ITAT BAR CASE REPORTER FOR THE MONTH OF NOVEMBER 2019

1 **The A.C.I.T vs. Shri Ravi Sharma (ITA No. 4930/D/2016) (Dated: 31.10.2019)**

S. 2(22)(e) – WHERE FROM THE BALANCESHEET OF THE COMPANY IT WAS EVIDENT THAT AMOUNTS GIVEN TO THE ASSESSEE WERE IN THE ORDINARY COURSE OF BUSINESS AS SECURITY DEPOSIT - PROVISIONS OF SECTION 2(22(E) OF THE ACT DO NOT APPLY – HELD YES

16. ….. in the assessment proceedings itself, the assessee has explained that he has rented out some property to the company, rent free, and in pursuance thereof, the company has given security deposit. This fact was very much available with the Assessing Officer who, for some reason, did not accept. It is the say of the ld. counsel for the assessee that however, when same facts were furnished before the ld. CIT(A), the ld. CIT(A), after going through the facts and after drawing support from some judicial decisions, accepted the same as nature of business transaction and deleted the addition.

17. We have given thoughtful consideration to the orders of the authorities below. It is true that during the course of assessment itself the assessee has explained the nature of transactions. It is also true that in the balance sheet of the company M/s J.C. Infotech Technologies Ltd, it has been clearly mentioned that the amount of Rs. 1,80,42,924/- was given to the assessee which was in the ordinary course of business. We find that when same evidence were furnished before the ld. CIT(A), after examining them, the ld. CIT(A) was convinced that the transaction was in the ordinary course of business and provisions of section 2(22(e) of the Act do not apply.

18. In our considered opinion, when the first appellate authority has given categorical finding after going through facts, no interference is called for.

2. **M/s. Lustre Merchants Pvt. Ltd.. vs. DCIT (ITA No.6396/Del/2015) (Dated: 30.10.2019)**

SECTION -2(47) WHERE THE ASSESSEE IS A NON-BANKING FINANCE COMPANY ENGAGED IN THE BUSINESS OF DEALING IN SHARES AND SECURITIES - WHETHER THE AO WAS CORRECT IN DISALLOWING THE LOSS ON ACCOUNT OF FORFEITURE OF SHARE APPLICATION MONEY PAID ON THE GROUND THAT TRANSACTION ATTRACT PROVISIONS OF SECTION 2(47) OF THE ACT AS IT INVOLVES

EXTINGUISHMENT OF RIGHT - THEREFORE IT IS A CAPITAL LOSS AND NOT BUSINESS LOSS- HELD NO.

16….. We do not find any merit in the action of the Revenue authorities especially in view of the direction of the Tribunal in the original proceedings while setting aside the issue to the file of the Assessing Officer. There is no finding by the Assessing Officer to the direction by the Tribunal that the lower authorities have not adverted to the crucial fact i.e., assessee's investment in Surya Roshni Ltd., a group company by way of subscription to the convertible debentures being held as stock-in-trade not only in this year, but, in earlier year also. Once the shares are held as stock-in-trade as argued before the Tribunal on the earlier occasion for which the Tribunal had restored the issue to the file of the Assessing Officer for verification of this crucial fact and since there is no material to controvert the above submission of the assessee before the Tribunal that such shares were held as stock-in-trade, therefore, we are of the considered opinion that the lower authorities in the set aside proceedings have not followed the direction of the Tribunal.

17. We find the CBDT, vide Circular No.6/2016 dated 29th February, 2016 had categorically held that 'where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income.

18. In our opinion, the above Circular being clarificatory in nature is retrospective and cannot be held as prospective as argued by the ld. DR. We further find the coordinate Bench of the Tribunal in the case of Cosmos Industries Ltd. (supra) while deciding somewhat identical issue has held that the loss incurred on sale of shares of a subsidiary company is a business loss.

3. **M/s. Saga Realtors Pvt. Ltd. vs. The ACIT (ITA.No.956/D./2019) (Dated: 15.11.2019)**

SECTION -36(1)(iii) – WHERE THE ASSESSEE HAS TAKEN UNSECURED LOAN WHICH WAS UTILIZED FOR INVESTMENT IN ANOTHER GROUP COMPANY OF ASSESSEE TO TAKE CONTROLLING INTEREST IN THE GROUP COMPANY – ASSESSEE IS ENTITLED FOR DEDUCTION OF THE INTEREST UNDER SECTION 36(1)(iii) OF THE ACT.

