance Act, 2003, if any person was searched u/s. 132 of the Act upto 31.05.2003, that person had to undergo the block assessment as per Chapter XIVB (*special procedure for assessment of search cases*) u/s 158BB of the Act; and thereafter if an assessee undergoes search u/s 132 of the Act, w.e.f 01.06.2003, the AO has been empowered to issue notice u/s 153A of the Act to searched persons u/s 132 of the Act, for six assessment years preceding the searched assessment year. Thus, ordinarily, having regard to the date of search in this present case i.e. 12-12-2017, the AO was well within his jurisdiction to issue notices u/s 153Aof the Act in respect of six (6) assessment years preceding the assessment year of search, which in the present case took place in AY 2018-19. Therefore, in terms thereof, the AO was competent to issue notices u/s 153A of the Act for the AYs 2012-13 to 2017-18. Now before us by raising Ground No.1/CO No. 1 (*Reframed Ground "A" refer supra para 7*), the assessee has challenged the validity of assumption of jurisdiction by the AO u/s 153A of the Act and the issuance of notice u/s 153A of the Act for AY 2011-12,which is the seventh (7) assessment year preceding the assessment year of search. To adjudicate this legal issue, we have to go through the fourth proviso of Section 153A of the Act which was inserted by the Finance Act, 2017 with effect from 01.04.2017, enabling an Assessing Officer (AO) of a searched person to issue notices u/s 153A of the Act for '*relevant assessment year or years*' in terms of Explanation 1 of the fourth proviso to Section 153A of the Act i.e. assessment years beyond the six (6) assessment years till tenth (10) assessment year preceding the searched assessment year (i.e. 7^{th} to 10^{th} AY's preceding the searched AY), provided the AO satisfies the essential conditions specified therein. The relevant parts of Section 153A of the Act i.e. fourth proviso to Section 153A of the Act, which has a bearing on the controversy in hand is being reproduced below:

> "Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—
>
> (a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017."

Explanation 1.- For the purpose of this sub-section, the expression 'relevant assessment years' shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2. – For that purposes of the fourth proviso, 'asset' shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

8.5. From a reading of the aforesaid fourth proviso to Section 153A, it can be seen that the expression used by the Parliament, while enlarging the power of the AO to extend the jurisdiction u/s. 153A of the Act from seventh to tenth AY is, first of all prohibiting the AO to issue the notice u/s. 153A of the Act, unless the condition precedent therein is satisfied. The expression used is "*no notice for assessment or reassessment shall be issued by the AO for the relevant AY/AY's*"; and the relevant AY/AY's has been explained by the aid of Explanation-1 appended to it (7^{th}-10^{th} AY's preceding the searched year). Therefore, it is noteworthy that the fourth proviso to section 153A bars the AO to issue notice u/s. 153A of the Act for the assessment or reassessment of the 7^{th} – 10^{th} AY's unless he has in his possession evidence/material which revealed that income represented in the form of asset valued Rs. 50 lakhs or more has escaped assessment. So, the AO, in order to assume jurisdiction for the extended period (i.e. 7^{th} to 10^{th} AY preceding the searched year) should have in his possession income represented in the form of 'asset' valued Rs. 50 Lakhs or more which has escaped assessment, which 'fact' according to Ld. A.R. Shri Dudhwewala is the '*jurisdictional fact*', which if present/or in possession of AO will only enable the AO to assume jurisdiction u/s. 153A of the Act to issue notice for these extended AYs'. According to Shri Dudhwewala, the *jurisdictional fact* in this case for AY 2011-12 (7^{th} AY preceding to searched year) is the existence of fact relating to the

undisclosed 'asset' valued Rs.50 lakh or more that has been discovered in the search qua the assessee qua the AY in question i.e. AY 2011-12. According to him, in the present case, not only when the AO issued notice u/s 153A for AY 2011-12, did he not have in his possession this essential jurisdictional fact, but even when he completed the assessment, there was no addition in respect of any undisclosed asset, rather the addition was in respect of purported un-explained credit u/s 68 of the Act, which according to him, lend credence to his argument that the *jurisdictional fact* was indeed absent and hence, the action of AO was bad in law for want of jurisdiction.

8.6. So, first let us examine whether this legal contention of Shri Dudhwewala that existence of the undisclosed asset valued Rs. 50 lakh or more discovered during search qua the assessee qua AY 2011-12 is the jurisdictional fact or not; and if it is the jurisdictional fact, then the next question is whether the AO was in possession of this jurisdictional fact prior to issuance of notice u/s. 153A for AY 2011-12. Since determination of this legal issue in favour of assessee will go to the root of the very jurisdiction of AO to even issue notice in this case for AY 2011-12 u/s 153A of the Act, let us first examine the same. For this, first of all we have to understand, what is *jurisdictional fact*? For that, let us look at the ruling of the Hon'ble Supreme Court in the case of Arun Kumar &Ors. Vs Union of India & Ors. 2006 (12) SC 121wherein it was held/explained as to what is jurisdictional fact. The Hon'ble Supreme Court explained that, a *'jurisdictional fact'* is a fact which must exist, before a Court, Tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one, on whose existence or non-existence, depends the jurisdiction of a court, a Tribunal, or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of *certiorari*. The underlying principle is that, by erroneously assuming the existence of such jurisdictional fact, no authority can confer upon itself jurisdiction, which it otherwise does not possess. The Hon'ble Supreme Court further clarified that if the statute prescribes a jurisdictional fact necessary for

invoking jurisdiction, then the existence of the '*jurisdictional fact*' is sine qua non for the exercise of power. If the 'jurisdictional fact' exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once an authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.

8.7. In the case of Raja Anand Brahma Shah v. State of U.P. &Ors., AIR 1967 SC 1081 : (1967) 1 SCR 362, the Hon'ble Supreme Court had an occasion to look into the jurisdiction of the District Collector to acquire land under sub-section (1) of Section 17 of the Land Acquisition Act, 1894 which enabled the State Government to empower the District Collector to take possession of 'any waste or arable land' needed for public purpose even in absence of award. The possession of the land belonged to the appellant had been taken away in the purported exercise of power under Section 17(1) of the Act. The appellant objected against the action inter alia contending that the land was mainly used for ploughing and for raising crops and was not 'waste land', unfit for cultivation or habitation. It was urged that since the jurisdiction of the authority depended upon a preliminary finding of fact that the land was 'waste land', the High Court was entitled in a proceeding for a certiorari to determine whether or not the finding of fact by the District Collector, that land was waste land, was correct or not. It is noted that the Hon'ble Supreme Court while upholding the contention and declaring the direction of the State Government to District Collector as without jurisdictions held that the District Collector had jurisdiction to acquire only if the jurisdictional fact existed i.e. if the land was waste land and if that fact is incorrect, then the District Collector does not have the jurisdiction to acquire the land. The Hon'ble Supreme Court ruled as under;

"In our opinion, the condition imposed by s. 17(1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to

take possession of the land under s. 17(1) of the Act. It is well-established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of certiorari to determine, upon its independent judgment, whether or not that finding of fact is correct".

8.8. In State of M.P. &Ors. v. D.K. Jadav, AIR 1968 SC 1186 : (1968) 2 SCR 823, the relevant statute abolished all jagirs including lands, forests, trees, tanks, wells etc., and vested them in the State. It, however, stated that all tanks, wells and buildings on 'occupied land' were excluded from the provisions of the statute. The Hon'ble Supreme Court held that the question whether the tanks, wells etc., were on 'occupied land' or on 'unoccupied land' was a jurisdictional fact and on ascertainment of that fact, the jurisdiction of the authority would depend. For doing so, the Hon'ble Apex Court relied upon a decision in White & Collins v. Minister of Health (1939) 2 KB 838 : 108 LJ KB 768, wherein a question debated was whether the court had jurisdiction to review the finding of administrative authority on a question of fact. The relevant Act enabled the local authority to acquire land compulsorily for housing of working classes. But it was expressly provided that no land could be acquired which at the date of compulsory purchase formed part of park, garden or pleasure-ground. An order of compulsory purchase was made which was challenged by the owner contending that the land was part of park. The Minister directed public enquiry and on the basis of the report submitted, confirmed the order. Interfering with the finding of the Minister and setting aside the order, the Court of Appeal stated; *"The first and the most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the Court would be illusory."*[See also Rex v. Shoredich Assessment Committee; (1910) 2 KB 859 : 80 LJ KB 185].

8.9. A question under the Income Tax Act, 1922 arose in Raza Textiles Ltd. v. Income Tax Officer, Rampur, (1973) 1 SCC 633 : AIR 1973 SC 1362. In that case, the ITO directed X to pay certain amount of tax rejecting the contention of X that it was not a non-resident firm. The Tribunal confirmed the order. A single Judge of the High Court of Allahabad held X as non-resident firm and not liable to deduct tax at source. The Division Bench, however, set aside the order observing that "*ITO had jurisdiction to decide the question either way. It cannot be said that the Officer assumed jurisdiction by a wrong decision on this question of residence*". X approached the Hon'ble Supreme Court. Allowing the appeal and setting aside the order of the Division Bench of the Hon'ble High Court, the Hon'ble Apex Court held as under:

"The Appellate Bench appears to have been under the impression that the Income-tax Officer was the sole judge of the fact whether the firm in question was resident or non- resident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assesses was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi- judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen."

8.10. In the light of the aforesaid case laws, in our opinion, the submission of Shri Dudhwewala is well founded and deserves to be accepted. From the ratio of the aforesaid decisions of the Apex Court, it is clear that if the statute prescribes the existence of *'jurisdictional fact*' for an authority/quasi judicial body to invoke jurisdiction, then the existence of the jurisdictional fact is *sine qua non* for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter upon the existence of *'jurisdictional fact*', then it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable, provided essential or fundamental fact as to existence of jurisdiction is present. Thus, we understand that *jurisdiction fact* is the fact which is required to exist, as insisted by the Parliament/Legislature, for a quasi judicial/

authority to exercise jurisdiction over a particular matter. So in this present case, we have to examine whether the Parliament has specified in the *fourth* proviso to Section 153A of the Act any such facts which can be termed as jurisdictional fact. On a reading of the fourth proviso to Section 153A of the Act along with Explanation 2 to it which defines 'Asset', we find considerable merit in the contention of Shri Dudhwewala that in order to invoke jurisdiction u/s 153A of the Act for the seventh to tenth AY preceding the searched year, the AO should have in his possession the jurisdictional fact i.e. *existence/possession of undisclosed/unaccounted assets valued at Rs. 50 lakhs or more as defined in Explanation 2 to fourth proviso of Section 153A qua the assessee qua the 7th to 10th AY un-earthed from search*, without which the AO cannot issue notice u/s 153A of the Act for these extended AY's. It is only when there exists this jurisdictional fact the AO can validly reopen those extended AYs; and then only AO can validly assume jurisdiction and then only he is empowered to issue notice. In other words, unaccounted asset valued at Rs. 50 lakhs or more which were discovered during search qua the assessee qua the assessment year (7th 10th years) preceding the searched assessment year is the *jurisdictional fact*; and if the *jurisdictional fact* is in the possession of the AO, [and possession means physical possession; or personal knowledge of the existence of the undisclosed asset which need to be spelled out in clear terms (*not vaguely*) qua assessee qua AY 2011-12 discovered during search.] then he can assume jurisdiction u/s. 153A of the Act and issue notice to assess the assessment of the escaped income for these assessment year's (7th to 10th year) which is the 'fact in issue' or 'adjudicatory fact'. On the other hand if the AO did not have in his possession the *jurisdictional fact*, then he is debarred from invoking/issuance of notice u/s 153A of the Act for the 7th-10th AY preceding the search.

8.11. Having held so, let us examine the next argument of Shri Dudhwewala that, the Parliament by specifying the jurisdictional fact as undisclosed asset valued Rs. 50 Lakhs or more, has impliedly excluded other items of income viz., *liabilities/credit, unexplained expenditure etc*. A reading of the fourth proviso to section 153A of the Act and Explanation (2) to fourth proviso to section 153A of the Act which defines 'Asset' for the purpose of fourth proviso to section 153A of the Act, clarify the intention of the Parliament to permit

the AO to enlarge the assessment u/s. 153A after search u/s. 132 of the Act beyond six assessment years to ten assessment years preceding the searched assessment year, provided the AO has in his possession the essential jurisdictional fact i.e. "undisclosed/unaccounted asset" valued Rs 50 lakhs or more of the assessee discovered during search pertaining to 7th to 10th Assessment Year preceding the searched assessment year. Since the Parliament has used the expression '*income in the form of asset*' and the definition of asset has been spelled out in the fourth proviso, this itself necessarily implies that the liability/items falling in the left side of the Balance Sheet stands excluded. For this view of ours, we rely on the legal Maxim for interpretation *"Expressio Unius Est Exlcusio Alterius"* which principle states that, express mention of one is the exclusion of other and this maxim has been accepted by the Hon'ble Supreme Court in GVK Industries Ltd. Vs. ITO [197 Taxman 337] (Constitution bench of 5 Supreme Court Judges). By express mention of 'Assets' and definition given to it specifically, it is implied that the Parliament silently excluded the items of 'revenue', 'expenditure' & 'liabilities' from its jurisdictional fact for invoking/assumption/usurpation of jurisdiction u/s. 153A of the Act for the seventh to tenth assessment year preceding the searched assessment year.

8.12 It is a rudimentary accounting concept, that "debit" denotes "asset" and "credit" denotes "liability". An asset represents an economic resource, either immovable or movable, having value, such as immovable property viz., land or building, investment held in shares and securities, loans & advances given and deposits in bank account. On the other hand, 'Liability' includes items such as share capital, reserves, loans obtained (secured as well as unsecured) etc. which cannot be characterized or classified as 'Asset'. Similarly, items of 'expenses' or revenues in form of 'sales' / 'turnover' does not constitute 'asset'. This can be illustrated in the following manner *(**'Asset'** below falls within the ambit of the fourth proviso to Section 153A of the Act)*:

Profit & Loss Account	
Particulars (Debit)	Particulars (Credit)
Expenses	Revenues

Balance Sheet	
Liabilities (Credit)	**Assets (Debit)**
Share Capital/ Reserves/ Loan/ Current Liabilities	**Immoveable Property/ Loans & Advances/ Shares/ Bank Balance**

8.13 The above view of ours get bolstered from reading of Explanation 2 appended to the fourth proviso, which defines 'asset', for the purpose of fourth proviso to Section 153A,to include i) immovable property, ii) shares and securities , iii) loans and advances & iv) Deposit in bank. Hence, where search action u/s 132 of the Act reveals that, (i) the assessee owns an undisclosed immovable property, or (ii) information has been gathered which shows that the assessee had given loans or advances outside the regular books or (iii) search has revealed unaccounted investments held by assessee in shares & securities, which do not form part of regular books of accounts or (iv) if undisclosed bank accounts having deposits, have been found in the course of search, pertaining to the 7^{th}-10^{th} AY preceding the search; then having in his possession this *jurisdictional fact*, the AO may assume jurisdiction under the fourth proviso to Section 153A of the Act for the relevant seventh to tenth assessment year preceding the searched assessment year. Hence, the most important aspect is that, these 'assets' must have been found to be undisclosed or unaccounted, in the regular books of account maintained by the assessee, and discovered during the course of search, which otherwise would not have seen the light of the day but for the search, resulting in escapement of income.

8.14 As per our discussion, is to be kept in mind that, the term 'deposits in bank account' has to be considered with the term 'asset'. The term 'deposits in bank account' and 'asset' are to be understood in their cognate sense, as it takes their colour from each other, i.e., the more general is restricted to a sense analogous to the less general. Hence, the term 'deposits in bank account' denotes discovery of an 'asset' in the form undisclosed bank deposits, say fixed deposit bank a/c, savings deposit bank a/c, foreign deposit bank a/c etc. which is found

to have escaped assessment in the 7th-10th AY preceding the search. It does not suggest or include any or all credits in bank accounts, which is disclosed and forms part of the regular books of accounts. To say, if any credits in a regular bank account, like sale proceeds/ loan / share capital etc. is found to be unexplained, then it may be a case of discovery of undisclosed 'income' / 'cash credit' but it does not suggest discovery of an undisclosed 'asset' by the Revenue so as to bring it within the teeth of the fourth proviso to Section 153A of the Act for invoking jurisdiction u/s 153A for the extended period.

8.15 Hence, from the above discussion, it is thus clear that Section 153A of the Act can be invoked only if the AO comes to a positive conclusion that he has in his possession documents or information revealing an *undisclosed asset* of the assessee qua the assessment year (7th to 10th) which is valued Rs. 50 lakhs or more. This, in our judgment is a foundational, fundamental or jurisdictional fact.

8.16. Having clarified the position of law regarding the jurisdictional fact (supra), now let us examine whether the jurisdictional fact existed before the AO when he issued notice u/s 153A of the Act dated 11.09.2019 (refer page 106 PB) for AY 2011-12. In this context, we note that, the assessee had specifically objected to the AO's action of reopening the unabated assessment for AY 2011-12 u/s 153A of the Act and had requested the AO to give details of the purported 'assets' (*undisclosed/unaccounted assets unearthed during search qua the assessee qua the AY 2011-12*). The AO however did not provide the details of the undisclosed/unaccounted assets of assessee, which were in his possession before issuance of notice u/s 153A of the Act for AY 2011-12. This fact is clear from the order sheet noting dated 04.11.2019 wherein he over-ruled the objection raised by the assessee against reopening u/s 153A of the Act the AY 2011-12 by stating as under:

> The A/R of the assessee, Shri Vivek S Sharma, FCA appeared with a letter stating that with respect to AY 2011-12 in the case of the assessee company, the assessment u/s 153A/143(3) was completed on 28/03/2013. The A/R further requested for details of income escaping assessment for the AY 2011-12 and the assets due to which the case of the assessee company for AY 2011-12 has been covered u/s 153A. It is explained to the A/R that the final order of assessment in this case will contain the details and the A/R can appeal before the appropriate appellate authority in case the A/R is not satisfied with the reasons for opening the case of the

> assessee u/s 153A and seek available remedy. However, at this point of time, the undersigned has recorded reasons there is seized material available, on the basis of which the case of the assessee for AY 2011-12 has been covered u/s 153A. The relevant documents and issues will be discussed in due course of assessment proceeding and the assessee will be given opportunity to explain the concerned issue. It has been conveyed to the assessee that primarily the issue pertains to the assessee company allotting shares to jamakharchi companies by taking share capital and premium for issue of shares to them. The sums so received are further invested by the assessee company either in fixed assets or extended as loans and advances or invested in shares further. It is explained to the A/R that this is a matter of investigation and assessment, that is why the case of the assessee for AY 2011-12 has been covered u/s 15A so that this issue can be assessed in the light of the search and seizure action conducted on the assessee company on 12/12/2017 and the documents and materials seized therein. The A/R is requested to furnish return of income for AY 2011-12 electronically as called for u/s 153A without further delay.(emphasis supplied)

8.17. Conjoint reading of the above order sheet noting with the objection raised by the assessee before the AO, shows that the assessee had specifically challenged the usurpation of jurisdiction by the AO under the fourth proviso to Section 153A of the Act and also requested him to spell out the details of the undisclosed/unaccounted "asset" found from the books of accounts/documents seized in the course of search, for which the assessment for AY 2011-12 was being re-opened. The AO however not only turned down the request to provide the details of the 'assets' (*jurisdictional fact*) but instead told the assessee that the final assessment order would contain the details of such "asset". It is noted that the AO did not stop at this, but went on to give a ludicrous advice to the assessee that in case the assessee is not satisfied with the assessment order, then he may seek recourse to appellate remedy. We do not countenance such an action of AO. According to us, when the assessee contended before the AO that there is no jurisdictional fact (as stated supra), the AO was duty bound to decide the said question as to his jurisdiction and record a finding as to whether he had in his possession details of any 'undisclosed/unaccounted 'asset' valued Rs 50 lakhs or more, qua the assessee qua the assessment year (7^{th} to 10^{th} year) preceding the searched assessment year, and thereby state clearly as to how the case of assessee was being covered by him under the 4^{th} proviso to section 153A read with explanation (2) appended thereto. Only upon valid assumption of jurisdiction, the AO ought to have proceeded against the assessee to assess the escaped asset of the assessee and thereafter other undisclosed income if any as per law. And when he does that, he first has to make addition

in respect of the escaped *asset* [based on which AO initiated section 153A proceedings] and then only based upon the incriminating documents unearthed in the course of search, that he can make additions/disallowances in respect of other items of escaped income/credit/expense etc., if any (for unabated assessment years); in the event if no addition could be made by AO in respect of undisclosed asset [based on which AO initiated section 153A proceedings] then the AO has to drop the section 153A proceedings because, he has assumed jurisdiction on a wrong/non-existing undisclosed asset and can resume only u/s 153A only on satisfaction of new/fresh undisclosed asset/jurisdictional fact, which principle will discuss separately (infra).

8.18 Be that as it may, we further note another interesting aspect that, the AO while denying the details of assets for AY 2011-12 observed that, "*at this point of time i.e. [04-11-2019] the undersigned has recorded reasons there is seized material available on the basis of which the case of assessee for AY 2011-12 has been covered u/s 153A",* This factual assertion made by the AO while making the order-sheet entry dated 04.11.2019 shows that, he had not recorded his satisfaction prior to issuance of notice dated 11.09.2019 in terms of the fourth proviso to Section 153A of the Act, but did so only subsequent to reopening of the assessment on 04.11.2019. His own admission in the noting sheet reveals that he has recorded satisfaction only on 04.11.2019 to cover the case of assessee in respect of AY 2011-12 on the strength of the seized material. From this assertion/averment/admission, it is clear that AO did not have in his possession the *jurisdictional fact* [on or prior to 11.09.2019] to invoke and issue notice u/s. 153A of the Act. Here, one should bear in mind that the fourth proviso was inserted by the Parliament w.e.f. 1.04.2017 by Finance Act, 2017, thereby extending the jurisdiction of the AO to assess/re-assess beyond six AY's to ten AY preceding the searched year. And as discussed at para 8.5, the fourth proviso clearly bars the AO to issue notice for the extended period (7^{th} – 10^{th} AY) unless the AO is in possession of the jurisdictional fact of undisclosed asset valued Rs. 50 lakh or more qua the assessee qua the extended assessment year. So the Legislative intent is very clear that AO would be empowered to issue notice u/s 153A only if he is in possession of the jurisdictional fact otherwise he cannot issue notice u/s 153A of the Act. No such bar can be

seen in the case of six AY's preceding the searched AY. So the Parliament while extending the jurisdiction of AO by Finance Act, 2017, for 7th – 10th AY has prescribed this particular safe guard against arbitrary exercise of power by the AO u/s 153A of the Act. It is thus prescribed in the fourth proviso that, *no notice shall be issued by AO,* unless the AO is in possession of the undisclosed assets valued Rs. 50 lakh or more qua the assessee qua the AY. Hence, the admission made by the AO in the order sheet on 04.11.2019, that *"at this point of time"* he was recording his satisfaction for covering AY 2011-12 u/s 153A of the Act as he had seized material with him, clearly shows that the AO had not applied his mind to the seized material prior to issuance of notice u/s 153A on 11.09.2019. The AO had not gone through the seized material to gather details/information which would suggest discovery of undisclosed assets qua the assessee qua the AY 2011-12 and even if something was found, then whether the undisclosed asset was valued Rs 50 lakhs or more? This exercise was not carried out by the AO. Instead, he simply made a sweeping statement that since seized material is there with him, so he is covering the case of AY 2011-12. This action of the AO cannot be accepted. According to us, the AO's bald assertion/dependence on the seized material before him, does not fulfil the requirement of law to confer on himself jurisdiction u/s. 153A of the Act. The extended jurisdiction to invoke/assess 7th – 10th AY is conferred on the AO by authority of law and the AO cannot confer to himself the jurisdiction in a casual manner by stating/substituting the specific *jurisdictional fact* to encompass all seized material. It is common knowledge that, seized material may contain both disclosed &undisclosed assets, liabilities, expenses & income. So, it is imperative that before issuance of notice u/s 153A [for the extended period], the AO sets out his objective satisfaction from the seized material, the details of the specified/undisclosed assets in his possession qua the assessee for AY 2011-12 valued Rs. 50 lakhs or more. If this essential requirement of law is not satisfied, the AO does not get the authority of law to invoke the jurisdiction u/s 153A for 7th to 10th AY. For this, we rely upon the dictum of the Privy Council in Nazir Ahmed Vs. King Emperor AIR 1936 PC 253*(which has since been accepted and later followed by Hon'ble Supreme Court*), that when a statute requires a thing to be done in a particular manner, it must be done in that manner or not at all. As discussed at Para 8.5 (supra), the language of the fourth proviso to section 153A of the Act show that

issuance of notice can be resorted to by the AO only after he is in possession of the jurisdictional fact, which is found to be absent in the present case. Therefore according to us, the AO only after having in his possession the jurisdictional fact could have assumed jurisdiction and issued notice u/s. 153A of the Act or else he could not have issued notice, as done in this case. For the reasons elaborately discussed by us in the foregoing, we thus hold that the notice u/s. 153A dated 11.09.2019 was issued by the AO without authority of law and without satisfying the essential jurisdictional fact, and hence the issuance of notice u/s. 153A is held to be bad in law.

8.19. Even though we are fortified with our above view, that prior to issuance of notice u/s 153A for the 7^{th} – 10^{th} AY, the AO should be in possession of the *jurisdictional fact*, we deem it fit to further examine the facts as to whether ultimately the AO, while addressing the request of the assessee to provide the details of the undisclosed assets qua the assessee for AY 2011-12,did at all make any endeavour to discover any undisclosed asset qua assessee for AY 2011-12. It is noted that the AO even in the impugned order did not bother to bring on record the *jurisdictional fact* nor did he even whisper anything about any undisclosed asset in the order nor did he make any addition in respect of undisclosed assets u/s 69 or 69A or 69B of the Act, which clearly shows not only did the AO not havein his possession the *jurisdictional fact* before invoking or while assumption of jurisdiction u/s 153A for AY 2011-12 but it remained absent even when he framed the impugned assessment order. The Hon'ble Supreme Court has categorically held that, if the jurisdictional fact does not exist, the AO/quasi-judicial authority or authority cannot act on the erroneous supposition that it exists. Further the Hon'ble Supreme Court held that, if a quasi judicial authority or authorities wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. [*Here in this case, it may be noted that AO refused to divulge the details of the undisclosed Assets discovered during search qua assessee for AY 2011-12 and asked the assessee to await the outcome of the reassessment order, which action of AO tantamounts to deny the assessee an opportunity to approach the Hon'ble High court for issue of writ of certiorari, which action of AO cannot be countenanced*.] The Hon'ble Supreme Court further laid down the principle that, by erroneously assuming

existence of jurisdictional fact, no authority/AO in this case can confer upon itself jurisdiction which it otherwise does not possess. From the facts narrated in the foregoing, it is evident that at no point of time did the AO have in his possession the evidence regarding the undisclosed/unaccounted assets as defined in Explanation (2) to the 4th proviso qua the assessee qua the assessment year 2011-12 and therefore he could not have conferred upon himself the jurisdiction under section 153A of the Act. Thus, on these admitted facts as discussed (supra), and for other defects and contention noted (infra), we find merit in the submission of Shri Dudhwewala that, the notice u/s 153A for AY 2011-12 had been issued by the AO in an arbitrary and casual manner, without first satisfying himself that he was in possession of incriminating material which revealed that income represented in form of asset had escaped assessment for AY 2011-12 which was the essential jurisdictional fact found to be absent in this case. In our considered view therefore, the AO's failure to do so, rendered the very act of usurpation of jurisdiction and issuance of notice dated 11.09.2019 under the fourth proviso to Section 153A of the Act for AY 2011-12 to be null in the eyes of law.

8.20. Thus according to us, the pre-requisite condition for conferment of jurisdiction under section 153A for the assessment of AY's falling from seventh (7th) to tenth (10th) assessment years preceding the searched assessment year being the jurisdictional fact in this case is absent and the AO without fulfilling this essential jurisdictional fact erroneously invoked jurisdiction u/s 153A of the Act for AY 2011-12, which is a serious flaw and a jurisdictional defect, that cannot be cured.

8.21. The Ld. A.R Shri Dudhwewala in the alternate also pointed out that, even in the assessment order, the AO had singularly failed to identify and spell out such "asset", as defined in Explanation 2 to the fourth proviso to Section 153A of the Act, which had escaped assessment for AY 2011-12 and did not make any addition to the income of the assessee u/s. 69, 69A or 69B of the Act. So, therefore, according to Shri Dudhwewala, since the AO did not make any addition on account of escaped income represented in form of undisclosed/unaccounted asset, the AO could not have made any *other addition* like, in respect of credit entry u/s. 68 of the Act. For this, he relied on the decisions rendered by the

case of Hon'ble High court of Bombay in Jet Airways (supra) and Hon'ble Delhi High Court in Ranbaxy Laboratories (supra) though in the context of reopening u/s. 147 of the Act. So, according to Shri Dudhwewala, the AO's action of making addition u/s. 68 of the Act, was even otherwise, legally impermissible.

8.22. From our discussion (supra) it is clear that, only if any of specified 'asset/s' as defined in Explanation (2)is unearthed during the course of search and the acquisition of such an 'asset' being unexplained or undisclosed, which is valued Rs. 50 Lakhs or more, that the AO can be said to be in possession of the jurisdictional fact to initiate proceedings u/s 153A for 7^{th}-10^{th} AY (AY 2011-12, in the instant case). Now, to understand the alternate ground of argument of Shri Dudhwewala, let us for the sake of argument, assume that the AO had validly invoked the jurisdiction u/s 153A for AY 2011-12.Then in such an event, it has to be borne in mind that, first the AO had to make addition in respect of the purported undisclosed asset valued at Rs. 50 lakhs or more; and only thereafter the AO can venture to make any other additions/disallowance which are not in the nature & character of 'Asset' but represents undisclosed/unexplained income/expenditure/credit etc. Perusal of the assessment order impugned before us, shows that that AO did not make any addition/s in respect of escaped/undisclosed asset in the relevant AY 2011-12. We therefore find ourselves in agreement with Shri Dudhwewala that, unless the AO made addition/s of Rs. 50 Lakhs or more in relation to escaped/undisclosed asset, he could not assume jurisdiction to make addition/s on other items (viz. liabilities like credit entry etc.) The reason is simple, because in such a scenario, it bellies the claim of the AO in issuing notice u/s 153A of the Act, that he is in possession of the *jurisdictional fact* i.e. undisclosed asset valued Rs. 50 lakhs or more has escaped assessment, which constitutes the key to open the lock and then re-assess the income of the assessee for the 7^{th} to 10^{th} AY. It is therefore incumbent upon the AO to show that the key used for opening the lock for the concluded 7^{th} to 10^{th} AY is the most appropriate key to unlock and thereby reopen the proceedings for bringing to charge any other items of escaped/unexplained income unearthed in the course of search. However in a case where, either the assessee demonstrates that the key used by the AO for reopening the assessment is either incorrect or where the AO himself abandons the *jurisdictional fact*

in the course of assessment proceedings, then as a corollary, it has to be held that the key used by the AO for opening the lock was incorrect and thereby the lock placed earlier on the concluded assessment remained unopened and therefore the AO could not enter upon the arena of reassessing the income of the assessee. So, when the AO fails to make any addition for the 'undisclosed asset', then it tantamount to admission that there was no jurisdictional fact present before the AO in the first place, and the necessary corollary is that he has wrongly assumed jurisdiction u/s. 153A for AY 2011-12 and therefore AO cannot proceed further to make other items of additions/disallowances. In such a scenario, the AO has no other option but to drop the assessment proceedings. He may however proceed again, if there is any new/fresh jurisdictional fact before him, of course, subject to limitation. For this conclusion of ours, we rely on the ratio laid down in the judgments of CIT Vs Jet Airways (supra) & Ranbaxy Laboratories Ltd. vs. CIT (supra).Though these judgments were rendered in the context of reopening u/s. 147 of the Act, however the ratio decidendi will apply in the present case, because, like Section 147/148 of the Act, the AO gets the authority to assess/reassess the income of a searched person or other person u/s 153A/153C for the extended assessment years (7^{th} to 10^{th} AYs) only if he has in his possession the jurisdictional fact, as discussed. If the AO is found to have assumed jurisdiction erroneously on mistaken belief about the existence of jurisdictional fact or ultimately drops it (after making enquiries in the course of assessment) while framing the reassessment order; then the AO cannot legally proceed further with the assessment/reassessment and/or make any other items of additions/disallowances, because the jurisdictional fact on the strength of which he assumed section 153A jurisdiction is absent or not in existence. In the light of the aforesaid discussion, and in our considered opinion, this alternate plea of Shri Dudhwewala is well founded and deserves to be accepted.

8.23. In view of the above and on perusal of the impugned re-assessment order, we note that the only addition made by the AO in AY 2011-12 was on account of unexplained cash credit represented by share application monies of Rs.5,38,35,000/- u/s 68 of the Act. According to the AO, the source of source of the monies received from shareholder, M/s Hari Trafin Pvt Ltd was not properly explained, and therefore the same was added as

unexplained cash credit u/s 68 of the Act. As noted above, the additions on account of unexplained cash credit and that too share capital, which is in the nature of 'liability' could not have been made by AO, unless he first made an addition of undisclosed 'asset' valued at Rs. 50 Lakhs or more. So in this case, as there was no addition made by AO on account of undisclosed asset, we can safely infer that there was no jurisdictional fact in the AO's hand or in his possession when he assumed jurisdiction u/s 153A for AY 2011-12 in the first place itself. As, the very usurpation of jurisdiction u/s. 153A of the Act is found to be bad in law for want of jurisdiction, the AO was precluded from making any other addition in the assessment for AY 2011-12. Hence, the AO's action of making addition u/s 68 of the Act in the relevant AY 2011-12 is held to be unsustainable for want of jurisdiction and is therefore is quashed. The assessee thus succeeds on this ground raised in the cross objections and the same is allowed.

9. Now we proceed to answer Question (B).

(B) Whether in absence of any incriminating material found in the course of search at the premises of the assessee, the additions/disallowances made in the assessments of the assessee, which were unabated/ non-pending on the date of search, could be held to be sustainable on facts and in law?

Ground No. 3 of Revenue's appeal for AY 2011-12
Ground No. 3 of Revenue's appeal for AY 2012-13
Ground No. 3 of Revenue's appeal for AY 2013-14
Ground No. 3 of Revenue's appeal for AY 2014-15
Ground No. 3 of Revenue's appeal for AY 2015-16

9.1 In light of the facts narrated in Para 2 above, it is noted that, on the date of search i.e. 12-12-2017, income tax assessments for AYs 2011-12 to 2015-16 were unabated. The provisions of Section 153A of the Act, forming part Chapter XIV of the Act contain special provisions for completing assessments in case of search conducted u/s 132 of the Act or

requisition made u/s 132A of the Act. These provisions can be invoked only in cases where the Income-tax Department has exercised its extra ordinary powers of conducting search and seizure operations after complying with stringent pre-conditions prescribed in Section 132 of the Act. We find that Section 153A itself creates the differentiation amongst specified six assessment years depending whether prior to search, the proceedings are abated or not. We note that the relevant section itself clarifies that where an assessment was already completed against an assessee and any appeals or further proceedings are pending, then such appeals or other proceedings do not abate. We should therefore keep in mind that merely because an assessee is subjected to search u/s 132 of the Act, such action by itself does not give carte blanche to the Department to subject such an assessee to the rigors of the assessment afresh for all the completed assessments. It is for this reason that the Parliament in its wisdom has categorically created two classes among the six years, (a) un-abated assessment and (b) abated assessments. Consequent to a search conducted u/s 132 of the Act, the AO is required to issue notices u/s 153A of the Act to assess the income of the assessee for six assessment years preceding the date of search. These six assessment years comprise of assessments which are not abated; and assessments which are pending on the date of search, and is treated to be abated. In case of abated assessments, the AO is free to frame the assessment in regular manner and determine the correct taxable income for the relevant year inter alia including the undisclosed income, having regard to the provisions of the Act. However, in relation to unabated assessments, which were not pending on the date of search, there is an embargo on the powers of the AO. In case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search. Considering these aspects the Hon'ble Delhi High Court in the case CIT vs Kabul Chawla reported in 380 ITR 573 held as under:-

> "37. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:
>
> Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Ld AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to complete assessment proceedings.

Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the Ld AO.

Completed assessments can be interfered with by the Ld AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

9.2 We find that the Hon'ble Delhi High Court while adjudicating the appeal in the case of CIT vs Kabul Chawla (2016) 380 ITR 573 had taken judicial note of host of the earlier decisions in the cases of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; MadugulaVenu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT

reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (NhavaSheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB). We also find that Revenue's SLP against the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (Supra) was dismissed by the Hon'ble Apex Court which is reported in 380 ITR (St.) 4 (SC).

9.3 The Hon'ble Delhi High Court in the case of Pr.CIT. Vs. Kurele Paper Mills (P) Ltd. (280 ITR 571) at Page 572held as follows:-

> "1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs.89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.
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> 2.The Court finds that the order of the CIT (Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.
>
> 3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination.
>
> 4.The appeal is, accordingly, dismissed."

It is noted that Hon'ble Supreme Court has dismissed the special leave petition filed by the Department against this judgment as reported at (2016) 380 I.T.R. (St.) 64.

9.4 The Hon'ble Gujarat High Court in the case of Pr.CIT Vs Saumya Construction Pvt Ltd (387 ITR 529) observed as follows:

> "15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to

issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153.the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In

case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. JayabenRatilalSorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year."

9.5 Gainful reference may also be made to the decision rendered by the coordinate bench of this Tribunal in the case of DCIT Vs Satyam IspatPvt Ltd in ITA No. 83 & 84/Gau/17 dated 02.08.2019 for AYs 2006-07 & 2007-08. In the decided case also there was a search operation u/s 132 on the assessee company. Thereafter notices u/s 153A were issued inter alia including for AYs 2006-07 & 2007-08, whose assessments had not abated on the date of search. In the assessments framed u/s 143(3)/153A for AYs 2006-07 & 2007-08, the AO made additions u/s 68 with regard to share capital raised by the assessee in those respective years. The AO observed that the assessee had unaccounted monies, which was routed back into the company in form of share application monies. On appeal the assessee challenged the validity of the assessment framed u/s 153A on the premise that in absence of any incriminating material found in the course of search, no addition was permissible. Upholding the contention raised by the assessee, the CIT(A) held that, as no incriminating material was found in the course of search to justify the addition made on account of share application monies in an unabated assessment year, the additions impugned before him were

liable to be deleted. The CIT(A) accordingly allowed the appeals of the assessee. On appeal, this Tribunal observed that the original returns for AYs 2006-07 & 2007-08were processed u/s 143(1) and that the time limit for issuance of notice u/s 143(2) had also expired prior to the date of search, and therefore the assessments for these years did not abate. It was accordingly held that the AO could have made addition only if any incriminating material was found in the course of search. Having regard to the facts of the case, the Tribunal upheld the order of the CIT(A) deleting the additions made towards share application monies in unabated assessments of AYs 2006-07 & 2007-08, for want of any corroborative incriminating material found in the course of search.