8. I have considered the rival submissions. The conditions for getting deduction under section 36(1)(iii) of the I.T. Act, 1961, in respect of the interest are – (1) money must have been borrowed by the assessee (2) it must have been borrowed

for the purpose of business (iii) the assessee must have paid interest on the said amount and claim it as deduction.

8.4. Considering the facts of the case in the light of above decisions, it is clear that one of the object of the assessee company for which it was established are, to carry on business in Hotels also. The assessee during the year under consideration has earned interest on loan only. The assessee claimed that in pursuance of the objects, the assessee made investment in M/s. Minor Hotels Pvt. Ltd. The assessee company is holding 32% of equity share capital and 100% of preference share capital issued by Minor hotels. The assessee was in the process of establishing hotel project, but, due to some litigation it was delayed. It is not always necessary that assessee should earn profit in assessment year under appeal in order to claim deduction of the expenditure. The assessee made investment in the group companies to take controlling interest in the group company. The assessee for that purpose has joined the JV and SVP also. It is not in dispute that assessee has borrowed money for business purpose and made investment in M/s. Minor Hotels Pvt. Ltd., and paid interest also. The genuineness of the payment of interest is not in dispute. Therefore, the above facts would clearly show that assessee is entitled for deduction of the interest in assessment year under appeal. The assessee made investment utilizing the borrowed funds for strategic business purposes and the amount borrowed have been utilised for business purpose only. Considering the above discussion, I am of the view that assessee has satisfied the conditions of Section 36(1) (iii) of the I.T. Act, 1961. I, accordingly, set aside the Orders of the authorities below and delete the addition.

4. Heidelberg Cement India Ltd. v. DCIT (ITA No. 2054/D/16)(31/10/19)

SECTION 37(1) – CAPITALIZATION OF TECHNICAL KNOW-HOW FEE – THE ASSESSEE PAID TECHNICAL KNOW HOW FEE AS PERCENTAGE OF ITS SALES TO ITS FOREIGN COMPANY FOR TECHNICAL ASSISTANCE AND FACILITATION OF ITS MANUFACTURING AND TRADING OPERATIONS – IT WAS HELD THAT NO CAPITAL ASSET WAS GENERATED ON PAYMENT OF SUCH FEES - THE CAPITALIZATION OF 25% OF FEE WAS HELD TO BE BAD IN LAW

Held, 22. We have heard the arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer, in the instant case, disallowed 25% of the total technical know-how expenses of Rs.14,09,84,000/- which comes to Rs.3,52,46,000/- treating the same as capital expenditure being spent towards acquisition of capital asset as it gives rise to enduring benefit which can be

enjoyed by the assessee over a number of years. He accordingly allowed depreciation on this @ 25% amounting to Rs.88,11,500/- and made an addition of Rs.2,64,34,500/- to the total income of the assessee. While doing so, the Assessing Officer held that the scope read with the provisions of technical know-how clearly indicate that the acquisition of technical know-how seeks to improve each and every aspect of the entire business. The agreement between the assessee and the HCA shows that the acquisition of technical know-how has brought in a complete and comprehensive overhauling of the entire business of the assessee. Therefore, the agreement clearly indicates that the technical knowledge the assessee obtained from this agreement with HCA secured to the assessee an enduring advantage and though benefit which was available to the assessee for its manufacturing and industrial process even after the termination of agreement ceases, but, when the agreement never terminates on account of revision/automatic renewal the benefit goes on and on. Further, continuous use of improved practices over several years leads to creation of institutional memory of advanced procedures and techniques. The Assessing Officer further noted that due to latent learning of systematic procedures and techniques through periodic training of personnel in the form of workshops and on the job trainings continues to reap benefits to the assessee way beyond periods confined with the agreement. According to him, the trained manpower continues to perform at higher levels of efficiency with better techniques even if the technical know-how agreement was to terminate. We find the ld.CIT(A) while upholding the action of the Assessing Officer noted that the payment made by the assessee has bestowed benefits of enduring nature which would not get terminated with the expiry of the agreement. According to him, when the assessee company is into manufacturing of cement and all the technologies given to it for manufacturing of cement would get merged into its business process. The business line of the assessee is of a particular nature which would require updating everyday like software industry or manufacturing of highly sophisticated instruments. The argument of the assessee that it would return all the designs according to him appears worth paper argument only because in a cement manufacturing plant, if the designs have been used for making the business process the changes are irreversible. It is the submission of the ld. counsel that the assessee has to continuously upgrade plant efficiency by employing modern and latest techniques to reduce costs and improve its productivity and quality. The expenditure on technical know-how was incurred by the assessee for technical information and assistance provided by HCA for the various services that were to be rendered by HCA to the assessee. It is also his submission that the benefit of the technical know-how does vest once and for all thereby resulting in an enduring benefit or for the purposes of bringing into existence any asset or advantage of an enduring nature, rather, the object of the technical assistance was for running the business effectively and profitably. Further, it is also his submission that the payment comprising 2% of sales as fee