9.6 We find that similar view was also expressed by the Guwahati Bench of this Tribunal in another case of DCIT Vs SMS Smelters Pvt Ltd (ITA No.91, 69, 76 & 77/Gau/17) dated 06.09.2019 wherein it held as under:

> "7. Next comes Revenue's appeal ITA No.69/Gau/2017 for assessment year 2007-08. The CIT(A)'s order under challenge has deleted share capitals share premium and share application money addition of Rs.6,69,71,870/-, 11,95,78,050/- and Rs.7,24,50,080/-; respectively vide following detailed discussion:-
>
> "5.2 I have considered the submissions made by the appellant before me. I have also perused the assessment order as well as the remand report sent by the Assessing Officer on this issue. In his remand report the Assessing Officer has simply stated that the addition was made on the basis of findings recorded in the assessment order. He has further stated that he has no objection to the admission of any fresh or additional evidence if it is considered to be relevant for disposal of the issue. Apart from this, the Assessing Officer has not given any comment on certain legal issues raised by the appellant in its written submissions.
>
> 5.3 In its written submissions the appellant has raised a legal issue regarding the nature of additions that could be made in an assessment that is to be made u/s.153A/153C read with section 143(3) of the Income Tax Act, 1961 in the case of a "non abated assessment". According to the appellant it is now a well settled proposition that in respect of nonabated assessment, i.e. where the proceedings have reached finality, the assessments u/s.153A read with Section 143(3) of the Act, has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those documents/incriminating material and clubbed only to the assessment framed originally. It is submitted that the appellant's assessment for the year under appeal had already attained finality and hence it was a "non abated assessment". Hence, the addition should have been confined to any incriminating material found during the search. In support of its contention, the appellant has relied upon the following case laws:-
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> i) All Cargo Global Logistics Ltd. V/s. DCIT (2012) 137 I.T.D. 287 (Mumbai)(S.B.)

(ii) C.I.T. Vs. Continental Warehousing Corpn. (NgavaSheva) Ltd. (2015) 374 ITR 645 (Bom.)

(iii) Marigold Merchandise Pvt. Ltd. V/s. D.C.I.T. (2014)164 TTJ 448 (Delhi "F" Bench)

(iv) Jai Steel (India) V/s. A.C.I.T. (2013) 259 CTR 281 (Rajasthan)

(i) A.C.I.T. Vs. Pratibha Industries Ltd. (2013) 141 I.T.D. 151 (Mumbai)

(ii) A.C.I.T. Vs. Kamal Kumar S. Agarwal (2010) 133 TTJ 818 (Nagpur)

(iii) C.I.T. Vs. Kabul Chawla (2016) 380 I.T.R. 573 (Del.)

(iv) Jaipuria Infrastructure Developers (P) Ltd. V/s. A.C.I.T. I.T.A. Nos. 5522 & 5523/Del/2015 decided by Hon'ble ITAT, Delhi Bench "B", Delhi on 27-06- 2016

(v) Principal C.I.T. Vs. Kurele Paper Mills (P) Ltd. (2016) 380 I.T.R. 571 (Delhi) (SLP filed by the Department against this judgment dismissed (2016) 380 I.T.R. St.64)

It is further submitted by the appellant that no incriminating document/material relating to the share capital/share premium was found and/or seized in the case of the appellant. The Assessing Officer has neither referred to nor relied upon any such document while making the assessment.

5.4 As far as merits of the case is concerned, the appellant has submitted the following documents with a prayer under Rule 46A of the Income Tax Rules 1962 for admission of these documents as additional evidences: (i) Chart showing name and address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies. (ii) Copies of the appellants statements with the following banks showing the receipt of share capital/application money: (a) HDFC Bank, H.B. Road, Guwahati (b) HDFC Bank, Guwahati (c) Standard Chartered Bank, Guwahati (iii) Copies of Memorandum & Articles of Association and audited balance sheet in respect of corporate shareholders/applicants. (iv) Copies of returns of allotment filed by the appellant in respect of shares allotted during the previous year relevant to the assessment year under appeal. The appellant has also pointed out that out of the total share capital Rs.6,69,71,870/-, which was added in the total income of the appellant, an amount of Rs.5,40,00,000/- was received by the appellant in the earlier year, as will be evident from the details submitted. Hence, the Assessing Officer erred in law as well as on facts in making the addition of this amount of Rs.5,40,00,000/- in the assessment year under appeal.

5.5 A perusal of the case laws relied upon by the appellant show that in the case of a non-abated assessment i.e. where the assessment proceedings have reached finality, the assessments u/s.153A/153C read with Section 143(3) of the Income Tax Act, 1961 has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those document/incriminating material and clubbed to the assessment made originally. Thus, the scope of additions to be made in the case of a non-abated assessment is well defined.

5.6 In the case of C.I.T. V/s. Kabul Chawla (supra), Hon'ble Delhi High Court held as follows: At page 589, 590 "Summary of the legal position

….

While so holding, Hon'ble Delhi High Court has taken note of the judicial pronouncements made in All Cargo Global Logistics Ltd. V/s. DCIT (supra), C.I.T. V/s. Continental Warehousing Corpn. (NgavaSheva) Ltd. (supra), Jai Steel (India) V/s. ACIT (supra) and Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra) and a number of other case laws.

5.7. In the case of Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra), Hon'ble Delhi High Court held as follows:- At page 572

…..

5.8 In the case of Jaipuria Infrastructure Developers (P) Ltd. V/s. ACIT (I.T.A. Nos. 5522 & 5523/Del/2015) which was decided by Hon'ble ITAT, Bench "B" Delhi on 27-06-2016, Hon'ble Tribunal has held as follows:-

…….

5.9 An analysis of the above case laws relied upon by the appellant clearly show that the completed assessments i.e. the non-abated assessments can be tinkered with only on the basis of any incriminating material found during the course of search and not otherwise. In view of what has been discussed above, I am of the considered view that the additions of Rs.6,69,71,870/-, Rs.11,95,78,050/- and Rs.7,24,50,080/- made on account of share capital, share premium and share application respectively are not sustainable in the eyes of law. Hence, these are deleted.

5.10 Even on the merits also, I find that the addition made by the Assessing Officer is not sustainable.

5.11 I find that the appellant had submitted the details of share capital and share premium in course of the assessment proceedings vide its letter dated 18.02.2015. This fact has been noted by the Assessing Officer in para 11(a) of his order. The appellant could not submit the documents in support of share capital/premium as these were not readily traceable at the time of assessment proceedings. The appellant has further contended that it was not given proper and meaningful opportunity of being heard to produce the documents in support of share capital/premium. The appellant has submitted before me the following details/documents in support of the share capital /premium: - (i) Chart showing name & address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies. (ii) Copies of the appellant's statements with the following banks showing the receipt of share capita [/application money: - (a) HDFC Bank, Guwahati (b) HDFC Bank, Guwahati (c) Standard Chartered Bank, Guwahati (iii) Copies of Memorandum & Articles of Association and audited balance sheets in respect of corporate shareholders/applicants, bank statements etc. (iv) Copies of returns of allotment filed by the appellant in respect of shares allotted during the previous year relevant to the assessment year under appeal. A prayer under Rule 46A of the Income Tax Rules, 1961 was made by the appellant for admission of these documents as additional evidence. These documents were sent to the assessing officer while calling for his remand report. As stated above, the Assessing Officer has not objected to the admission of these additional evidences. Considering the facts

and circumstances of the case, I admit the additional evidences now produced by the appellant as these are required to be admitted for doing substantial justice in the matter.

5.12 The appellant has filed complete details of shareholder companies viz. - their names & addresses, No. of shares applied for/allotted, face value of shares, premium paid, mode of payment, their PAN No., CIN No., copies of Memorandum & Articles of Association, audited balance sheets and copy of return of allotment. A perusal of the bank statements filed by the appellant show that all the transaction have taken place through banking channels. On examination of these details/documents, I do not find any reason to doubt the identity of the shareholders, their credit worthiness and the genuineness of the transactions. It is settled law that once an assessee provides details regarding identity of the share applicants/holders, their permanent account numbers, bank details, balance sheets, A/D receipt in support of filing of income tax returns, copies of Memorandum & Articles of Association etc., the share application money/capital cannot be treated as unexplained in the hands of the assessee. This view has been taken in the following cases:

(i) Principal CIT. V/s. Soft-line Creations Pvt. Ltd. (2016) 387 ITR 636 (Delhi)

(ii) C.I.T. V/s. KamdhenuStel& Alloys Ltd. (2014) 361 ITR 220 (Delhi)

(iii) C.I.T. V/s. Lovely Exports Pvt. Ltd. (2009) 319 ITR (St.) 5 (S.C.)

(iv) C.I.T. V/s. Sameer Bio-Tech Pvt. Ltd. (2010) 325 ITR 294 (Delhi)

(v) C.I.T. V/s. Five Vision Promoters Pvt. Ltd. (2016) 380 ITR 289 (Delhi)

(vi) C.I.T. V/s. Dwarkadhish Investment Pvt. Ltd. (2011) 330 ITR 298 (Delhi)

(vii) C.I.T. V/s. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Delhi)

In view of the above also, the addition made in respect of share capital and share premium cannot be sustained. This ground of appeal is, therefore, allowed."

8. It is therefore clear that the CIT(A) has quashed the impugned assessment(s) on the ground that the department had not found or seized any incriminating material against the assessee during the course of search in issue. Various high court(s) in CIT vs Kabul Chawla (2016) 380 ITR 573 (del), PCIT vs. M/s Salasar Stock Broking Ltd in GA No. 1929/2016 ITAT No.264 of 2016 dated 24.08.2016 (Cal), PCIT vs Dipak J Panchal (2017) 397 ITR 153 (Guj) support the assessee's case qua the instant legal aspect. Mr. Singh has quoted E.N. Gopakumar vs. CIT (2017) 390 ITR 131 (Ker) and CIT vs. KesarwaniZardaBhander Income-tax Appeals No.270/2014 dated 06.09.2016 (Allahabad) that the purpose of the impugned sec. 153A proceedings is to assess total income of the searched taxpayer rather than that based on incriminating material only. Hon'ble jurisdictional high court has admittedly not adjudicated upon the instant legal issue as informed by the learned senior counsel as well as the department. We therefore quote hon'ble apex court's decision in CIT vs. M/s Vegetable Products Ltd. (1973) 88 ITR 192 (SC) that the view favouring the assessee / taxpayer has to be adopted in such a backdrop involving conflicting judicial opinions of various hon'ble high courts and accordingly hold that the CIT(A) has rightly quashed the impugned assessment since not based

on any incriminating material found or seized during the curse of search. That being the case, the Revenue's pleading on merits are renderedinfructuous. Its appeal ITA No. 69/Gau/2017 is rejected."

9.7 Considering the judicial precedents (supra) on the subject, and the decisions rendered by the coordinate Bench of this Tribunal at Guwahati, the settled law is clear that, in the case of unabated assessments of an assessee, no addition is permissible in the order u/s 153A unless it is based on any tangible & cogent incriminating material found during the course of search.

9.8 To this extent, even the Ld. DR, in the course of hearing, did not dispute this legal position. According to him however, the addition/s made by the AO in the AYs 2011-12 to 2015-16 was based on seized incriminating document, GCL-HD-1,which was the group-wise share holding pattern of the assessee found from the computerized books of account and hence, he submitted that the above discussed judicial principle was not applicable in the given facts of the present case. According to him, this piece of evidence extracted from the books of accounts was 'incriminating' enough to justify the additions made u/s 68 of the Act. He contended that the Ld. CIT(A) had erred in holding that GCL-HD-1 was not 'incriminating' in nature and therefore urged that the additions made by the AO be restored. Per contra, the Ld. AR supported the order of the Ld. CIT(A).

9.9 Heard both the parties. In light of the above settled position of law, which has not been disputed by either of the parties, the limited question for our consideration is, whether the contents of the seized document GCL-HD-1, referred to by the AO, was 'incriminating' in nature or not. Before we proceed to examine the contents of the seized document GCL-HD-1, it is first relevant to understand as to the meaning of the expression "incriminating material" or evidence. There can be several forms of incriminating material or evidence. In order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the information, document or material, whether tangible or intangible, is of such nature, which incriminates or militates against the person from whom it is found. Some common forms of incriminating material, *inter alia*, are for instance, where the search action u/s. 132 of the Act reveals information (oral or documentary) that the assets found

from the possession of the assessee in form of land, building, jewellery, deposits or other valuable assets etc. do not corroborate with his returned income (which includes earlier AY's return also) and/or there is a material difference in the actual valuation of such assets and the value declared in the books of accounts. Further, incriminating evidence may also constitute of information, tangible or intangible, which suggests or leads to an inference that the assessee is conducting transactions outside the regular books of account which are not disclosed to the Department. Incriminating material may also comprise of document or evidence found in search which demonstrates or proves that what is apparent is not real or what is real is not apparent. In other words, let us assume that an assessee has recorded transactions in his books or other documents maintained in the ordinary course of business, then it is discovered in the search from certain material or evidence which states the contrary.In such an event then, the discovered material or evidence can be held to be incriminating in nature, only when it is found to affect the veracity of the entries made in the books of the assessee and thus lead to the conclusion that the entries made regularly/maintained by the assessee do not represent true and correct state of affairs. Rather the evidence unearthed or found in the course of search would go on to show that the real transaction of the assessee was something different than what was recorded in the regular books and therefore the entries in the books did not represent true and correct state of affairs *i.e.* the assessee has undisclosed income/expense outside the books or that the assessee is conducting income earning activity outside the books of accounts or all the revenue earning activities are not disclosed to the tax authorities in the books regularly maintained or the returns filed with the authorities from time to time is not true etc. The nature of the evidence or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion but should be of such nature which would *prima facie* show that the real and true nature of transaction between the parties is something different from the one recorded in the books or documents maintained in ordinary course of business. In some instances, the information, document or evidence gathered in the course of search, may raise serious doubts or suspicion in relation to transaction reflected in regular books or documents maintained in the ordinary course of business, then also in such an event the AO is not permitted to straightaway treat such

material as 'incriminating' in nature unless the AO thereafter brings on record further corroborative material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs and rather that can be the starting point of inquiry to un-earth further material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs. Until these conditions are satisfied, it cannot be held that every seized material or document found in the course of search as incriminating in nature *qua* the assessee justifying the additions in unabated assessments. In other words, any and every seized material, which comes in AO's possession cannot be construed as 'incriminating material' straightaway. For instance, scribbling or rough notings found on loose papers cannot be straightaway classified as 'incriminating material' unless the AO establishes nexus or connect of such notings with unearthing of undisclosed income of the assessee. This nexus or connect has to be brought out in explicit terms with corroborative material or evidence which any prudent man properly instructed in law must be able to understand or correlate so as to justify the AO's inference of undisclosed income from such seized incriminating material. This exercise is therefore found to be essentially a question of fact.

9.10 Useful reference in this regard may be made to the decision of the Hon'ble Delhi High Court in the case of PCIT Vs Index Securities Ltd (86 taxmann.com 84). In the decided case, search was conducted u/s 132 of the Act upon Jagat Group wherein documents comprising of trial balance and balance sheet of the assessee company was found & seized by the Revenue. According to AO, since these documents pertained to the assessee, he proceeded to reopen the assessments of the assessee u/s 153C of the Act and added the share application monies received by the assessee u/s 68 of the Act. On appeal, the assessee challenged the validity of jurisdiction exercised by the AO u/s 153C of the Act on several grounds inter alia including that these seized documents cannot be said to be 'incriminating' to justify additions made u/s 68 of the Act in the unabated assessments of the assessee. The Hon'ble High Court found merit in this plea of the assessee and accordingly upheld the orders of the lower authorities deleting the impugned additions by observing as under:

> 32. In the present case, the two seized documents referred to in the Satisfaction Note in the case of each Assessee are the trial balance and balance sheet for a period of five months in 2010. In the first place, they do not relate to the AYs for which the assessments were reopened in the case of both assessees. Secondly, they cannot be said to be incriminating. Even for the AY to which they related, i.e. AY 2011-12, the AO finalised the assessment at the returned income qua each Assessee without making any additions on the basis of those documents. Consequently even the second essential requirement for assumption of jurisdiction under Section 153 C of the Act was not met in the case of the two Assessees.
>
> 33. This Court does not consider it necessary to examine the merits of the case as far as the deletions by the CIT (A) of the additions made by the AO under Section 153C of the Act are concerned. In any event, a detailed analysis has been undertaken by the CIT (A) of the materials produced by the Assessee which justified the deletion of such additions. Even on this score, no interference is warranted with the impugned order of the CIT (A).

9.11 We may, in this regard, gainfully refer to the decision of the Kolkata Bench of this Tribunal in the case of Daffodil VincomPvt Ltd Vs DCIT in ITA (SS) Nos. 95 & 96/Kol/2018 dated 28.06.2019. In the decided case the AO had added the share capital raised by the assessee in AYs 2011-12 & 2012-13 by way of unexplained cash credit u/s 68 of the Act in the assessments framed u/s 153A of the Act. Before the Tribunal the assessee contended that the addition u/s 68 was not based on any incriminating material found in the course of search and therefore the additions made in unabated assessments of AYs 2011-12 & 2012-13 were unsustainable. Per contra, the Revenue contended that the additions were made with reference to documents ID Marked SFA/01 and SFA/02 which were seized in the course of search and hence urged that the AO had rightly made the impugned addition. Upon examining the contents of the seized material referred to by the Revenue, this Tribunal noted that it comprised of bank account statements which formed part of the regular books of the assessee and these accounts were disclosed to the Department prior to the search. The Tribunal observed that indeed these documents were found during the course of search and seizure operation but for such reason alone these could not be held as incriminating in nature justifying the impugned addition. It was noted that all the entries of deposits and withdrawals of the said bank account statement formed part of the regular books of account and therefore these documents did not constitute incriminating evidence which could be linked to the impugned additions. The Tribunal therefore, in absence of any incriminating material found in the course of search, deleted the additions made in the orders u/s 153A in the unabated assessments for AY 2011-12 & AY 2012-13. For arriving

at this conclusion, this Tribunal relied on the following observations of the co-ordinate Bench in the case of M/s A ONE Infra Projects Pvt. Ltd Vs DCIT in IT(SS) A No. 91/Kol/2018.

> "8. In the present case, the addition of Rs.15,00,000/- by treating the share application money as unexplained cash credit under section 68 was made by the Assessing Officer in the assessment completed under section 153A of the Act on the basis of Bank account found during the course of search and since the said Bank account as well as the transactions reflected therein were duly disclosed by the assessee in its return of income originally filed for the year under consideration, we find ourselves in agreement with the contention of the ld. Counsel for the assessee that the same cannot be treated as incriminating material found during the course of search."

9.12 Similar issue also came up for consideration before the Delhi Bench of this Tribunal in the case of HBN Insurance Agencies Vs ACIT in ITA No. 3783/Del/2014 dated 23.12.2019. In this case the AO had added cash deposits made in bank account in the assessments framed u/s 153A of the Act. On appeal, the assessee contended that the additions made u/s 68 were not based on any incriminating material found in the course of search whereas the Revenue claimed that the balance sheet, bank statements etc. found and seized in the course of search constituted 'incriminating material' which justified the impugned addition. The Tribunal rejected the Revenue's argument and deleted the addition by observing as under:

> "In our considered opinion, the profit and loss account and balance sheet of the assessee company, by any stretch of imagination, cannot be considered as incriminating material. It is also not the case of the Revenue that the bank accounts were unearthed during the search operation. On these facts, the ratio laid down by the Hon'ble High Court of Delhi in the case of Kabul Chawla [supra], squarely apply wherein the Hon'ble High Court of Delhi held as under:
>
> ……..
>
> Respectfully following the ratio laid down by the Hon'ble High Court of Delhi and Hon'ble Supreme Court [supra], we are of the considered view that the assessment framed u/s 153A of the Act for both the Assessment Years under appeal deserves to be set aside. We, accordingly direct the Assessing Officer to delete the impugned additions from both the Assessment Years."

9.13 In view of the above, let us now examine the only material referred to by the AO in the order impugned to justify the addition i.e. GCL-HD-1.The image of this material is extracted below:

Name of the Company: Goldstone Cements Limited
Shareholding Pattern for the F.Y ended as on 31st March, 2017

Sl No	Name of Companies	No of Shares	Amounts of Share (In Rs)	Percentage of Holding (%)
UFM Group (MP Jain Group)				
1	Nirvana Enterprises Ltd	68250	6,82,500	0.11
2	Leonine Vanijiya Pvt Ltd	953645	95,36,450	1.53
3	Godavari Vincom Pvt Ltd	1818758	181,87,580	2.92
4	Hari Trafin Pvt Ltd	10819795	1081,97,950	17.39
5	Lalit Projects Private Ltd	40000	4,00,000	0.06
5	Bonus Dealers Pvt Ltd	1884126	188,41,260	3.03
6	Harakchand Investment Ltd	7935	79,350	0.01
7	Namokar Marketing Ltd.	80555	8,05,550	0.13
8	Sethi Oilfield & Services Pvt Ltd	31746	3,17,460	0.05
9	Arihant Sugar Limited	579062	57,90,620	0.93
10	Ufm Industries Ltd	1616661	161,66,610	2.60
11	Yogesh Jain (Huf)	71746	7,17,460	0.12
12	Yogesh Jain	51920	5,19,200	0.08
13	Vishal Jain	443399	44,33,990	0.71
14	Vishal Jain HUF	95692	9,56,920	0.15
15	Tara Rani Jain	228301	22,83,010	0.37
16	Sonam Jain	113973	11,39,730	0.18
17	Avishek Jain Huf	31746	3,17,460	0.05
18	Jyoti Jain	15873	1,58,730	0.03
19	Mahabir Prasad Jain (Huf)	294280	29,42,800	0.47
20	Mahabir Prasad Jain	166865	16,68,650	0.27
21	Avishek Jain	450847	45,08,470	0.725
22	Bakra Pratishthan	74603	7,46,030	0.1199
23	Msv Fiscal Services (P) Ltd	15873	1,58,730	0.0255
24	Gallore Suppliers Pvt Ltd.	36507	3,65,070	0.0587
25	Oleander Manufacturers	31746	3,17,460	0.0510
26	Orchid Finlease Pvt Ltd	1284236	128,42,360	2.0646
27	Shantidham Marketing Pvt. Ltd.	23376756	2337,67,560	37.5815
28	Lalit Poly Weave LLP	732199	73,21,990	1.1771
29	United Commercial Co.	291897	29,18,970	0.4693
30	Shree Lalit Cold Storage	272100	27,21,000	0.4374
31	Shetty Flour Mills	340100	34,01,000	0.5468
32	Shweta Jain	1040100	104,01,000	1.6721
	Total	473,61,292	4736,12,920	76.14
More Group				
1	Akash Buiscuits Pvt Ltd	135000	13,50,000	0.2170
2	Arjun Ply & Veneers Pvt Ltd	46030	4,60,300	0.0740
3	Consistent Construction Pvt Ltd	1281745	128,17,450	2.0606
4	Deepak Kumar More	5000	50,000	0.0080
5	Holyfield Vyapar Pvt Ltd.	173809	17,38,090	0.2794
6	Mayur Ply Industries Pvt. Ltd.	8825872	882,58,720	14.1889
7	Mayur Roller Flour Mills Pvt Ltd	890000	89,00,000	1.4308
8	Naurang Lal More	5000	50,000	0.0080
9	Orthodox Distributors Pvt. Ltd.	150000	15,00,000	0.2411
10	Padma Devi More	5000	50,000	0.0080
11	Prakash Kumar More	23805	2,38,050	0.0383
12	Prefer Infrastructure Pvt. Ltd.	100896	10,08,960	0.1622
13	Southern Resources & Holding Pvt. Ltd.	450000	45,00,000	0.7234
[illegible]	Sunny Fincom Pvt. Ltd.	182000	18,20,000	0.2928
[illegible]	[illegible]oti More	10000	1,00,000	0.0161
	Total	12284157	1228,41,570	19.75
Others				
1	Abhinandan Complex Pvt Ltd	315870	31,58,700	0.51
2	Dhawan Vinimay Pvt Ltd	158730	15,87,300	0.26
3	Improve Tradecom Pvt Ltd	809520	80,95,200	1.30
4	Remole Marketing Pvt Ltd	79365	7,93,650	0.13
5	Sanket Sales Pvt Ltd	476190	47,61,900	0.77
6	Transparent Tie Up Pvt Ltd	717460	71,74,600	1.15
7	Balentine Shylla	100	1,000	0.00
8	Bokstar Kurkalang	100	1,000	0.00
	Total	2557335	255,73,350	4.11
	Grand Total	62202784	6220,27,840	100.00

9.14 We note that the Ld. CIT(A) had examined in detail the contents of the above document and concluded that this document was not an incriminating document and that the it was a shareholding pattern of the assessee which was duly verifiable from the books of accounts and other secretarial records filed by the assessee with ROC, prior to the date of search. For the sake of convenience, the relevant findings recorded by the Ld. CIT(A) in this regard, at Pages 145 to 147 of his order, is extracted below:

“The Appellant has further submitted that the purported incriminating material/documents referred to and relied upon by the AO was in-fact a Secretarial Compliance Report which was filed by the Appellant, on 28/11/2017 with the Registrar of Companies along with Form MGT-7(i.e. the Annual Return of the Appellant filed in the ROC). It has been further submitted by the Appellant that the office of the Registrar of Companies is a Public Office and any document or return filed in such à public office is a "public document" and, thereby, upon filing of the document with the ROC, the same becomes unclassified and lies catapulted in public domain. As such any document or information which is available in the public office (read Registrar of Companies here) and public domain cannot be regarded or considered to be a secret/classified/concealed information or incriminating information hidden from public or any Authority. The Appellant thus submitted that not only was the said document a regular business record but the information regarding the shareholders of the company was already available in the public domain much prior to the date of search. The said statement formed a part of the secretarial records of the Appellant having no incriminating contents, whatsoever. It is further submitted by the Appellant that even the AO was unable to correlate or link as to how the contents of the aforesaid document led to unearthing of unexplained cash credit received in form of equity capital by the Appellant, more-so, when the purported document contained only the names of the shareholders and the details of the respective shareholdings.

The Appellant had, thus, contended that the aforesaid document, by any stretch of imagination, cannot be construed to be "incriminating" in nature. The Appellant has also submitted that the AO has also not specified as to how the aforesaid document was incriminating" in nature or as to how the aforesaid document formed the basis of the additions made under Section 68 of the Act. The Appellant finally submitted that the seized material identified as GCL-HD-1 was not incriminating at all but instead it was a regular business document duly recorded in the books of accounts as well as the corporate records and information contained therein was also available in the public office of the ROC. In order to bring home its contentions, the Appellant has also referred to rationes of certain judicial pronouncements which have been considered and would be referred at relevant places in this order.

Be that as it may be, in this case, a shareholding pattern of the Appellant company was purportedly discovered during the course of search and the AO had treated the aforesaid share holding pattern as an incriminating document. On the other hand, the Appellant has submitted that the aforesaid shareholding pattern of the Appellant is not an incriminating document.

In this regard, it is noted that the word "incriminating" does not find mention in Section 132 or in Section 153A or even in Section 153C of the Act. Nor has the said word been defined in the Act. Further, as per Section 153A of the Act, the jurisdiction of the AO was clearly to assess the true and correct "total income" of the Appellant, and, which was to be necessarily based on some material. Also, what is incriminating could itself be a matter of dispute. What is incriminating for one may not be so for the other, so that the same, imbued with subjectivity, cannot decide the jurisdictional aspect. Yet, again, the same, though relevant and incriminating, may get wholly or partly explained in assessment, i.e. on the basis of the additional materials gathered or called for or produced by the assessee itself or otherwise explained by it during assessment proceedings. At the same time, there could be times when some material maybe

found during the course of a search but the said material is not seized. So, can the same be declared as non-incriminating? These are questions essentially of fact and not of law.
As is evident, the aforesaid form MGT-7, along-with its annexure(s), showing the purported shareholding pattern of the Appellant was filed by the Appellant with ROC after duly affixing, the digital signature of the Managing Director of the Appellant and the aforesaid form was further verified and certified by a competent Company Secretary who had also, in turn, affixed her digital signatures. Further, an image of the relevant challan dated 28/11/2017 through which the aforesaid Form MGT-7 was filed by the Appellant with ROC is also reproduced hereunder for reference:
……..
It is noted, from a perusal of the aforesaid Form MGT-7 as well as the challan through which the aforesaid form was filed by the Appellant with ROC, that the said form was filed by the Appellant on 28/11/2017 and in the case of the Appellant the date of search was 12/12/2017. Thus, it is vivid and conspicuous that the aforesaid form containing the shareholding pattern of the Appellant was well in the public domain, accessible not only to the public authority with whom it was filed (i.e. ROC) but also to the other users of the financial statements as well as public at large. It is also noted that, in-case the aforesaid purported shareholding pattern of the Appellant was in any way incriminating, then in that case the Appellant, to incriminate itself, would have surely not furnished the aforesaid form/ details in the said manner with ROC. Rather it is worth appreciating that a competent Company Secretary in practice had duly affixed his/her digital signatures with the aforesaid form and this would only go on to prove that the purported details were duly verifiable from the books of accounts of the Appellant as well as other records and documents and registers maintained by the Appellant in accordance with the various provisions of the Companies Act,1956/Companies Act 2013. It is needless to state that in-case the purported shareholding pattern would have been incriminating or would not have been in consonance with the records and books of accounts of the Appellant, then, In that eventuality, a competent Company Secretary would not have risked his/her career by digitally certifying the aforesaid shareholding pattern, coined by the AO as an "incriminating" material.

It is noted that the material referred by the AO as "incriminating material" is not incriminating in nature as it is rather a declaration of the facts pertaining to the Appellant. The "shareholding pattern" merely contains the details of the persons who are holding the shares of the company. It is further noted, from the "shareholding pattern" alleged by the AO as "incriminating", that the aforesaid "shareholding pattern" indeed refers to the share capital of the Appellant organized by the respective groups and, in any case, the entries related to the receipt of share capital subscription as well as allotment of share capital was duly disclosed in the regular books of accounts of the Appellant and therefore are part of the regular records of the Appellant. It is further noted that the increase in the share capital was being reflected by the Appellant in the Appellant's audited Annul Accounts filed by the Appellant with the ROC and that the details of Increase in share capital subscription was also being reflected in the Income Tax Returns of the Appellant filed with the Department.

It is further noted that the Appellant was duly declaring the shareholding pattern (i.e. the names and number of share held by each shareholder) with ROC regularly and further the details of the shareholder were also being stated in the audited Annual Accounts of the Appellant in accordance with the requirements of the governing law. It is not in dispute thatthe shareholding

pattern of the Appellant was already available before the Assessing Officer along with the Return of Income. Therefore, by any stretch of the imagination, it cannot be said that the purported shareholding pattern fled by the Appellant is an incriminating material found during the search as claimed by the AO.

If the argument of the O to hold the "share-holding pattern" of the Appellant, as disclosed to the Registrar of Companies, as "incriminating" was to be accepted and allowed, then, in that eventuality, every single filing (read Form 2 or MGT-7 or Annual Return here) of such details of the share-holders with the Registrar of Companies would be "incriminating" in nature and render every single corporate amenable to a search and seizure operation and, thereafter, to assessments or re-assessments under Section 153A/153C of the Act. In other words, this would completely demolish the checks and balances imposed on various authorities under the Income Tax Act, 1961 and would open wide the flood-gates to anarchy wherein every single company could be searched and assessed/re-assessed simply on the basis of compliances made with Registrar of Companies. This, I believe, cannot be the intention of the Hon'ble Legislature and cannot be countenanced under the Rule of Law.

It is pertinent to note that it was only vide show-cause notice dated 27/12/2019 that the AO had confronted the Appellant with respect to his observation regarding the purported shareholding pattern and the relevant observation as contained in the show-cause, as aforesaid, is being reproduced hereunder:

> “In the electronic seized material marked as GCL-HD-1, it is seen that the capital in the company Goldstone Cements Ltd has been brought in by three major promoter groups, i.e., "UFM Group" headed by Sh. Mahabir Prasad Jain (Silchar), "More Group" headed by Sh. Prakash Kumar More and thirdly, Sh. Mahavir Prasad Jain of Guwahati. However, these individuals have not brought in all the capital in their own names but through a number of shell companies, The mention of group-wise share capital and share premium introduction into the assessee company is itself incriminating material that money was routed through multiple shell companies and invested into the assessee company."

The aforesaid show-cause notice was fixed for final hearing / opportunity on 28/12/2019 at 11:00 am. Notwithstanding the fact that the time permitted to the Appellant to respond was too short, it is noted that in this case the relevant assessment folders were also perused and it is evident that the AO had not conducted any enquiry qua the purported shareholding pattern from any of the aforesaid 3(three) groups. Thus, it is clear that in this case, the AO was swayed by merely coining the purported share holding pattern as an incriminating material and, thereafter, the AO resorted to additions under Section 68 of the Act.

In view of the above discussion and for the reasons stated above and respectfully following the judgments of various authorities, discussed above including those relied upon by the Appellant, it is held that the purported shareholding pattern of the Appellant was not an incriminating document and that the said shareholding pattern of the Appellant was duly verifiable from the books of accounts and other records, including returns and forms filed by the Appellant with ROC, prior to the date of search.”

9.15 Having examined the contents of GCL-HD-1, we find ourselves in agreement with the above findings of the Ld. CIT(A) that this document was a share-holding pattern document prepared by way of secretarial compliance report, which as the assessee has shown, was filed along with the company's annual return in Form MGT-7 on 28-11-2017 with the Registrar of Companies and was therefore available in the public domain (much prior to the date of search). It is found to contain the details of the name of shareholders, their amount and percentage of shareholdings. In our considered view, this document was a regular business document having no incriminating content whatsoever. Nothing whatsoever has been brought on record by the Revenue to correlate or link as to how the contents of this statement led to unearthing of unexplained cash credit by the AO and therefore the aforesaid factual finding of the Ld. CIT(A) remains uncontroverted. Hence, we do not see any reason to interfere with the order of the Ld. CIT(A) on this aspect and hold that the seized document GCL-HD-1 did not constitute incriminating material or evidence.

9.16 For the reasons discussed in the preceding paragraphs and the judicial precedents as discussed above, we hold that the seized document GCL-HD-1 referred by the AO for justifying the addition/s made u/s 68 of the Act in the orders impugned before us, did not constitute 'incriminating material' and therefore no addition/s was legally permissible in the assessments framed u/s 153A for the AYs 2011-12 to 2015-16 for which the assessment did not abate, when the search was conducted on 22-12-2017. The assessee thus succeeds on Question (B) as well. Accordingly Ground No. 3 of the Revenue's appeal for AYs 2011-12 to 2015-16 thus stands dismissed.

10. Now we proceed to adjudicate Question (C).

(C) Whether the Joint Commissioner of Income-tax, Guwahati had validly granted approval u/s 153D of the Act and therefore whether the consequent order passed u/s 153A/143(3) was sustainable in law or not ?

Ground No. 2 of Cross Objection for AY 2011-12
Ground No.1 of Cross Objection for AY 2012-13
Ground No.1 of Cross Objection for AY 2013-14

Ground No.1 of Cross Objection for AY 2014-15
Ground No.1 of Cross Objection for AY 2015-16
Ground No.1 of Cross Objection for AY 2017-18

10.1 In this ground, the assessee has challenged the validity of the assessments framed u/s 153A/143(3) of the Act for AYs 2011-12 to 2015-16 & 2017-18 on the ground that the approval u/s 153D of the Act was granted the Ld. JCIT/Addl. CIT in a casual and mechanical manner, which according to the assessee, rendered all the orders impugned before us to be a nullity.

10.2 It is noted that, the AO had issued a detailed questionnaire enquiring about the details of share capital only on 04-11-2019. The AO thereafter made enquiries from the shareholders by issue of notices u/s 133(6) of the Act dated 27-11-2019. The Ld. AR pointed out that, the Director of the assessee was personally examined u/s 131 of the Act on 28-11-2019. After making these necessary enquiries, the AO finally issued the show cause notice requiring the assessee to explain as to why the share application monies received in these years should not be assessed by way of unexplained cash credit on 27-12-2019, which was a Friday. In response, the appellant had furnished a detailed explanation along with supporting on Saturday, 28-12-2019. According to Ld. AR, the AO forwarded the draft assessment orders, each running in 44 pages, for all the seven assessment years together, seeking approval of the Joint Commissioner of Income-tax Range-3, Guwahati, only on 30-12-2019. The said Official gave his administrative approval u/s 153D of the Act vide letter No. F. No. JCIT/Range-3/Ghy/2019-20/2264 on the same date i.e. 30-12-2019. Upon obtaining the approval, the AO passed all the orders on the same date in the evening, all of which bear time stamps between 5.30 PM to 6 PM. Taking us through these sequence of events, the Ld. AR contended that it was impossible for the JCIT to have objectively examined draft orders along with the voluminous assessment folders in a few hours and therefore, according to him, the approval had been mechanically granted by the Jt. CIT u/s 153D of the Act. Relying on the decision rendered by the Mumbai Bench of this Tribunal in the case of Arch Pharmalabs Ltd vs ACIT [2021 4 (TMI) 533], he urged that since the

approval was granted by Jt.CIT without due application of mind, the same rendered the orders impugned before us to be non-est and a nullity. Per contra, the Ld. DR supported the order of the Ld. CIT(A) on this issue.

10.3 Having perused the material available before us in light of the judicial precedents on this subject, it is noted that the relevant copies of the letters addressed by the AO to the Jt.CIT and the letters of approval issued by the latter are not available on record, which are necessary to adjudicate this particular issue. Moreover, since we have already held the orders passed u/s 153A/143(3) of the Act and the additions made therein to be unsustainable in law for the reasons set out above, we are not inclined to return our findings with regard to this legal issue raised in the cross objections as the same has now become academic in nature. So this issue is left open without our finding on it. Accordingly, Ground No. 2 of all the cross objections are dismissed as infructuous.

11. Now we proceed to decide the issue (D).

(D) Whether the assessee had discharged its onus of establishing the identity and creditworthiness of the share subscribers and substantiating genuineness of the transactions and therefore whether the additions made u/s 68 of the Act on account of share application monies received by the appellant was tenable on facts and in law ?

Ground No. 1 & 2 of Revenue's appeal for AY 2011-12
Ground No. 1 & 2 of Revenue's appeal for AY 2012-13
Ground No. 1 & 2 of Revenue's appeal for AY 2013-14
Ground No. 1 & 2 of Revenue's appeal for AY 2014-15
Ground No. 1 & 2 of Revenue's appeal for AY 2015-16
Ground No. 1,2 & 3 of Revenue's appeal for AY 2017-18

11.1 It is noted that the reasoning/findings recorded by the AO in the orders for AYs 2011-12 to 2015-16 & 2017-18 for making addition/s u/s 68 of the Act is verbatim same. The AO had drawn up a common summary statement in all the assessment orders setting out the details of the share application monies received by the assessee in the AYs 2011-12

to 2015-16 & 2017-18, whose source of source, according to him was not properly explained. The statement giving investor wise and assessment year wise details of the addition/s made by the AO u/s 68 of the Act in these AYs are as follows:

A.Y.	Particulars	Amount
2011-12	Hari TrafinPvt Ltd	5,38,35,000
2012-13	Hari TrafinPvt Ltd	50,00,000
	Southern Resources & Holdings Pvt Ltd	2,51,00,000
2013-14	Prefer Infrastructure Pvt Ltd	6,12,00,000
	Capital Steel Trading Pvt Ltd	5,18,00,000
	Consistent Constructions Pvt Ltd	55,00,000
2014-15	Prefer Infrastructure Pvt Ltd	6,38,50,000
	Capital Steel Trading Pvt Ltd	8,88,00,000
	Consistent Constructions Pvt Ltd	2,44,49,990
	Transparent Tie Up Pvt Ltd	4,51,99,980
2015-16	Remote Marketing Pvt Ltd	49,99,995
	Bonus Dealers Pvt Ltd	1,30,00,000
2017-18	Orchid FinleasePvt Ltd	1,75,54,848
	Shantidham Marketing Pvt Ltd	32,94,00,000

11.2 The AO further referred to the statements of one alleged entry operator Shri S.K. Agarwal and reproduced extracts thereof, to conclude that, few of the above named shareholders were controlled and managed by these so-called entry operators, which according to him, further proved that the share application monies obtained from these few companies were in the nature of accommodation entries provided by them, to route assessee's own unaccounted monies. The AO also set out three flow charts, which according to him, were cash trails, in support of his conclusion that the share application monies received by the assessee represented its own routed unaccounted monies. The AO accordingly made additions u/s 68 of the Act on account of share capital received by the assessee.