for technical know-how is recurrent depending on sales and pertains only to the period of agreement. We find some force in the above argument of the ld. counsel for the assessee.

23. We find somewhat similar issue had come up before the Hon'ble Delhi High Court in the case of CIT vs. Hero Honda Motors Ltd. (supra).

27. Respectfully following the decisions cited, supra, we hold that the ld.CIT(A) is not justified in upholding the action of the Assessing Officer in treating 25% of the technical know-how fees as capital in nature. We, therefore, set aside the order of the CIT(A) on this issue and direct the Assessing Officer to treat the entire amount as revenue in nature. The grounds raised by the assessee on this issue are accordingly allowed.

5. M/s. NIIT Ltd v. DCIT (ITA No.376/Del./2014)(01/11/2019)

SECTION 37(1) – FINANCE LEASE – THE EXPENDITURE IN THE FORM OF PAYMENT OF FINANCE LEASE IS ALLOWABLE UNDER THE INCOME TAX ACT – THE ALLOWABILITY OF AN EXPENSES IS TO BE GOVERNED BY THE PROVISIONS OF THE ACT AND NOT ON THE BASIS OF ACCOUNTING TREATMENT – THE EXPENSE WAS HELD TO BE ALLOWABLE

Held, 7. We have considered the rival submissions and perused the material available on record. It is not in dispute that in assessment year under appeal assessee is engaged in the business of Information Technology Education and Knowledge Solutions. The assessee claimed the amount in question as revenue expenditure because finance lease were paid for the purpose of business. It is not in dispute that assessee entered into lease agreements time to time with different parties and provisions have been made for infrastructure facilities. Copies of the lease agreements Dated 01.09.2006, 01.04.2008 and 01.06.2008 are filed in the paper book, in which, terms and conditions of lease have been mentioned. It is provided that after termination of the agreement, assessee would buy the infrastructure. Annexure-A is provided to the initial agreement, according to which, assessee have been provided infrastructure asset for Front Office, Centre Head Room, Cashier Room, OCRs-1, 2, 3, Server Room, Library, Facultys Room, SSA Room, Store Room, Class Room, Machine Room Passage and Security Table. The description of the items is also provided which are mainly tables, chairs, ordinary tables, sofa, fan, iron file rack, cashier table, CPUs, Monitor, Projector EPSON and Black and White Monitor etc. These infrastructure are required for the purpose of business of the assessee. The assessee paid finance lease rentals to the lessor for the purpose of business. Thus, the assessee is not owner of these infrastructure facilities provided on rent. Similar claim of assessee on the basis of

same agreements have been allowed in favour of the assessee in preceding Assessment Years 2007-2008 and 2008-2009 in the scrutiny assessments under section 143(3) of the I.T. Act, 1961. In Assessment Years 2012-2013 and 2014-2015 also, the Tribunal has allowed the claim of assessee of the similar nature vide Order dated 26.07.2019. The decisions relied upon by assessee before the authorities below are squarely apply to the facts and circumstances of the case.