11.3 At the time of hearing, Shri Dudhwewala pointed out that the AO had made independent enquiries from each of the shareholders, named in the above table, and all of them had complied with the AO's requisition u/s 133(6) of the Act. Taking us through the documents filed by them inter alia including IT acknowledgments, audited financial statements, bank statements etc., he pointed out that each of the shareholders held valid PAN and had sufficient own surplus funds and therefore, their identity & creditworthiness stood substantiated. He also showed that each of the shareholder/share applicants had provided the details of their respective sources of funds in the manner as desired by the AO, and therefore it could not be said that the proviso to Section 68 remained un-satisfied. He further submitted all the shareholders belonged to the same promoter group, who had invested in the capital of the assessee across several year/s and therefore the genuineness of the transactions and rationale for making investment also stood proved. He also furnished a summary chart giving the details of funds infused by these shareholders across several years/s to show that the AO himself had accepted the identity and creditworthiness of these same shareholders and the genuineness of the funds received from them in other years and/or partially accepted the genuineness of share capital received in the same year. Taking us through the relevant supporting documents, he urged that, when on same set of facts & circumstances, the AO had accepted these shareholders and their source of funds to be genuine in preceding/subsequent years and/or partially in the same year, the AO's action of disputing their genuineness only qua the additions made in the orders impugned before us, were ex-facie perverse and untenable. He further brought to our notice the assessment orders passed u/s 143(3) in the matters of some of these shareholders/share applicants to show that even the AOs of the shareholders also did not doubt or question the genuineness of the investments made by them in the assessee. He also pointed out that the Director/s of the assessee had also been personally examined u/s 131 of the Act who had affirmed the transactions with the shareholders. He took us through the statement of Director, Shri Vishal Jain, which is placed at Pages 199 to 206 of paper book, to show that nothing adverse came out from his examination, which suggested that the share capital/share application received from these entities were not genuine. The Ld. AR thereafter pointed out several defects and factual infirmities in the statement of Shri S.K. Agarwal, relied upon by the Revenue. He

further submitted that, inspite of the Director of the assessee being personally present before him, the AO never confronted him with the statements of the alleged entry operator but instead used it behind his back, which according to him, was impermissible in law. He further dissected each of the flow charts set out by the AO at Pages 17 to 20 of the assessment order and argued that none of them even remotely suggested that the alleged cash deposits found, that too in 5th or 6th source, represented unaccounted monies given by the assessee to these depositors. Shri Dudhwewala thus contended that all these facts considered cumulatively substantiated each of the three ingredients prescribed u/s 68 of the Act, and therefore urged that the addition impugned before us deserves to be deleted.

11.4 Per contra, the Ld. DR, Shri Pandey appearing on behalf of the Revenue relied on the order of the AO. He laid much emphasis on the statement of Shri S.K. Agarwal, which according to him, showed that the share application monies received by the assessee were in the nature of accommodation entries. He also relied on the flow charts, which according to him, showed that, in some instances, the AO was able to find the source of introduction of unaccounted monies of the assessee.

11.5 We have heard both the parties. Before examining the facts pertaining to each year, it is first relevant to understand the provision of Section 68 of the Act under which, the addition has been made by the AO. The said provision reads as under:

> "68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.
>
> Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—
>
> (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
>
> (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB)of section 10."

11.6 The phraseology of Section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case, the Legislative mandate is not in terms of the words 'shall' be charged to income-tax as the income of the assessee of that previous year. The Supreme Court while interpreting similar phraseology used in Section 69 of the Act has held that in creating the legal fiction the phraseology used therein employs the word "may" and not "shall". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as also held by the Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 237 ITR 570.

11.7 Hence, the initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68 of the Act. These are:

(i) identity of the investors;

(ii) their creditworthiness/investments; and

(iii) Genuineness of the transaction.

11.8 The Revenue’s exercise starts only when these three ingredients are established prima facie by the assessee and the Department is required to investigate into the facts presented by the assessee. As per the statutory provision of Sec 68 of the Act and the judicial procedure laid down by the Hon'ble Courts, it is clear that primarily the burden is on the assessee to discharge that the credit received by it is from the sources whose identity can be proved, the genuineness of the transaction and the creditworthiness of the creditor is also established by supporting relevant material/documentary evidences. If the assessee presents all these details during the assessment proceeding before the AO, the onus shifts to the AO to prove it wrong. If the AO accepts such evidences without finding anything wrong after enquiry, it can be said that assessee has discharged its onus. On the other hand if the AO

presents some contrary evidences and finds fault with the evidence submitted by the assessee, then the onus again shifts upon the assessee to rebut such contrary evidences.

11.9 The next aspect that is to be considered in this case is regarding the proviso to Section 68 of the Act, which was inserted by the Finance Act, 2012 putting further burden upon the assessees to substantiate the "source of source" of funds. We note that the proviso to Section 68 of the Act was inserted by the Finance Act, 2012 and it was made effective from 01-04-2013 i.e. AY 2013-14 and onwards. For this, reference may be made to the Memorandum as well as the Notes to Clauses of the Finance Bill, 2012 which makes explicitly clear that the Parliament had introduced the proviso to Section 68 of the Act prospectively and the same was made applicable only from AY 2013-14 and onwards. Useful reference in this regard may also be made to the judgment of the Full Bench of the Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Limited (367 ITR 466) where the Hon'ble Supreme Court categorically held that any legislation which imposes new obligation or new duties or a new levy shall have to be necessarily treated as prospective in nature.

11.10 We may also gainfully refer to the following decisions wherein the Hon'ble Constitutional Courts have held that the proviso to Section 68 of the Act, introduced by the Finance Act, 2012 with effect from 01-04-2013 will not have retrospective effect.

(i) CIT Vs Gagandeep Infrastructure Private Limited (394 ITR 680) [Bom HC]:

> "We find that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso…."

(ii) Pr. CIT vs. Apeak Infotech (88 Taxmann.com 695) [Bom HC]:

> Similarly, the amendment to section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject assessment year 2012-13 and cannot be invoked. It may be pointed out that this court in CIT v. Gagandeep Infrastructure (P.) Ltd. [2017] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 (Bom.) has while refusing to entertain a question with regard to section 68 of the Act has held that the proviso to section 68 of the Act introduced with effect from April 1, 2013 will not have retrospective effect and would be effective only from the assessment year 2013-14.

11.11 We thus find that the Ld. CIT(A) had rightly held that the proviso to Section 68 of the Act, introduced by the Finance Act, 2012,was applicable only from AY 2013-14 and onwards, and therefore the said proviso cannot be held applicable in AYs 2011-12& 2012-13. Meaning thereby, the assessee was under no obligation to substantiate the source of funds of its shareholders in AYs 2011-12& 2012-13 and to that extent, the AO's reasoning justifying the addition/s u/s 68 of the Act in these two AYs for want of explanation regarding "source of source" of funds is held to be erroneous.

11.12 As regards AYs 2013-14 to 2015-16 & 2017-18, we note that even though the Parliament has inserted the proviso in Section 68 by the Finance Act 2012 with effect from 01-04-2013, it should be borne in mind that, there is no change or amendment in the substantive provision of Section 68 of the Act in terms of which, if any sum is found by the AO to have been credited in the books of an assessee in the relevant financial year, then when called upon by him (AO) to explain the nature and source of the credit; and pursuant to which if the assessee fails to explain to the satisfaction of AO the nature and source of the credit, then the AO may treat the credit as income chargeable to tax. In other words, if the assessee is able to explain the nature and source of the credit to the satisfaction of AO, then the AO cannot use this provision to charge the credit appearing in the books of the assessee as income for the purpose of taxation under the Act. It is a settled position of law that 'satisfaction' contemplated in Section 68 of the Act is that of a reasonable prudent person (AO) and not that of an unreasonable person. So, when the AO calls upon the assessee to explain the nature and source of the credit found in assessee's books, then initial burden is on the assessee to bring material on record to show the nature and source of the credit i.e. identity, creditworthiness and genuineness of the transaction in question. Once an assessee is able to discharge its initial burden, then the onus shifts to the AO to disprove/rebut the

material adduced by the assessee to substantiate the nature and source of the credit transaction. And if the AO is not able to disprove/rebut the evidence brought on record by the assessee to prove the nature and source of the credit entry, then Section 68 of the Act cannot be applied by the AO. This position of law, we note remains the same even after the insertion of the proviso in Section 68 by the Finance Act, 2012, wherein additional requirement/burden is brought in by the Parliament in the cases of an assessee which is a corporate entity (not being a company in which the public are substantially interested) who claims to have received share application money, share capital, share premium or any such amount, then with effect from 01-04-2013, while giving the explanation to the AO regarding the nature and source of such sum credited in its books, the share subscribers have to offer the proof of 'source of source' of the share application money, share capital, share premium. In other words from AY 2013-14 and onwards, in the event if an assessee company, when called upon by the AO to explain the nature of the credit in its books, claims that the credit entry is share application money, share capital and share premium, then the additional requirement of law as per the proviso to Section 68 of the Act is that the share subscriber should be able to show the source from which it was able to invest in the assessee company. And if the 'source of source' of share application/capital/premium is shown to AO and if he is unable to rebut or disprove the same, then the deeming fiction set out in Section 68 will not apply.

11.13 Having regard to the above legal position, we now proceed to examine the facts of the case on hand. We note that the assessee, when called upon by the AO to explain the nature and source of the credit entries for the respective AYs, has discharged its burden by furnishing the necessary details inter alia including the name, PAN, address of the share subscribers, details of share application monies received, shares allotted along with bank statements evidencing that all payments were received through banking channel. After going through the details submitted the AO had made verification/enquiries u/s 133(6) of the Act from the shareholders, who in response had filed copies of their Income-tax Acknowledgments, financial statements, bank statements, explanation regarding source of their funds, copies of assessment orders etc. in support of their identity, creditworthiness and genuineness of these transactions. Thus, the inference that flows from the aforesaid

facts is that the initial burden imposed under section 68 of the Act stood discharged. The details filed by the assessee were cross verified by the AO from the shareholder and no infirmity was pointed out in the same, except making a bald statement that the "source of source" of funds of the application monies was not properly explained. Having perused the orders impugned before us in light of the documents furnished by the shareholders, we find that the AO only looked with suspicious the "source of source" brought to his notice and other than making a bald statement that "source of source" was not fully explained, the AO failed to bring any material or evidence on record, which suggested that the amount credited in the books of the assessee did not belong to the shareholder but that of the assessee. For this, let us now into the relevant facts of each investor/s which invested money in the company in the form of share capital along with share premium.

(A) M/s Hari TrafinPvt Ltd (AY 2011-12& 2012-13 - Rs.5,38,35,000/-& Rs.50,00,000/-)

(i) It is noted that during AY 2011-12, the assessee had received share application monies of Rs.20,65,00,000/-from M/s Hari TrafinPvt Ltd. Qua the application monies aggregating to Rs.15,26,65,000/-,it is interesting to note that the AO accepted the identity, creditworthiness & genuineness of the transaction but chose to dispute sum to the extent of only Rs.5,38,35,000/-.Similarly in AY 2012-13, the assessee had received share application of Rs.75,00,000/- from this shareholder and the AO partly accepted the genuineness of the same shareholder to the extent of Rs.25,00,000/- but added the remaining sum of Rs.50,00,000/- as unexplained cash credit. We find that the AO had not given any reasons for adopting such an action in relation to the same shareholder. Moreover the Ld. AR pointed out that the AO accepted as genuine the share application monies of Rs.50,00,000/-, Rs.99,99,670/-, Rs.2,19,99,915/- and Rs.22,32,00,000/- received by the assessee from the very same shareholder in the subsequent AYs 2013-14 to 2015-16 & 2017-18 respectively and that similar documentation were filed before him, to explain the nature & source of source of funds [similar documents were furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to AO's notice u/s 133(6) of the Act].We note that in all these subsequent AYs (supra), the identity and creditworthiness of the

same share subscriber and genuineness of the transactions with this shareholder have been accepted by the AO. Even the Ld. DR was unable to refute this fact. Hence, we hold that when on the same set of facts/documents, the AO had accepted the identity & creditworthiness of same shareholder and also the genuineness of the transactions in the subsequent years, the action of the AO in disputing the genuineness of the transaction with the same shareholder, that too partly, in the relevant AYs 2011-12 & 2012-13 is held to be conspicuously perverse.

(ii) We further note that at pages 365 – 609 of the paper book, the details of M/s. Hari Trafin Pvt. Ltd. are set out. This company is a registered Non-Banking Financial Company (NBFC) with the Reserve Bank of India (RBI) having CIN: U67120WB1995PTC068649. The AO had issued notice u/s 133(6) dated 27.11.2019 upon this shareholder requiring it to provide the following details of the shares subscribed in the assessee in the FYs 2008-09, 2010-11, 2011-12, 2013-14, 2014-15 & 2016-17:

With regard to the shares subscribed above, please furnish the following information/documents:

1. Details of sources of funds used to make the share application.
2. Dates of transfer of share application money with regard to each share allotment separately.
3. Supporting bank account statements for all your bank accounts, audited accounts including balance sheet and P&L Account, and ITR.
4. In case the source of funds is loan/share capital & premium, please furnish the name, PAN, address and bank account number of the lender/share applicant.
5. In case the source of funds is by sales/turnover please specify what was the item traded, please furnish the name, PAN, address and bank account number of each buyer, Please furnish purchase and sales ledgers, along with supporting bills/vouchers.
6. Shareholding pattern of the company for the financial years 2010-11 to 2017-18.
7. Name, Pan, Address of each directors date of appointment of each present director.

(iii) It is noted that, in response to the said notice, the shareholder company submitted its reply along with relevant evidences, copy of the letter is available at Pages 367-368 of the Paper-book. After perusing the details, we find that assessee had furnished all the requisitioned documents including audited financial statements, Income Tax returns,

extracts of bank account, details of source of funds as well as the share-holding pattern and director details for all the above FYs as sought for by the AO. The shareholder company is found to hold PAN-AAACH6716P and is assessed under the jurisdiction of ITO, Ward 12(3), Kolkata. On examination of the audited financial statements for FY 2010-11 & 2011-12 which is available at Pages 373-386 and Pages 415 to 426 of the Paper-book, it is noted that the company had reported turnover from trading in shares & securities and interest income which aggregated to Rs.1,16,72,041/-& Rs.1,70,93,016/-. The company also had sufficient funds to cover the cost of share capital invested in the assessee. It is noted from Schedule C - Investments for both the years, that the shareholder held investments in several blue chip securities listed on the stock exchange, which further fortifies their creditworthiness. Shri Dudhwewala thereafter invited our attention to the Schedule F - Loans & Advances of FYs 2010-11 & 2011-12 to show that this shareholder was the core investment company of UFM Group [promoter of the assessee] and it had advanced loans only to the entities, which belonged to the UFM Group. The bank statement of the shareholder is found placed in the paper book at Page 411-413&440-441, which reveals that there is no deposit of cash and all transfers have been made through proper banking channels. Although we note that there was no obligation for the assessee to discharge the source of source of funds in AYs 2011-12 & 2012-13, but it is noted that the shareholder had provided the explanation regarding the source of source of funds received by the assessee, in the exact manner as sought for by the AO in the notice u/s 133(6) of the Act, which is available at Page 414& 442 of the Paper book. It is noted from the explanation provided that the source of funds of the shareholder was primarily share application monies received by this company and/or loans received earlier, details of which along with name, PAN & address are found to be set out in Pages 414 & 442of the paper-book. Sri Dudhwewala has rightly pointed out that the AO did not doubt the 'source of source' of funds of the assessee but the 'source of source' of funds of the shareholder, M/s Hari TrafinPvt Ltd viz., the source of funds in the hands of M/s Godavari VincomPvt Ltd, which had repaid back the loan taken from M/s Hari TrafinPvt Ltd, which in turn, was paid to the assessee by way of share capital/share application monies. We do

countenance this action of AO for the reason that the assessee is not required to prove beyond the source of source of the receipt of funds in form of share capital/share application. Hence, we find that the source of source of funds in both AYs 2011-12 & 2012-13 stood explained.

(iv). It is also noted that shareholder was subjected to income-tax scrutiny u/s 143(3) of the Act in AYs 2012-13 and 2017-18, and during these years it had infused fresh sum of Rs.75,00,000/- and Rs.22,32,00,000/- towards the share capital of the assessee company. It is noted that in none of the assessment orders, copies of which are found placed at Pages 604-608 of paperbook, did the AO of the shareholder draw any adverse inference regarding the source of investments made by the shareholder in the assessee company. In the circumstances when the source of funds of the investor had been accepted to be genuine by the AO of the investor, we hold that the AO, in the present case, was unjustified in holding that the source of source of funds remained unexplained.

(v) Shri Dudhwewala pointed out that M/s Hari TrafinPvt Ltd was an associate concern and that the director of the said shareholder company and the assessee were common. He invited our attention to the statement of the director of the assessee, Shri Vishal Jain, who is also the director of this shareholder and whose statement was recorded under oath by the AO on 28-11-2019, copy of which is found placed at Pages 199 to 206 of the paperbook. Perusal of the statement shows that the director had also affirmed the transactions between M/s Hari TrafinPvt Ltd and the assessee and nothing adverse came out from his statement. We thus do not find any defect nor any falsity or infirmity in the documents submitted before the AO to substantiate the nature and source of the credit entries.

(vi) As regards the alleged cash trail of Rs.155 lacs in relation to M/s Hari TrafinPvt Ltd, which has been extracted at Pages 18& 19 of the impugned order, Shri Dudhewewala had rightly pointed out that, the cash trail to the extent of Rs.50 lacs viz.,

Rs.25 lacs, Rs.5 lacs and Rs.20 lacs received by the assessee from M/s. Hari TrafinPvt Ltd on 26.12.2012, 27.12.2012 & 28.12.2012 respectively, which pertained to FY 2012-13 i.e. AY 2013-14 and did not pertain to the relevant AYs 2011-12 & 2012-13 and therefore this particular trail was irrelevant in as much as the AO has accepted the genuineness of the share application monies received from M/s. Hari Trafin Pvt Ltd in AY 2013-14 and thereby himself disregarded this cash trail in the facts of the present case. With regard to the balance trail of Rs.105 lacs viz., Rs.80 lacs & Rs.25 lacs received by the assessee from M/s Hari TrafinPvt Ltd on 26.09.2010 and 16.11.2010, perusal of the flow chart, shows that the AO himself had traced the source of the monies credited to the assessee's account. The AO was not only able to identify the names of the payer companies but was also able to identify and establish the bank accounts of the source as well as source of source from which payments were received by the assessee. Both the source as well as the source of source is noted to be within the banking system only and there is no cash deposit found. It is true that there were cash deposits at the end of the 5th or 6th layer of the transaction, but we find merit in the Ld. AR, Shri Dudhwewala's contention that there was no evidence or material or nexus whatsoever brought on record by the AO to show that the cash deposits made in the accounts of the proprietary concerns represented unaccounted monies provided by the assessee. We thus find that the cash trails extracted by the AO cannot be sufficient to draw adverse inference against the assessee.

(vii) For the reasons discussed in the foregoing, it is held that the assessee had discharged its burden of substantiating the identity, creditworthiness and genuineness of the transaction involving receipt of share application monies from M/s Hari TrafinPvt Ltd. and the AO could not rebut or find any infirmity in the documents to substantiate the identity, creditworthiness and genuineness of the share transaction other than cash deposit at the 5th or 6th layer of transaction which also the AO failed to show any material/nexus of the assessee to the cash deposited, we hold that preponderance of probability is in favour of assessee and no adverse view can be taken against the assessee in the facts and circumstances discussed supra.

(B) Southern Resources & Holdings Pvt. Ltd. (AY 2012-13 – Rs.2,51,00,000)

(i) We note that at pages 610-645 of the paper book, the details of M/s. Southern Resources & Holdings Pvt Ltd are set out. From the reply furnished by this shareholder in response to the notice u/s 133(6), it is noted that this shareholder is a private limited company having PAN AAECS8302A and CIN: U65999WB1995PTC075240, which regularly filed its return of income and is assessed under the jurisdiction of ITO Ward 9(2), Kolkata. The shareholding pattern of the company shows that it also belonged to one of the promoter group i.e. More Group of the assessee. Hence, the rationale behind making of investment by this shareholder in the assessee stands explained. From the audited financial statements, which is found placed at Pages 630 to 641 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.34,18,34,638/- as on 31-03-2012 which corroborates with the investment of Rs.3,38,00,000/- made by the shareholder during the relevant year. The shareholder had also reported turnover from trading in shares & securities and interest income, which was in excess of Rs.493 lacs. Accordingly, the creditworthiness cannot be doubted. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date and is not struck-off or non-existent. To substantiate the source of source of funds, it is noted that the shareholder had furnished the bank statement for the relevant period, which is found placed at Page 613-619 of the Paper book. On examination of the same, it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The details of source of source of funds received by the assessee were provided by the shareholder, in the manner as requisitioned in the notice u/s 133(6) of the Act viz., name, PAN & address of the payer i.e. the share applicant/lender/ borrower who had paid the sum, along with the specified dates of receipt and the corresponding bank statements evidencing bank account details of the said payers, which is available at Page 611-612 of the Paper book. We thus find merit in the contention of the Ld. AR that, when all the details regarding source of source of funds, in the manner as desired by the AO, had been provided by the shareholder, then

the AO's allegation that the genuineness of the source of source of funds was not established, was unjustified. It is noted that the source of funds of the shareholder was primarily refund of loans advanced earlier and/or sale of investment holdings, details of which are available on record. Having regard to the aforesaid facts, we find that not only did the assessee discharge its burden of proving the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(ii) We further note that, this shareholder had paid aggregate sum of Rs.3,38,00,000/- towards share capital of the assessee in the relevant AY 2012-13, and the AO had accepted the identity & creditworthiness of this shareholder and genuineness of the transactions to the extent of Rs.87,00,000/- but doubted the genuineness of balance sum of Rs.2,51,00,000/-. It is noted that similar documentation in as much as even the explanation regarding source of source of funds for the entire sum of Rs.3,38,00,000/- was furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to the AO's notice u/s 133(6) of the Act. We find that no reasons were given by the AO for adopting two different yardsticks in relation to the same shareholder. Even the Ld. CIT, DR was unable to shed light on this cherry picking action of the AO. In such a scenario, when the A.O is found to be satisfied with the identity, creditworthiness and genuineness of the shareholder by his action of accepting the share application of Rs.87,00,000/- paid by them, his action of not accepting the balance sum of Rs.2,51,00,000/-, is held to be not tenable/un-reasonable/irrational without any cogent evidence/material to disprove or hold otherwise.

(C) Consistent Constructions Pvt. Ltd.(AY 2013-14& 2014-15 – Rs.55,00,000/- & Rs.2,49,49,990/-)

(i) We note that at pages 646-681 of the paper book, the details of M/s. Consistent Constructions Pvt. Ltd. have been set out. From the reply furnished by this shareholder in response to the notice u/s 133(6), it is noted that this shareholder is a private limited company having PAN AADCC0716H and CIN: U45400WB2007PTC115770, which regularly files its return of income and is assessed under the jurisdiction of ITO Ward

9(3), Kolkata. The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. The director of the shareholder is also the promoter-director of the assessee. Hence, the rationale behind making of investment made by this shareholder stands explained. From the audited financial statements, which is available at Pages 667 to 676 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.14,19,91,122/- which corroborates with the investment made by the shareholder. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date.

(ii) As regards the source of source of funds, Sri Dudhwewala pointed out that not only the AO's averment disputing its genuineness viz., by stating that, *sale proceeds of shares were not established*, was factually erroneous but accordingly to him, the same was a sweeping remark in as much as AO did not point out the specific instance/item whose genuineness was not established. It is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 651 to 666 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The shareholder, also provided the details of source of source of funds in the manner as desired by the AO in the notice u/s 133(6) of the Act, which is found placed at Pages 649 to 650 of the Paper book. Perusal of the same shows that the immediate source of funds of the shareholder was primarily refund of advances made earlier (proceeds from sale of investments was comparatively lower), details of which along with name, PAN & address are found to be set out in Pages 649 to 650 of the paperbook. Moreover, even in relation to the proceeds received on sale of investments, which were invested by this shareholder in the assessee company, it is noted that complete details of the respective buyer/s were provided by the shareholder, in the manner as sought for by the AO in the notice u/s 133(6) of the Act. Neither the AO nor the Ld. CIT, DR was able to pin-point out as to what was the defect therein based on which these sale proceeds had been held to be non-genuine or for that matter which detail/document had not been submitted by the shareholder, which otherwise would have discharged the genuineness of the source

of source of funds. Having regard to the aforesaid facts therefore, we find that not only did the assessee discharge its burden of proving the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(ii) It was also brought to our notice that this shareholder had originally paid share application monies to the tune of Rs.4,00,00,000/- in the preceding AY 2012-13. In the income-tax assessment of the assessee for AY 2012-13, the AO had accepted the identity and creditworthiness of this shareholder and also the genuineness of the source of source of funds of Rs.4,00,00,000/-received by the assessee from this shareholder. It is observed that, the shares were not allotted in AY 2012-13and therefore the shareholder was refunded back the entire sum of Rs.4,00,00,000/- in AY 2013-14. Thereafter, the shareholder had again re-infused the sums of Rs.55,00,000/- & Rs.2,49,49,990/- in the assessee company in AYs 2013-14 & 2014-15. Having regard to these background facts, we find that when the source of source in respect of the original payment of Rs.4,00,00,000/- had been accepted by the AO, then its subsequent re-payment and receipt back by the assessee again in AYs 2013-14 & 2014-15 could not be doubted or be said to be unexplained. This action of AO thus cannot be countenanced being irrational. So, we are of the view that assessee has discharged its primary burden to establish the nature and source of source of credit and there being no evidence or material to rebut the same in the hands of AO, we are inclined to accept the identity, creditworthiness and genuineness of the share transaction.

(D) Prefer Infrastructure Pvt. Ltd. (AY 2013-14& 2014-15 – Rs.6,12,00,000/- &Rs.6,38,50,000/-)

(i) We find from pages 682-709 of the paper book, the details of M/s. Prefer Infrastructure Pvt. Ltd. are set out. From the reply furnished by this shareholder in response to the notice of AO u/s 133(6) of the Act, it is noted that this shareholder is a private limited company having PAN AAECP2657B and CIN: U45400WB2007PTC115882, which regularly files its return of income.The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. The director of the shareholder is also the

promoter-director of the assessee. Hence, the rationale behind making of investment made by this shareholder cannot be doubted. From the audited financial statements, which is found placed at Pages 698 to 707 of the paperbook, it reveals that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.1253 lacs which is sufficient to make the investment. From a perusal of the MCA Master Data of the company it is evident that the company is 'Active' till date. As regards the source of source of funds, it is noted that the shareholder company had placed on record the copy of the bank statement for the relevant period, which is found placed at Page 688 to 697 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The shareholder is noted to have also provided the details of source of source of funds in the exact manner as sought for in the notice of AO u/s 133(6) of the Act, which is found placed at Pages 685 to 687 of the Paper book. Perusal of the same shows that the source of funds of the shareholder was primarily refund of loans advanced earlier and/or sale of investment holdings, details of which are available on record. Neither the AO nor the Ld. CIT, DR was able to pin-point out as to what was the defect therein based on which these source of source of funds had been sweepingly held to be non-genuine or for that matter which detail/document had not been submitted by the shareholder, which otherwise would have discharged the genuineness of the source of source of funds. We are thus unable to countenance the action of the AO. Having regard to the aforesaid facts, we find that not only did the assessee discharge its burden of proving the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained. So without any specific infirmity being pointed out by the AO, no adverse view ought to have been taken against this share transaction.

(E) Captain Steel Trading Pvt. Ltd. (AY 2013-14&2014-15 –Rs.5,18,00,000/- & Rs.8,88,00,000/-)

(i) We note from pages 710-735of the paper book, the details of M/s. Captain Steel Trading Pvt. Ltd. which are set out therein. From the reply furnished by this shareholder in response to the notice of AO u/s 133(6), it is noted that this shareholder is a private limited company having PAN AADCC0752B and CIN: U51109WB2007PTC115933, which regularly files its return of income. The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. The director of the shareholder is also the promoter-director of the assessee. Hence, the rationale behind making of investment made by this shareholder need not be doubted. From the audited financial statements, which is found placed at Pages 724 to 733 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.1420.83 lacs which corroborates with the investment made by the shareholder. The MCA Master Data of the company, which is also available on record from which it is evident that the company is 'Active' till date. As regards the source of source of funds, it is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 718 to 723 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The shareholder, also provided the details of source of source of funds in the exact manner as sought for in the notice of AO u/s 133(6) of the Act, which is found placed at Pages 713 to 717 of the Paper book. Perusal of the same shows that the source of funds of the shareholder was primarily refund of loans advanced earlier and/or sale of investment holdings, details of which are available on record. Both the AO and even the Ld. CIT, DR was unable to pin-point out the specific defect in the details provided by the shareholder qua its source of funds, for which it was being alleged to be non-genuine. We are thus unable to countenance the action of the AO. Having regard to the aforesaid facts, we find that not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(ii) As regards the alleged cash trail of Rs.35 lacs in relation to M/s Captain Steel Trading Pvt Ltd., a perusal of the flow chart, shows that the AO himself had identified

the source of the monies credited to the assessee's account. The AO was not only able to identify the names of the payer companies but was also able to identify and establish the bank accounts of the source as well as source of source from which payments were received by the assessee. Both the source as well as the source of source was within the banking system only and there is no cash deposit found. It is true that there were cash deposits at the end of the 5th or 6th layer of the transaction, but we find that there was no evidence/material whatsoever brought on record by the AO to show that the cash deposits made in the accounts of the proprietary concerns represented unaccounted monies provided by the assessee and even the AO failed to bring any nexus with the assessee with that of the proprietary concern. In the absence of any adverse material based on the preponderance of probability, we are of the view that assessee has discharged its burden. We thus find that nothing turns around because of the cash trail unless the AO brings on record that the cash deposited was that of assessee's or the depositor had nexus with the assessee. Since there is no infirmity in the documents produced by the assessee to prove the nature and source of credit entry no adverse view is legally sustainable.

(F) Transparent Tie Up Pvt. Ltd. (AY 2014-15- Rs.4,51,99,980/-)

(i) We note from pages 736-760 of the paper book, the details of M/s. Transparent Tie Up Pvt. Ltd. are set out. Perusal of the reply furnished by this shareholder in response to the notice of the AO u/s 133(6) of the Act, shows that this shareholder is a private limited company having PAN AACCT7185L and CIN: U52100WB2007PTC116798, which regularly filed its return of income and is assessed under the jurisdiction of ITO, Ward 9(1), Kolkata. The shareholding pattern of the company shows that it belonged to one of the promoter group i.e. More Group of the assessee. Hence, the rationale behind making of investment made by this shareholder need not be doubted. From the audited financial statements, which is found placed at Pages 724 to 733 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.1807 lacs which corroborates with the investment made by the shareholder. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date. As regards the source of source

of funds, it is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 756 to 758 of the Paper book from which the source of source of funds are verifiable. Having regard to the aforesaid facts, we find that not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

(G) Remote Marketing Pvt. Ltd. (AY 2015-16 – Rs.49,99,995)

(i) We note from pages 761-802 of the paper book, the details of M/s. Remote Marketing Pvt. Ltd. are set out. Perusal of the reply furnished by this shareholder in response to the notice of AO u/s 133(6) of the Act, shows that this shareholder is a private limited company having PAN AADCR1140G and CIN: U51109WB2005PTC102287, which regularly filed its return of income and is assessed under the jurisdiction of ITO, Ward 4(1), Kolkata. In the last return of income filed for AY 2019-20, the shareholder had declared total income of Rs.18.45 lacs. From the audited financial statements, which is found placed at Pages 772 to 782 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.682.79 lacs which more than sufficient to make investment with the shareholder. The MCA Master Data of the company is also available on record from which it is evident that the company is 'Active' till date. As regards the source of source of funds, it is noted that the company had placed on record the copy of the bank statement for the relevant period at Page 801 to 802 of the Paper book along with statement giving explanation regarding the source of source of funds. It is noted that the shareholder had sold the investments held in M/s.Sesa International Ltd and out of these proceeds it had re-invested in the capital of assessee company. The shareholder has provided copy of Form-2 of M/s. Sesa International Ltd, which is available at Pages 764 to 769 of paper book, to substantiate its investment holdings in the shares of this company. The copy of sale bill evidencing sale of shares is found to be available at Page 763 of paper book. Having regard to the aforesaid facts, we find that

not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained. The AO has not been able to rebut the evidence/material placed by the assessee to prove the identity creditworthiness and genuineness of the share transaction. So, in the absence of any material to the contrary applying the principle of preponderance of probability the assessee's claim needs to be accepted.

(H) Bonus Dealers Pvt. Ltd. (AY 2015-16 – Rs.1,30,00,000/-)

(i) It is noted that during AY 2015-16, the assessee had received share application monies of Rs.3,02,00,000/- from M/s Bonus Dealers Pvt Ltd. qua the application monies aggregating to Rs.1,72,00,000/-, and the AO has accepted the identity, creditworthiness & genuineness of the transaction but chose to dispute sum to the extent of only Rs.1,30,00,000/-. It is noted that similar documentation in as much as even the explanation regarding source of source of funds for the entire sum of Rs.3,02,00,000/- was furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to the AO's notice u/s 133(6) of the Act. When this is the position, we wonder as to how the AO could believe part of the share transaction and disbelieve other part. We find that AO has not adduced any material to justify such a stand with the same shareholder. Even the Ld. CIT, DR was unable toshed light on this apparent irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the identity, creditworthiness and genuineness of the shareholder by his action of accepting the share application to the tune of Rs.1,72,00,000/- paid by them, his action of not accepting the balance sum of Rs.1,30,00,000/-, is held to be arbitrary/un-reasonable/irrational.

(ii) Further, we note that at pages 803-966 of the paper book, the details of M/s. Bonus Dealers Pvt. Ltd. are given therein. This company is having PAN: AAECB2227R and having CIN : U52390AS2010PTC01704. It is noted that, in response to the notice issued by the AO u/s 133(6) of the Act, the company submitted its reply along with relevant evidences, copy of the letter is found placed at Pages 806 & 807 of the Paperbook. After perusing the details, it is noted that assessee had furnished all the

requisitioned documents including audited financial statements, Income Tax returns, extracts of bank account, details of source of funds as well as the share-holding pattern and director details as sought for by the AO. On examination of the audited financial statements for FY 2014-15 which is found placed at Pages 827-859 of the Paperbook, it is noted that the company had sufficient funds to the tune of Rs.16,48,61,838/- to cover the cost of share capital invested in the assessee. The bank statement of the shareholder also available in the paper book at Page 817-826,reveals that there is no deposit of cash and all transfer have been made through proper banking channels. It is noted that the shareholder had provided the explanation regarding the source of source of funds received by the assessee, in the exact manner as sought for by the AO in the notice u/s 133(6) of the Act, which is found placed at Page 808-816 of the Paper book. Upon examining the same, it is noted from the explanation provided that the source of funds of the shareholder was primarily the share of profit received from its partnership firm M/s LalitPolyweave LLP, which belonged to the UFM Group. It is further noted that some of the sources of funds were the proceeds received on redemption of fixed deposits held with banks. Even where the source of funds were the proceeds received on sale of investment holdings, it is noted that the shareholder had provided complete details along with name, PAN & address of the payer. We thus find that even the source of source of funds stood explained.

(iii). It is also noted that shareholder was subjected to income-tax scrutiny u/s 143(3) of the Act in 2017-18, a copy of the assessment order is found placed at Pages 951 to 956 of the Paper book. This proves the genuine and bona fide existence of the shareholder and also establishes the veracity of the investments held by it in the assessee company.

(iv). Shri Dudhewewalapointed out that M/s Bonus DealersPvt Ltd was an associate concern and that the director of the said shareholder company and the assessee were common. He invited our attention to the details of the directors of the shareholder, which is available at Page 966 of the paper book, from which it is noted that Shri Vishal Jain, who is also the director of the assessee. Perusal of the statement of Shri Vishal

Jain, which was recorded under oath by the AO on 28-11-2019, shows that the director had also affirmed the transactions between M/s Bonus DealersPvt Ltd and the assessee and nothing adverse came out from his statement. And the AO could not find any defect nor falsity or any infirmity in the documents submitted before the AO.

(v). In the light of the aforesaid discussion, it is held that the assessee had discharged its burden of substantiating the identity, creditworthiness and genuineness of the transaction involving receipt of share application monies from M/s Bonus Dealers Pvt Ltd. and also the source of source of funds. And the AO could neither rebut the same nor bring any contrary evidence to shift the onus. So, we accept the share transaction with this share holder.

(I) OrchidFinlease Pvt. Ltd. (AY 2017-18 – Rs.1,75,54,848)

(i) We note from pages 1057-1144 of the paper book, the details of M/s. Orchid FinleasePvt Ltd are set out. Perusal of the reply furnished by this shareholder in response to the notice issued u/s 133(6) of the Act, shows that the shareholder is a registered non banking finance company (NBFC) holding certificate of registration No. B.08.00108, having PAN AABCG9438Q and CIN: U65929AS1996PTC004898, which regularly filed its return of income and is assessed under the jurisdiction of ITO Ward 3(1), Guwahati. It is noted that this shareholder had actually advanced loan to the assessee of Rs.2,55,00,000/- in the earlier FY 2015-16 pursuant to a loan cum share purchase agreement dated 11-01-2016. Copy of the said agreement and board resolution approving the same is found placed at Pages 1065 to 1069 of the paperbook. We further note that the said company has provided detailed break-up of loans advanced along with the bank statement evidencing the advancement of loan, copy of which is enclosed at Pages 1070 to 1073 of the paperbook. It is noted that the net owned funds of the company was in excess of Rs.2611 lacs and therefore it is evident that the company had sufficient networth to justify the loan advanced to the assessee. The details of source of source of loan advanced to the assessee was also provided by the shareholder, which is found placed at Pages 1060-1062 & 1074-1080 of the Paper book. It is noted that the

source of funds of the shareholder for advancement of such loan was mainly the proceeds of Rs.1,95,50,000/- received on sale of investment holdings in M/s VRC Technologies Pvt. and M/s Parasmani Planning & Development Pvt. Ltd. to M/s Darkwell Dealers Pvt. Ltd., details of which along with copies of sale bills are found placed at Pages 1074-1080 of the paperbook.