7.1. It is well settled Law that rule of consistency do apply to the income tax proceedings. Therefore, the A.O. should not have taken out a different view in the assessment year under appeal, when similar claim of assessee have been allowed as revenue expenditure in earlier years. Considering the totality of the facts and circumstances of the case and nature of infrastructure facilities provided to the assessee on lease rent, it is clear that the same have been provided through Agreement for business purpose of the assessee. Since assessee used these items wholly and exclusively for the purpose of business and was not the owner of the same, therefore, assessee rightly claimed the same as revenue expenditure and rightly claimed the deduction of the same. It is also well settled Law that the liability under the Act is governed by the provisions of the Act and is not depending on the treatment followed for the same in the books of account. It is also well settled that whether the assessee was entitled to a particular deduction or not, would depend upon the provisions of Law relating thereto, and not on the view, which the assessee might take of his right, nor could the existence or absence of entries in the books of account by decisive or conclusive in the matter. In view of the above discussion, we do not find any justification to sustain the addition. We, accordingly, set aside the Orders of the authorities below and delete the entire addition.

6. Dy. Commr. Of Income-tax vs. Shri Abhinav Arora (ITA.No.4039/D/2013) (Dated: 10.2019)

S. 69 – VALUATION REPORT OF THE PROPERTY PROVIDED AS A COLLATERAL SECURITY CANNOT BE A YARDSTICK FOR THE PURPOSE OF DETERMINATION OF THE PROPERTY VALUE FOR THE PURPOSE OF ADDITION U/S 69 OF THE ACT.

12. We have gone through the record in the light of the submissions made on either side. It could be seen from the impugned order that it is an established fact that nothing incriminatory was found in respect of the property purchased by the assesses during the search. Further, there is no evidence on record to show that the property at A-25/9, Kachnar Marg is similar in all respect of the property purchased by assessees. There in nothing wrong in the ld. CIT(A) believing the confirmation issued by the Axis Bank that the property was provided as a

collateral security and for such purpose, the valuation was done by M/s M.L.Aggarwal/Arun Aggarwal at higher price. N Revenue failed to bring on record any material assailing the correctness of the findings of the ld. CIT(A) on this aspect. We, therefore, are of the considered opinion that in so far as the valuation report of M/s M.L.Aggarwal/Arun Aggarwal cannot be a yardstick for the purpose of determination of the proper value is concerned, findings of the learned CIT(A) are legal and do not invite any interference. On this premise, we dismiss the grounds of appeal of the revenue.

7. Sagar International Pvt. Ltd., Vs. ITO (ITA No.2456/Del/2019) (06/11/2019)

BOGUS PURCHASES – THE AO WAS NOT JUSTIFIED IN MAKING ADDITION OF ENTIRE AMOUNT OF UNEXPLAINED PURCHASES – AT BEST ADDITION ON ACCOUNT OF PROFIT EARNED ON SALES EFFECTED FROM PURCHASES COULD BE MADE – THE BOOKS OF ACCOUNT ARE AUDITED AND QUANTITATIVE STOCK DETAILS HAVE NOT BEEN DISPUTED BY AO - THE ADDITION WAS DELETED WITH THE DIRECTION TO APPLY GROSS PROFIT RATE @5%

Held, 14. We have heard the rival submissions and perused the material available on record. We find that the assessee has made purchases of scrap of 53.58 lakhs from the aforesaid four parties, however, the parties have admitted in their statements that they have issued bogus purchase bills. Therefore, genuineness of the purchases were not proved. We, further find that the assessee has submitted copies of purchase bills issued by the aforesaid parties and payment is made by the account payee cheques. This shows that the purchases have been made, may not be from the party from whom purchase bills have been obtained. The only possibility is therefore, is that the assessee might have inflated the purchases as sales has not been doubted by the AO. We, further find that the books of accounts of the assessee are audited and details of closing stock purchases consuming and closing stock has been duly filed. The AO has added the entire bogus purchases whereas the ld.CIT(A) has reduced the same by working out the average rate or purchases as compared to other parties. However, we are of the considered opinion that it is not just or reasonable to calculate the average rate of purchases. We, further find that their sales are not doubted and there cannot be any sales without making purchases. We, further find that the decision of N.K.Protein (supra) relied by the DR is distinguishable on the facts on the ground that in that case a search has taken place wherein seizure and recovery blank signed cheques, vouchers of number of concerns along with books, blank purchase bills, books, searched persons were seized in the case of assessee, the assessee is furnished a copies of purchase bills, payment made by account payee and shown sales of Rs.81 lakhs. Therefore, we are of the considered opinion that it would be fair and just to apply 5% Gross Profit Rate on

the unverifiable purchases in the light of decision of Hon'ble Gujarat High Court in the case of Mayank Diamonds [Tax Appeal No.200 of 2003 dated 17.11.2014] wherein 5% Gross Profit unverifiable purchase were held to be reasonable. Therefore, in the light of above such facts, the addition of Rs.53,58,954/- is restricted to 5% which is in commensurate with the Gross Profit Rate disclosed by the assessee at 4.82%, accordingly the addition of Rs.2,67,948/- [5% of 53,58,854/-] is sustained and balance addition of Rs.9,57,662/- is deleted, this ground of appeal is therefore partly allowed.

8. Mitsubishi Electric Automotive [I] P. Ltd. v. DCIT (ITA No. 312/D/15)(30/10/19)

SECTION 92C – ARM'S LENGTH PRICE- INTENSITY OF FUNCTION IS AN IMPORTANT CRITERIA WHILE ASCERTAINING THE ELIGIBILITY OF COMPARABLES – COMPANY WITH HIGH INTENSITY OF FUNCTION TENDS TO EARN HIGH PROFITS – COMPANY WITH HIGH INTENSITY OF FUNCTION CANNOT BE CONSIDERED AS COMPARABLE WHILE APPLYING RPM

Held, the reason for significant difference in the operating expenses to sales ratio is due to the significant difference in the intensity of functions. There is no quarrel that the appellant is not performing the functions, such as, advertisement, marketing, finding new customers, inventory management etc. Accordingly, the cost of such functions is also borne by the associated enterprise and not borne by the appellant whereas the comparable companies, being independent distributors, are also performing all these functions. Consequently, the intensity of functions of the appellant is much lower than that of the comparable companies as is evident from the operating expenses sales ratio.

This high level of difference in the intensity of functions makes the comparability at the gross level unreliable. As mentioned elsewhere, since the appellant is performing limited functions and is assuming limited risks, it is compensated on the basis of guaranteed net margin. This fact tilts the TNMM as MAM in favour of the assessee.

The co-ordinate bench Bangalore in the case of Abott Medical Optics Pvt. Ltd Vs. DCIT ITA No. 1116/Bang/2011 has held that in cases where there is significant difference in the intensity of functions performed by the tested party and the comparables companies, RPM cannot be applied as the MAM.

Accordingly, the companies with high level of intensity of functions cannot be regarded as appropriate comparables for bench marking transactions applying RPM. Whereas TNMM, which is a net margin based method, takes into

consideration the differences in functional profile and level of intensity of functions of the tested party vis v is comparable companies. [Para 26-29]

9. Cargill Global Trading India P. Ltd. v. DCIT (ITA No. 3059/D/15)(15/11/19)

SECTION 92C – TRANSFER PRICING ADJUSTMENT – ARMS LENGTH PRICE- REVENUE AUTHORITY CANNOT DISPUTE THE NEED FOR SERVICES AND AS LONG AS THE EXPENSES ARE INCURRED, THE LIMITED QUESTION WOULD BE ASCERTAINING THE ARMS LENGTH PRICE – THE TPO AND CIT(A) MADE THE ADJUSTMENT ON THE GROUND THAT SERVICES ARE DUPLICATIVE IN NATURE – THE ADJUSTMENT WAS HELD TO BE BAD IN LAW

Held, Since, in the instant case, the incurring of the expenditure is not in dispute and since the only reason given by the Revenue authorities is that the assessee did not need the services as the same were duplicative and that the assessee did not derive any tangible benefit from such expenditure and did not file sufficient details to establish that it has, in fact, received some benefit or that the AE has rendered some services, therefore, respectfully following the decision of the Hon'ble Delhi High Court cited (supra), we set aside the order of the CIT(A) and direct the A.O./TPO to delete the addition. [Para 11]

10. Louis Dreyfus Company India Pvt. Ltd. vs. ACIT (ITA No. 1863/D/2016) (Dated 31.10.2019)

WHETHER THE CLAIM OF OF DEDUCTION ON ACCOUNT OF WASHOUT CHARGES IS ALLOWABLE - WHEREIN THE PERMISSION HAD ALREADY BEEN GIVEN BY THE RBI FOR REMITTANCE OF WASHOUT CHARGES ON THE CANCELLATION OF PART OF THE CONTRACT BETWEEN THE PARTIES – HELD YES