(ii) In the relevant FY 2016-17, M/s Orchid Finlease Pvt. Ltd. did not pay any fresh sum to the assessee company. From the documents available on record, it is noted that the assessee vide Board Resolution dated 04-05-2016 had exercised their right available under the loan agreement to convert the unsecured loan into equity shares. Having regard to the fair market value of the shares determined in accordance with Rule 11UA, the company allotted 4,04,761 equity shares at Rs.63 per share to this shareholder. Copy of the allotment letters issued by the assessee are found placed at Pages 1063 & 1064 of the Paperbook. Having regard to these facts, we therefore note that there was no fresh credit received by the assessee in the relevant AY 2017-18 from M/s Orchid Finlease Pvt. Ltd. It was a case where the unsecured loan has been converted into equity capital by way of journal entry.In absence of there being any fresh credit received during the relevant year, the provisions of Section 68 of the Act could not have been invoked or applied in AY 2017-18. For this, we find support in the decisions of the Hon'ble Calcutta High Court in the case of Jatia Investment & Company vs CIT (206 ITR 718) and Hon'ble Madhya Pradesh High Court in the case of VISP Pvt. Ltd. (265 ITR 202). We therefore hold that the Ld. CIT(A) had rightly held that no addition was warranted u/s 68 of the Act in relation to the conversion of loan into equity to the extent of Rs.1,75,54,848/- in AY 2017-18.

(iii). Even otherwise, it is noted that the explanation regarding source of source of funds to the extent of Rs.1,95,50,000/- was payments received from M/s Darkwell Dealers Pvt. Ltd. It is noted that the AO chose to believe this source of source to the extent of Rs.19,95,152/-and disbelieved sum of Rs.1,75,54,848/-.We find that no reasons were given by the AO for believing some sums and disbelieving some sums in relation to the same source of source of funds. Even the Ld. CIT, DR was unable to throw light on this

apparent irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the source of source to the extent of Rs.19,95,152/- paid by them, his action of not accepting the balance sum of Rs.1,75,54,848/- cannot be countenanced.

(iv) Perusal of alleged cash trail prepared by the AO in relation to M/s Orchid FinleasePvt Ltd, shows that it was the source of source of M/s Darkwell Dealers Pvt. Ltd. where cash deposits in the account of the payers to the extent of Rs.97,67,000/- were found. Hence, going by this chart, suspicion, if any, gets raised qua the source of source of M/s Darkwell Dealers Pvt. Ltd and not the assessee. There was no evidence whatsoever brought on record by the AO to show that the cash deposits made in the accounts of the proprietary concerns represented unaccounted monies provided by the assessee or any evidence regarding nexus with the assessee. We thus find that this cash trail extracted by the AO in his order raises doubt but due to lack of any adverse material to connect the assessee with the proprietary concern, no adverse view can be taken against the assessee.

(v) For the reasons discussed in the foregoing, it is held that the assessee had discharged its onus of substantiating the identity, creditworthiness and genuineness of the transaction with M/s Orchid FinleasePvt Ltd. and also the source of source of funds.

(J) Shantidham Marketing Pvt. Ltd. (AY 2017-18 – Rs.32,94,00,000)

(i) We note from pages 1145-1266 of the paper book, the details of M/s. Shantidham Marketing Pvt. Ltd. are set out. It is observed that the AO had issued notice u/s 133(6) dated 27.11.2019 upon this shareholder requisitioning several details and inter alia requiring it to substantiate its source of funds out of which it paid the share application monies to the assessee. Perusal of their response reveals that the shareholder belongs to the UFM Group of companies (promoter of the assessee) and is engaged in the business of promoting and marketing of cement and trading of poly weave bags. The shareholder is a GST registered entity having PAN AAOCS2874F and CIN: U51909AS2010PTC012266, which regularly filed its return of income and is assessed under the jurisdiction of ITO, Ward 2(1), Kolkata. The shareholder had explained the

strategic business objective behind infusion of share capital into the assessee company, for the reason that it was in the last leg of completion and commissioning of its cement plant. It is noted that the investment was made at the fair market value computed in terms of Rule 11UA of the Rules. Copy of the valuation report is found placed at Pages 1255 to 1264 of the paperbook. Therefore, the justification regarding share premium stands fulfilled.

(ii) It is noted that during AY 2017-18, the assessee had received share application monies of Rs.55,62,50,814/- from M/s Shantidham Marketing Pvt Ltd. qua the application monies aggregating to Rs.22,68,50,814/-, the AO has accepted the identity, creditworthiness & genuineness of the transaction but chose to dispute sum to the extent of Rs.32,94,00,000/-. We find that no reasons were ascribed by the AO for believing some sums are correct and disbelieving some part of share transactions from the same shareholder, particularly when similar documentation in as much as even the explanation regarding source of source of funds were furnished by the shareholder in the same manner as sought for by the AO under the cover of the same letter furnished in response to AO's notice u/s 133(6) of the Act. The AO has instead made a bald assertion that some of the source of source of funds remained unexplained without giving any cogent basis or reasoning whatsoever. When confronted with this fact, even the Ld. CIT, DR was unable to explain this irrational action of the AO. In such a scenario, when the A.O is found to be satisfied with the identity, creditworthiness and genuineness of the shareholder by his action of accepting the share application of Rs.22,68,50,814/- paid by them, his action of not accepting the balance sum of Rs.32,94,00,000/-, is held to be un tenable/un-reasonable/irrational being arbitrary.

(iii) From the audited financial statements furnished, which are found placed at Pages 1180 to 1195 of the paperbook, it is noted that the company was having sufficient own funds in the form of capital and free reserves to the tune of Rs.46,42,76,005/- as on 31-03-2017 which is sufficient to cover the cost of investments made by the shareholder during the relevant year. As regards the source of source of funds, it is noted that the

company had placed on record the copy of the bank statement for the relevant period at Page 1161 to 1179 of the Paper book. On examination of the bank statement it is taken note that there is no deposit of cash and all transfer have been made through proper banking channels. The details of source of source of funds received by the assessee were also provided by the shareholder, in the manner as prescribed in the notice u/s 133(6) of the Act, which is found placed at Page 1157 to 1160 & 1245 to 1254 of the Paper book. It is noted that the source of funds of the shareholder was primarily deposits from channel partners and/or sale of investment holdings, details of which along with name, PAN & address are found placed at Pages 1245 to 1254 of the paperbook.

(iv) Shri Dudhewewala pointed out that M/s Shantidham MarketingPvt Ltd was an associate concern and that the director of the said shareholder company and the assessee were common. He invited our attention to the details of the directors of the shareholder, which is available at Page 1155 of the paper book, from which it is noted that Shri Vishal Jain, who is also the director of the assessee. Perusal of the statement of Shri Vishal Jain, which was recorded under oath by the AO on 28-11-2019, shows that the director had also affirmed the transactions between M/s Shantidham MarketingPvt Ltd and the assessee and nothing adverse came out from his statement. When enquired about the source of funds of the shareholders, the Director stated that the shareholder was engaged in the business of marketing of clinkers and cement in North Bengal, Bhutan and Nepal and that the names, addresses and PANs of the payers had been provided to the AO so that the AO can make enquiries from the respective source of sources. It is also noted that upon insistence of the AO, the Director collated and furnished various supporting documents viz. which includes invoices, bank statements as well as confirmations from the payers of the shareholders in support of source of source of funds under the cover of his letter dated 21.12.2019, which is found placed at Pages 1267 to 1507 of the paperbook. Having perused the same, we find that the assessee had furnished relevant evidences in support of the source of source of funds and that even the AO was unable to point out any defect nor any falsity or infirmity in the documents submitted before him.

(v) It is also noted that this shareholder was also subjected to income-tax scrutiny u/s 143(3) of the Act in AY 2017-18. Perusal of the assessment order, copy of which is at Pages 1265-1266 of paper book, shows that the AO of the shareholder did not draw any adverse inference regarding the source of investments made by the shareholder in the assessee company. In the circumstances when the source of funds of the investor had been accepted to be genuine by the AO of the investor, we hold that the AO, in the present case, was unjustified in holding that the source of source of funds remained unexplained. Having regard to the aforesaid facts, we find that not only did the assessee discharge its onus of establishing the identity, creditworthiness and genuineness of the transaction but even the source of source of funds was explained.

11.14 In light of the above, we now proceed to examine whether the decision of the Hon'ble Supreme Court in the case of **Pr.CIT v. NRA Iron & Steel (P) Ltd (412 ITR 161)** relied upon by the Ld. DR is apt in the facts and circumstances of the present case? For this, let us so examine the principles laid down by the Hon'ble Supreme Court in the case of **Pr.CIT v. NRA Iron & Steel (P) Ltd (supra)** and whether it is applicable to the present facts of the case or not. In the decided case, the assessee-company received share capital and premium of Rs.17.60 crores in all from nineteen parties (six from Mumbai, eleven from Kolkata and two from Guwahati). The shares had a face value of Rs.10/- and were subscribed by the investor-companies at a premium of Rs. 190 per share. The AO made the addition of Rs. 17.60 crores after carrying out various inquiries as under-

(i) To verify the veracity of the transactions, the notices were served on three investor-companies namely Clifton Securities Pvt. Ltd.-Mumbai, Lexus Infotech Ltd.-Mumbai, Nicco Securities Pvt. Ltd. Mumbai but no reply was received.

(ii) The address with respect to a company namely Real Gold Trading Co. Pvt. Ltd.-Mumbai was not correct.

(iii) The notice could not be served on two investor-companies, namely Hema Trading Co. Pvt. Ltd.-Mumbai, Eternity Multi Trade Pvt. Ltd.-Mumbai.

(iv) Submissions from nine companies were received (Neha Cassetes Pvt. Ltd.-Kolkata, Warner Multimedia Ltd. Kolkata, Gopikar Supply Pvt. Ltd. Kolkata, Gromore Fund Management Ltd. Kolkata, Bayanwala Brothers Pvt. Ltd. Kolkata, Shivlaxmi Export Ltd. Kolkata, NatrajVinimay Pvt. Ltd. Kolkata, Neelkanth Commodities Pvt. Ltd. Kolkata, Prominent Vyappar Pvt. Ltd. Kolkata), however, they had not given any reasons for paying such a huge premium.

(v)The details of share purchased and the amount of premium were not specified by certain companies, namely Super Finance Ltd. Kolkata, Ganga Builders Ltd. Kolkata. Furthermore, these companies had not enclosed the bank statement.

(vi) In addition to above, AO found that:

a. Out of the four companies at Mumbai, two companies were found to be non-existent at the address furnished.

b. With respect to the Kolkata companies, nobody appeared nor did they produce their bank statements to substantiate the alleged investments.

c. Guwahati companies - Ispat Sheet Ltd. and Novelty Traders Ltd., were found non-existent at the given address.

d. None of the investor-companies appeared before the A.O.

11.15 It was in light of the above conspectus of facts that it was held by the Hon'ble Apex Court, that the Assessee-Company failed to discharge the onus required under Section 68 of the Act. However in the case on hand, we find that, the assessee and all the shareholders had discharged the onus casted upon them under the provisions of Section 68 of the Act which has been elaborated in the preceding paragraph.

11.16 In our humble understanding therefore, we note that the decision in the case of NRA Iron & Steel (P.) Ltd. (supra) is based on facts. Hence, this judgment can be applied only on those cases having similar facts and circumstances and not other cases having different facts and circumstances. In this regard, we draw support and guidance from the judgment of Hon'ble Calcutta High court in the case of CIT v. Peerless General Finance & Investment Co. Ltd (282 ITR 209) wherein it was observed that, the binding nature of a decision is of two kinds - one is in relation to the facts and the other is in relation to the principles of law. A principle of law declared would be treated as precedent and binding on all. The finding of facts would bind only the parties to the decision itself and it is the ultimate decision that binds. Where facts are distinguishable, such as, in the present case, all the notices were served upon the shareholders, which were duly complied with, and the director of the shareholders was also personally examined who confirmed the transactions, hence the bonafide existence of the shareholders has been proved. They were regular Income-tax assessee and the shareholders long after investment, has been continued to be assessed by the Income Tax Department. The shareholders details & DIN of directors of are available on record which shows that the all investees are family-held group entities, share premium charged is support by valuation reports, adequate creditworthiness on the basis of assets, income streams etc. along with source of source of the funds for investment have also been substantiated, etc., therefore, the ratio laid down in the decision in NRA Iron & Steel (P.) Ltd. (supra) cannot be applied in the facts of the present appeal.

11.17 In this regard, we draw support and guidance form the judgment of Hon'ble Bombay High Court in case of Pr. CIT v. Ami Industries (India) (P.) Ltd. (424 ITR 219) where it was held as under:

> "17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds. It was further held that non-responding to notice would not ipso facto mean that the creditors had no credit worthiness. In such circumstances, the first appellate authority held that where all material evidence in support of explanation of credits in terms of identity, genuineness of the transaction and credit-worthiness of the creditors were available, without any infirmity in such evidence and the explanation required under section 68 of the Act having been discharged, Assessing Officer was not justified in making the additions. Therefore, the additions were deleted.

19. In appeal, Tribunal noted that before the Assessing Officer, assessee had submitted the following documents of the three creditors:—

(a) PAN number of the companies;

(b)Copies of Income-tax return filed by these three companies for assessment year 2010-11;

(c)Confirmation Letter in respect of share application money paid by them; and

(d)Copy of Bank Statement through which cheques were issued.

20. Tribunal noted that Assessing Officer had referred the matter to the investigation wing of the department at Kolkata for making inquiries into the three creditors from whom share application money was received. Though report from the investigation wing was received, Tribunal noted that the same was not considered by the Assessing Officer despite mentioning of the same in the assessment order, besides not providing a copy of the same to the assessee. In the report by the investigation wing, it was mentioned that the companies were in existence and had filed income tax returns for the previous year under consideration but the Assessing Officer recorded that these creditors had very meager income as disclosed in their returns of income and therefore, doubted credit worthiness of the three creditors. Finally, Tribunal held as under:—

"5.7 As per the provisions of Section 68 of the Act, for any cash credit appearing in the books of assessee, the assessee is required to prove the following-

(a) Identity of the creditor

(b)Genuineness of the transaction

(c)Credit-worthiness of the party

(i)In this case, the assessee has already proved the identity of the share applicant by furnishing their PAN, copy of IT return filed for asst. year 2010-11.

(ii)Regarding the genuineness of the transaction, assessee has already filed the copy of the bank account of these three share applicants from which the share application money was paid and

the copy of account of the assessee in which the said amount was deposited, which was received by RTGS.

(iii)Regarding credit-worthiness of the party, it has been proved from the bank account of these three companies that they had the funds to make payment for share application money and copy of resolution passed in the meeting of their Board of Directors.

(iv)Regarding source of the source, Assessing Officer has already made enquiries through the DDI (Investigation), Kolkata and collected all the materials required which proved the source of the source, though as per settled legal position on this issue, assessee need not to prove the source of the source.

(v)Assessing Officer has not brought any cogent material or evidence on record to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represent company's own income from undisclosed sources.

Accordingly, no addition can be made u/s.68 of the Act. In view of above reasoned factual finding of CIT(A) needs no interference from our side. We uphold the same."

21. From the above, it is seen that identity of the creditors were not in doubt. Assessee had furnished PAN, copies of the income tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were concerned, Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the Board of Directors of the three creditors. Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In NRAIron& Steel (P.) Ltd. (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case.

23. Therefore, on a thorough consideration of the matter, we are of the view that the first appellate authority had returned a clear finding of fact that assessee had discharged its onus of proving identity of the creditors, genuineness of the transactions and credit-worthiness of the creditors which finding of fact stood affirmed by the Tribunal. There is, thus, concurrent findings of fact by the two lower appellate authorities. Appellant has not been able to show any perversity in the aforesaid findings of fact by the authorities below.

24. Under these circumstances, we find no error or infirmity in the view taken by the Tribunal. No question of law, much less any substantial question of law, arises from the order of the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost.”

11.18 We find similar facts and circumstances were involved before the Kolkata Bench of this Tribunal in the case of Baba Bhootnath Trade & Commerce Ltd in ITA No. 1914/Kol/2017 dated 1st April 2019. In the decided case the assessee had raised share subscription monies of Rs.2.04 crores. Complete details were furnished in the course of assessment. Notices u/s 133(6) & 131 of the Act were also complied with by the respective shareholders. The AO, however,in disregard of these materials, assessed the entire sum of Rs.2.04 crores by way of unexplained cash credit on the premise that the companies did not have any creditworthiness or business rationale to invest in the assessee company. On appeal before this Tribunal; the Revenue supported the order of the AO relying on the recent decision of the Hon'ble Apex Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd (supra).This Tribunal however noted that the judgment of the Hon'ble Supreme Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd (supra) was distinguishable on facts in as much as in that case, the AO after making extensive enquiries had found and established that most of the investor companies were non-existent and that some of the investor companies did not produce their bank statements which was imperative to prove the source of funds for making investments. On the facts of the decided case, this Tribunal notes that not only had the shareholders furnished all relevant documentary evidences, but even the details of source of monies were provided and both the enquiries u/s 133(6) & 131 of the Act were met by the shareholders. This Tribunal accordingly deleted the addition made u/s 68 of the Act. The relevant findings are as under:

> "6.17. Finally the ld DR placed reliance on the recent decision of the Hon'ble Apex Court in the case of Principal CIT vs. NRA Iron & Steel (P) Ltd reported in 103 taxmann.com 48 (SC) wherein the decision on addition made towards cash credit was rendered in favour of the revenue. We have gone through the said judgement and we find in that case, the ldAO had made extensive enquiries and from that he had found that some of the investor companies were non-existent which is not the case before us. Certain investor companies did not produce their bank statements proving the source for making investments in assessee company, which is not the case before us. Source of funds were never established by the investor companies in the case before the Hon'ble Apex Court, whereas in the instant case, the entire details of source of source were duly furnished by all the respective share subscribing companies before the ld AO in response to summons u/s 131 of the Act by complying with the personal appearance of directors. Hence the decision relied upon by the ld DR is factually distinguishable and does not advance the case of the revenue."

11.19 Gainful reference may also made to the following findings of this Tribunal in the case of M/S. Blue Lotus Designers Pvt. Ltd. vs ITO in ITA No.941/Kol/2017 which involved somewhat similar facts as involved in the present case.

> "5. Learned departmental representative at this stage quoted hon'ble apex court's decision in PCIT vs. NRA Iron & Steel Pvt. Ltd. in Civil Appeal No. 2463 of 2019 dated 05.03.2019 restoring such unexplained cash credits addition in the nature of the share capital / premium invoking accommodation entry providers. We note that their lordships had come across an instance of the concerned assessee having failed to satisfy the above stated three parameters (supra) whereas the facts in the instant case sufficiently reveal that this taxpayer had duly discharged its onus and also responded to section 131 summons. We therefore reject the Revenue's arguments supporting lower authorities' action and delete the impugned un-explained cash credits addition of 2,01,50,000/-. The assessee succeeds in its sole substantive grievance."

11.20 For the reasons as aforesaid and on the given facts of the case, we thus hold that the assessee had discharged the burden casted upon it under Section 68 of the Act and it had also substantiated the source of source of funds of the share application received in all the years. Hence, the averments made by the AO in this regard, in the orders impugned before us, are found to be untenable.

11.21 It is further noted that, to support the additions made u/s 68 in relation to share application monies received from M/s Captain Steel Trading Pvt. Ltd., M/s Consistent Construction Pvt. Ltd., M/s Prefer Infrastructure Pvt. Ltd, M/s Remote Marketing Pvt. Ltd., M/s Southern Resources and Holdings Pvt. Ltd. &M/s Transparent Tie up Pvt. Ltd., the AO had relied on the statements dated 13-12-2017&06-05-2018 of alleged entry operator, Shri S.K. Agarwal. According to the AO, he had admitted to being engaged in the business of providing accommodation entries to various beneficiaries inter alia including the assessee. This according to AO further substantiated the addition made by him u/s 68 of the Act. On appeal, the Ld. CIT(A) discarded the AO's reliance on these statements since he had denied the assessee the opportunity to cross examine them.