14. In the facts and circumstances of the case, we find that there was a contract between the parties to purchase the goods in the month of January 2005. Only part of goods could be purchased by the assessee, as the supplier of the goods had requested for an extension of contract i.e. to extend the period of shipping/delivery. The communication is dated 10.01.2005 and is also prior to shipping of part of the contract received by assessee. The reason forextending the contract was also mentioned in the said letter itself i.e. availability of the vessel at the end of February, 2005. Simultaneously, there was fall in the prices of crude soyabean oil and as a business decision, the assessee communicated to LD Asia, supplier, to cancel the delivery of balance goods. The said decision was taken in order to save the losses that the assessee would have incurred after receipt of the

balance crude soyabean oil, as the market had collapsed and the assessee could not have been in a position to sell the goods on profit. Another aspect of issue is that in order to make the aforesaid payment to LD Asia, permission had to be sought from RBI, for such remittance. The permission had been awarded by the RBI, consequent to which only the assessee made the payment to LD Asia. In such a scenario on the ground that the extension of contract, not being available before the TPO, could not be the reason to deny the claim of the assessee, especially where the assessee claims that it had filed the same before TPO. The said communication was filed before the CIT(A), who had accepted that there was fall in prices in the soyabean oil in the market. The only objection was whether there was a valid contract of 2/3rd February, when the contract was cancelled. We find no merit in the orders of the authorities below in this regard as the contract was between the two parties and in case of business exigencies they took a decision to extend the contract and the said contract was then cancelled between the parties because of the market conditions. The payment of the washout charges has been made after sanction of RBI and in such circumstances, we hold that the assessee is entitled to claim deduction of Rs.1.65 crores. Accordingly we hold so. Thus, grounds of appeal raised by the assessee in this appeal are allowed.

11. Taruna Verma vs. ITO (ITA No. 2496/D/2018) (Dated 15.11.2019)

SECTION 147:-REOPENING INVALID – A.O. HAS RECORDED INCORRECT FACTS IN THE REASONS FOR REOPENING OF THE ASSESSMENT BEING FACTUALLY INCORRECT, CONTRADICTORY AND VAGUE - A.O. HAS NOT APPLIED HIS MIND TO THE INFORMATION PROVIDED BY INVESTIGATION WING.

5.3. Considering the totality of the facts and circumstances of the case and comparing the reasons for reopening of the assessment for A.Y. 2007-2008 and 2012- 2013 (under appeal), it is clear that A.O. has recorded incorrect facts in the reasons for reopening of the assessment which are factually incorrect, contradictory and vague. The A.O. did not verify the report received from Investigation Wing and did not apply his mind to the information as well as facts of the case. In A.Y. 2007-2008 on the identical reasons, the Division Bench of the Tribunal did not approve the reopening of the assessment in the matter and quashed the same vide Order Dated 19.09.2017 (supra). The issue is, therefore, covered in favour of the assessee by the Order of the Tribunal in the case of same assessee for A.Y. 2007-2008 (supra). There isno link between material and formation of opinion that income escaped assessment. There is no independent application of mind to the information received from Investigation Wing and no

prima facie opinion have been formed, therefore, reassessment is invalid. I rely upon Judgments of Hon'ble Delhi High Court in the case of Pr. CIT vs., G and G Pharma India Ltd., [2016] 384 ITR 147 (Del.), Pr. CIT vs., Meenakshi Overseas Pvt. Ltd., [2017] 395 ITR 677 (Del.) and Pr. CIT vs., RMG Polyvinyl (I) Ltd., [2017] 396 ITR 5 (Del.). Considering the totality of the facts and circumstances of the case, I am of the view that reopening of the assessment is invalid and bad in law and is liable to be quashed. I, accordingly, set aside the Orders of the authorities below and quash the reopening of the assessment in the matter. Resultantly, all the additions stand deleted. Appeal of the assessee allowed.