11.22 After careful analysis of the documents placed before us and after examining the statements of the so-called entry operator, which the AO had selectively extracted in the assessment order, we find that the adverse view taken by the AO bereft of any merit because, our examination of statements showed nowhere had he admitted of receiving any

unaccounted cash from the assessee and in lieu thereof the cheques were issued. However, certain facts brought to our notice, which we will discuss infra, will show that his statement cannot be relied upon.It was brought to our notice that the so-called entry operator was not even a shareholder or director in any of these share applicant companies. In the statement dated 06-05-2018, Shri Agarwal had allegedly named eight (8) shareholders of the assessee company. We find that out of the eight (8) shareholders, the AO himself has accepted three (3) shareholders as genuine namely, M/s Abhinandan Complex Pvt Ltd, M/s Improve TradecomPvt Ltd and M/s Sanket Sales Pvt Ltd to be genuine bodies corporate and also accepted the share application monies received by the assessee from these three bodies corporate. Hence, we wonder as to how the AO himself believed some shareholders against whom Shri Agarwal made statement and how the AO drew adverse inference against few others on the strength of statement of Shri Agarwal. No cogent reason has been given by AO for his action of finding fault with/cherry picking of some share holders on the strength of same statement. Moreover, in the answer given by Shri Agarwal in the statement dated 06-05-2018, he names Mayur Ply Group to be the beneficiary of the accommodation entries and not the assessee. Accordingly, for the reasons aforesaid, this statement of Shri Agarwal does not inspire confidence to take a view against the shareholders company in the light of the documentary evidence and for the reasons stated infra.

11.23 Coming to the selective extracts of the statement dated 13-12-2017, it is noted that the AO himself has observed that Mr. Agarwal in this statement had stated on oath that Gangwal Group had made investments through his entities and not the assessee. Further, in this statement, Shri Agarwal allegedly names two (2) shareholders of the assessee company viz., M/s DhawanVinimayPvt Ltd, in which he himself was a Director, and M/s Transparent Tie Up Pvt Ltd in which Mr. Ritesh More was a Director. It is surprising to note that, having regard to this averment, the AO accepted M/s DhawanVinimayPvt Ltd, to be a genuine body corporate and did not make any addition in relation thereto but disbelieved the genuineness of the transaction withM/s Transparent Tie Up Pvt. Ltd. in which admittedly Mr. Agarwal was neither a director nor a shareholder. These facts considered cumulatively render the AO's act of relying on these statements to be factually perverse.

11.24 We also note that although the statements of the entry operator were used in evidence, the AO had never personally examined him to verify the correctness of the facts nor did he afford the assessee an opportunity to cross examine him. Shri Dudhewewala took us through the statement of the Director of the assessee recorded under oath before the AO on 28-11-2019 and showed that even when the Director had personally appeared before the AO, he was never confronted with these statements nor was he afforded any opportunity to cross examine Shri Agarwal. It is also noted that the assessee in their response to the SCN had sought cross-examination of Shri Agarwal, whose statements the AO was choosing to rely upon. The AO however at Para 18 of his order rejected this plea holding it to be a peripheral issue. This act of the AO, denying the assessee an opportunity to cross examine Shri Agarwal was a serious infirmity which rendered the addition/s made by the AO, by relying on such statements collected at the back of the assessee, to be null and void. In this regard, we refer to the following findings recorded by the Hon'ble Apex Court in the case of **Andaman Timber Industries Ltd vs Commissioner of Central Excise in Civil Appeal No. 4228 of 2006** reported in **(2015) 62 Taxman 3 (SC)**,which reads as under:

> "According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected."

11.25 The AO was both under obligation and duty to bring on record the true and correct facts because while discharging the duties as an Assessing Officer, he was expected to function both as an investigator and adjudicator. In his role as an investigator, he was under obligation to investigate fully and truly the relevant facts; and as an adjudicator he was required to be fair, just and to ensure that the principles of natural justice are implemented by granting opportunity of examining/furnishing, the adverse material/evidence gathered by him to the affected party and facilitate an opportunity to cross examine the maker of the adverse oral testimony. Unless the oral evidence is tested on the touch-stone of cross-examination, the veracity of the evidence cannot be believed and it cannot be acted upon to the disadvantage of assessee. Failure of AO to give opportunity to the assessee to cross examine renders his reliance on the statement of Shri Aggarwal a nullity, as held by Hon'ble

Supreme Court in Andaman Timber (supra). We thus note that before passing the assessment order, the AO failed to perform his twin duties, that of the investigator and adjudicator, resulting in the addition/s being vitiated in law.

11.26 We may in this regard, gainfully refer to the decision of Hon'ble Apex Court in the case of CIT Vs Odeon Builders Pvt Ltd reported in 418 ITR 315 involving similar facts as involved in the present case. In the decided case, the Revenue had disallowed the purchases made by the assessee holding it to be bogus based on statement given by a third party. On appeal, the Ld. CIT(A) noted that on one hand the assessee had discharged its initial burden of substantiating the purchases by producing all relevant documentary evidences which it was ordinarily required to maintain in the regular course of business, whereas on the other hand, the Revenue had denied the opportunity of cross examination to the appellant. The Ld. CIT(A) therefore held the purchases to be acceptable and deleted the disallowance made by the AO. On the self-same reasoning this Tribunal and later on the Hon'ble High Court also dismissed the appeal of the Revenue. On further appeal, the Hon'ble Supreme Court also concurred with the findings of the Ld. CIT(A) and did not find any infirmity in the orders passed by the lower appellate authorities and accordingly dismissed the appeal of the Revenue. The relevant portion of the judgment of the Hon'ble Supreme Court reads as under:

> "3. However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs. 19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the CIT (Appeals) allowed the appeal of the assessee stating:
>
> "Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs. 19,39,60,866/-, is directed to be deleted."

> 4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT."

11.27 It is by now a settled proposition of law that where in the revenue proceedings any inference is drawn against the assessee on the basis of statements of any third person then such inference is legally unsustainable if opportunity of cross examining the Departmental Witness is not granted to the affected person. In this regard, we may make useful reference to the decision of the Hon'ble Bombay High Court in the case of CIT Vs Reliance Industries Ltd (102 taxmann.com 372). In this case the assessee had claimed deduction for consultancy charges paid to one S, a Consultant. On the basis of statement recorded from S. in the course of search conducted u/s 132, the AO held that S did not render any service to the assessee and therefore the deduction claimed for consultancy charges paid was not allowable. The Tribunal held that the disallowance; based solely relying on the statement of S, recorded in the course of search without there being any independent material; was not justified. On appeal by the revenue the Hon'ble Bombay High Court upheld the order of the Tribunal. In this judgment, it was thus in principle held that unless & until there is a corroborative evidence or material to substantiate the statement of a third party, it is not open for the Tax Authorities to draw conclusions against the assessee solely based on the statement recorded in the course of search. The relevant findings of the Hon'ble High Court are as follows:

> "Question Nos.1 and 2 are elements of the same issue and relate to the addition of Rs. 3.39 crores (rounded off) made by the Assessing Officer by disallowing expenditure of the said sum incurred by the respondent-assessee in form of payments to one Shri S.K. Gupta. The Assessing Officer on the basis of statement of said Shri Gupta recorded during search operations held that the said person had not rendered any service to the assessee-company so as to receive such payments. CIT (Appeals) however deleted the addition inter-alia on the grounds that Shri S.K.Gupta had retracted the statement recorded during search, that the assessee-company had pointed out range of services provided by Shri Gupta and that the Assessing Officer had no other material to disallow the expenditure. The Tribunal in further appeal by the revenue confirmed the view of the CIT (Appeals) independently coming to the conclusion that the Assessing Officer was not justified in making the addition. It was noted that Shri Gupta retracted his statements within a short time by filing an affidavit. Subsequently, his further statement was recorded in which he also reiterated the stand taken in affidavit. The Tribunal

also referred to the decision in case of the Dy. CIT v. Link Engineers (P.) Ltd. [IT Appeal No. 968 & 2248 (Delhi) of 2011] in whose case also a similar issue of genuineness of payment to Shri S.K. Gupta had come up for consideration. The Tribunal noted that in such a case also the Tribunal had held in favour of the assessee.

3. Having heard learned counsel for the parties and having perused documents on record, we notice that the entire issue is based on the appreciation of materials on record. CIT (Appeals) and the Tribunal concurrently held that there was sufficient evidence justifying the payment to Shri S.K.Gupta, a Consultant and that the Assessing Officer other than relying upon the retracted statements of Shri Gupta recorded in search, had no independent material to make the additions. No question of law arises.*"*

11.28 Similar view was expressed by the Hon'ble Gujarat High Court in the case of CIT Vs Kanti Bhai Ravidas Patel (42 taxmann.com 128), wherein it was observed as follows:

"5. We have heard rival contentions and gone through the material on record. Ld. A.O. has used third party statement of Vikas A. Shah in framing the assessment. The statement of Shri Vikas A. Shah recorded under Section 131(1A) not under Section 132 of the IT Act on 14/03/2005 and 19/04/2005. The ld. A.O. had used this statement without allowing cross examination of Vikas A. Shah which is against the principle of natural justice. This land had registered document and the value has been accepted as to correct by registering authority to the charge of stamp duty. There was no material or evidence that any on money was paid by the appellant on the transaction. Ld. A.O. had not referred this land to the DVO for determining the market value on date of registration. The statement given by Vikas A. Shah was self service statement without any supporting evidence. There was no search carried out on the appellant. The seized papers were found in the possession of Shri Vikas A. Shah. The third person evidence cannot be base for addition on the basis of any entries therein. The ld. CIT(A) had also considered following decisions.

I. Prathana Construction (P.) Ltd. v. Dy. CIT [2001] 70 TTJ 122 (Ahd.)

II. Asstt. CIT v. Prabhat Oil Mills [1995] 52 TTJ 533 (Ahd.)

III. Jindal Stainless Ltd. v. Asstt CIT [2009] 120 ITD 301 (Delhi)

After considering all the facts and legal position of this issue, we do not find any reason to intervene in the order of the CIT(A). Accordingly, we uphold the order of the CIT(A)."
6. It is required to be noted that the order passed by the ITAT in the case of the co-purchaser-Abhalbhai Arjanbhai Jadeja was further carried before this Court by way of Tax Appeal No. 233/2013 and other allied appeals and it is reported that vide order dated 03/04/2013, the Division Bench of this Court has dismissed the said appeal confirming the order of deletion of similar addition in the case of Abhalbhai Arjanbhai Jadeja-co- purchaser.
7. In view of the above, when in the case of the co-purchaser, similar addition came to be deleted by the CIT(A), which came to be confirmed up to this Court, it cannot be said that the tribunal1 has committed any error in dismissing the appeal preferred by the revenue and consequently confirming the order passed by the CIT(A) deleting the addition of Rs.92,00,000/- made on account of unaccounted investment. No question of law, much less substantial question

of law arises in the present Tax Appeal. Hence, the present Tax Appeal deserves to be dismissed and is accordingly dismissed."

11.29 We also rely on the following observations of the Hon'ble Rajasthan High Court in the case of CIT Vs A L Lalpuria Construction Pvt. Ltd (32 taxmann.com 384);

"2. The revenue has preferred instant appeals U/s 260A of Income Tax Act,1961 ("Act, 1961") assailing judgment of the Tribunal dt.31.03.2010 affirming order of Commissioner (Appeals) dt. 05.03.2008, with modification that on the statement of KripaShanker Sharma, the income of Rs. 5 Lacs was assessed in the hands of assessee and it was observed by the Tribunal that the statement of KripaShanker Sharma was never confronted and no documentary evidence was supplied to the assessee, in absence whereof the income in the hands of the assessee on the basis of statement of KripaShanker Sharma deserves deletion.

3. The assessee as alleged carried out construction activities and disclosed income from sub-contract and investment in building construction. After the search U/s 132 of the Act,1961 was carried out on 12.04.2005 in the case of another assessee M/s. B.C. Purohit& Company at Jaipur & Kolkata, evidence was gathered and from the investigation it revealed that in the garb of tax consultation the owners and employees of this group were running the racket of providing accommodation entries of gifts, loans, share application money, share investment and long term capital gains in shares. It will be relevant to record that the present assessee might have been in consultation with M/s. B.C. Purohit& Company and a member of the group and has drawn inference regarding providing accommodation entries and the assessing officer was of the view that details made available by the assessee as regards unsecured loans and share application money, reference of which has been made in para-4 of its order, appears to be the accommodation entries and the present assessee was middle man and invoking Sec.68 of the Act, it was considered to be part of the income in the hands of the assessee. However, on appeal preferred before the Commissioner (Appeals) by the assessee U/s 143(3) r/w 147 of the Act, 1961 all the factual statements were examined at length and the Commissioner (Appeals), after due appreciation of material which came on record, observed that from independent enquiry the copies of bank account were obtained by the assessing officer and found that for clearing of the cheques issued by these companies either cash was deposited in the same account or in another account of the group company in fact was M/s. B.C. Purohit of which the present assessee was considered to be one of the group member. However, it was further observed that summons issued U/s 131 of the Act were served upon all such applicant/ creditors and their confirmation letters were filed and the companies were assessed to tax being the private limited companies, the existence of their separate legal entity ordinarily could not have been doubted. However on the basis of statement of KripaShanker Sharma which was recorded by the search authorities as regards accommodation entries, a sum of Rs.5 Lacs was assessed in the hands of present assessee alone and as regards other income, it was not considered to be in the hands of the present assessee. Obviously the department being aggrieved preferred appeal before the Tribunal and at the same time, the present assessee filed cross objection regarding part of the income, to the extent of a sum of Rs.5 Lacs, as being recorded in the hands of present assessee on the basis of statement of KripaShanker Sharma. The Tribunal while appreciating the factual matrix came on record observed that after the summons were issued U/s 131 of the Act,1961 to

the applicant/creditors and their confirmation letters were filed and the companies were assessed to tax being private limited companies the existence of their separate legal entity ordinarily could not have been challenged more so when the identity of existence of the investor is not disputed and accordingly upheld the view of Commissioner (Appeals), at the same time further observed that merely on the basis of oral statement of KripaShanker Sharma recorded before the search authorities that the assessee provided accommodation entries was not sufficient for the income to be assessed for a sum of Rs.5 Lacs in the hands of the assessee and while allowing the cross objection filed by the assessee dismissed the appeal preferred by the revenue under order impugned.

4. We have heard the parties at length and of the view that what has been observed by the Commissioner (Appeals) & the Tribunal appears to be based on factual matrix and there appears no substantial question of law arises which may require interference by this Court to be examined in the instant appeal.

5. Consequently, the instant appeals are wholly devoid of merit and accordingly stand dismissed."

11.30 In view of the above judicial precedents (supra), we are of the considered view that the AO's failure to personally examine the witness and his denial to allow the assessee opportunity to cross examine the Departmental witness on whose statements he was relying upon was a serious & fundamental flaw which resulted in the additions made u/s 68 of the Act to be a nullity as held by the Hon'ble Supreme Court in Andaman Timber (supra).

11.31 For the elaborate reasons as discussed in the foregoing, we therefore hold that the all additions made u/s 68 of the Act in AYs 2011-12 to 2015-16 & 2017-18 were untenable both on facts as well as in law and was therefore rightly deleted by the Ld. CIT(A). Accordingly these grounds of the Revenue stand dismissed.

12. Now we take up the Question (E)

(E) Whether the AO had rightly computed interest u/s 234A of the Act ?

Ground No. 3 of Assessee's Cross Objections for AY 2011-12

Ground No. 2 of Assessee's Cross Objections for AY 2012-13

Ground No. 2 of Assessee's Cross Objections for AY 2013-14

Ground No. 2 of Assessee's Cross Objections for AY 2014-15

Ground No. 2 of Assessee's Cross Objections for AY 2015-16

Ground No. 5 of Assessee's Cross Objections for AY 2017-18

12.1 This ground taken in the Cross Objections relates to levy of interest u/s 234A of the Act. According to Ld. AR Shri Dudhwewala, the AO had grossly erred in levying interest u/s 234A of the Act with reference to the original due date of filing of return of income u/s 139(1) of the Act as opposed to the due date in terms of notice u/s 153A of the Act. We note that the dates of issuance of notices u/s 153A and filing of return of income in response thereto were as follows:

Asst Year	Notice u/s 153A	Filing of ROI
2011-12	11.09.2019	15.11.2019
2012-13	11.09.2019	11.10.2019
2013-14	11.09.2019	11.10.2019
2014-15	11.09.2019	17.10.2019
2015-16	11.09.2019	11.10.2019
2016-17	11.09.2019	11.10.2019

12.2 Under Sub Section (3) of Section 234A of the Act, an assessee is required to pay interest under Section 234A only when the return of income is filed after the expiry of the time limit set out in notice issued under Section 153A of the Act and even in such circumstance the interest is levied only for the period commencing on the day following the expiry of the time prescribed in notice under Section 153A of the Act upto the date of filing of return of income. We find that the AO had wrongly taken the due date of filing of return in response to the notices issued under Section 153A of the Act dated 11.09.2019 to be the original due date u/s 139 of the Act i.e. 30.09.2011 for AY 2011-12, 30.09.2012 for AY 2012-13 and so on, rather than the day following the expiry of the time limit prescribed in notice under Section 153A of the Act, resulting in erroneous and excessive levy of interest u/s 234A of the Act. The AO is accordingly directed to re-compute the levy of interest u/s 234A of the Act in terms of sub-section (3) of Section 234A of the Act i.e. from the date on which the time limit for filing of return of income in response to notices u/s 153A of the Act dated 11.09.2019 had expired. This ground therefore stands allowed for statistical purposes

13. Question (F) i.e. Ground No. 2 of the assessee's Cross Objection for AY 2017-18 was not pressed at the time of hearing and therefore the same is hereby dismissed.

14. Having regard to our above findings deleting the addition of Rs.34,69,54,848/- made u/s 68 of the Act in AY 2017-18, Questions (G) & (H) i.e. Ground Nos. 3 & 4 of assessee's Cross Objection for AY 2017-18 has become academic in nature and is therefore dismissed as infructuous.

15. Question (H) i.e. Ground No. 6 of the Cross Objections relates to adjustment of seized cash of Rs.61,73,000/- by way of self-assessment tax in the hands of the assessee in AY 2017-18. The Ld. AR Shri Dudhwewala brought to our notice that the assessee had filed a petition dated 28-02-2020 before the AO requesting him to adjust this seized cash of Rs.61,73,000/- against their tax liability for AY 2017-18. Having regard to the provisions of Section 132B(iii) of the Act, the AO is accordingly directed to grant the credit of seized cash by way of self-assessment tax in accordance with law. This ground therefore stands allowed for statistical purposes.

16. In the result the appeals of the Revenue in ITA Nos. 126-131/Gau/2020stands dismissed and the cross objections of the assessee in CO Nos. 03 to 08/Gau/2020 stands partly allowed.

Order is pronounced in the open court on 10th December, 2021

Sd/-	Sd/-
(P. M. Jagtap)	(Aby. T. Varkey)
Vice President	Judicial Member

Dated: 10.12.2021

JD(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – ACIT, Circle-1, Guwahati.

2 Respondent – M/s. Goldstone Cements Ltd., Vill/ Musiang Lamare (Old) Khliehriat, East Jayantia Hills, Meghalaya-793200

3. CIT(A), Guwahati-2, Guwahati .

4. CIT-

5. DR, ITAT, Guwahati

/True Copy, By order,

Senior Pvt. Secy.