12 Indsao Construction P. Ltd. v. ITO (ITA No. 907/D/18)(06/11/2019)

SECTION 147/148 – RE-ASSESSMENT ORDER PASSED BEFORE EXPIRY OF 4 WEEKS TIME FROM THE DATE OF DISPOSAL OF OBJECTION – THE ASSESSMENT ORDER PASSED IN CONTRAVENTION OF DECISION OF BOMBAY HIGH COURT IN THE CASE OF ASIAN PAINTS LTD. VS. DCIT - IN ABSENCE OF PROPER OPPORTUNITY TO THE ASSESSEE TO EXPLORE ALTERNATE REMEDY, THE ASSESSMENT ORDER WAS HELD TO BE ILLEGAL AND BAD IN LAW

Held, As argued by the Ld. Counsel for the assessee, which I have verified from the records that the Assessee has field the objections on 26.8.2016 which were disposed of by the AO on 01.12.2016 and he completed the assessment on 20.12.2016 u/s. 143(3) of the Act. For the sake of convenience, the relevant portion of the judgement of the Hon'ble Bombay High Court in the case of Asian Paints Ltd. Vs. Deputy Commissioner of Income Tax (Supra) is reproduced as under:-

> *"1. Heard learned counsel for the petitioner and the respondent. Rule, returnable forthwith. By consent all the petitions are taken up for final hearing.*
>
> *2. In all the above petitions, it is a case regarding reopening of the assessment order under section 148 of the Income-tax Act. In all the above cases, the petitioners have filed their respective objections on January 15, 2007, with regard to reopening of the assessment.*
>
> *3. The learned senior counsel for the petitioner pointed out that in some of the cases as soon a the objections were rejected by the concerned Income-tax Officer, even the assessment order has been passed within a very short time whereby the assessee is left without any remedy to challenge such an order of rejection.*
>
> *4. Hence we make it clear that if the Assessing Officer does not accept the objections so filed, be shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the said order on objections, on the assessee.*

5. Accordingly, rule is made absolute.

6. We also direct that the Income-tax Officer concerned shall follow the above procedure strictly in all such cases of reopening of assessment.

7. All the petitions stand disposed of accordingly."

Keeping in view of the facts and circumstances of the present case and the judgment passed by the Hon'ble Bombay High Court in the case of Asian Paints Ltd. Vs. Deputy Commissioner of Income Tax (Supra), I am of the view that the AO has rejected the objections of the assessee on 01.12.2016 and completed the assessment on 20.12.2016 which was within a very short time whereby the Assessee was left without any remedy to challenge such an order of rejection. The Hon'ble Bombay High Court has taken a serious view on this issue and also direct that AO concerned shall follow the above procedure strictly in all such cases of reopening of assessment. Therefore, respectfully following the aforesaid precedent of the Hon'ble Bombay High Court in the case of Asian Paints Ltd. Vs. Deputy Commissioner of Income Tax (Supra) the addition in dispute is deleted by accepting the appeal of the assessee. [Para 4.2 & 4.3]

13. M/s. KVF Securities (P) Ltd. v. ITO (ITA.No.5731/D/2014 & CO.No.169/D/2015) (01/11/2019)

SECTION 147 – INCORRECT FACTS IN THE REASONS – THE ASSESSING OFFICER RECORDED REASONS MERELY ON THE BASIS OF INFORMATION FROM INVESTIGATION WING – THE QUANTIFICATION OF INCOME ESCAPING ASSESSMENT WAS DONE BY TAKING TOTAL OF CREDIT SIDE OF THE BANK ACCOUNT WITHOUT APPRECIATING THE OTHER ENTRIES OF DIFFERENCE NATURE – CASE OF NON APPLICATION OF MIND – REOPENING WAS HELD TO BE INVALID

Held, The Ld. D.R. also filed copies of statements recorded by A.O. at remand proceedings as well as filed copy of the statement of Shri Govind Ram Saini recorded by Investigation Wing. Dated 13.05.2005 on record. The Ld. D.R. stated that the letter Dated 13.03.2006 which is the basis of recording reasons for reopening of the assessment is not available in assessment record. In the letter Dated 13.03.2006 referred to in the reasons, the Investigation Wing. Referred to the statement of Shri Govind Ram Saini which is the basis for reopening of the assessment. However, in his statement there is no reference to the assessee for providing any accommodation entry. The A.O. in the re-assessment order also mentioned that information provided by the assessee at re-assessment proceedings stated that details of accounts as reflected in the statement provided showing transaction in bank account of Rs.10,24,42,961/-. Therefore, contention

of Learned Counsel for the Assessee is correct that this is the amount which has appeared at credit side of the bank account of the assessee. The A.O. has taken the entire amount deposited in the Bank account of the assessee as accommodation entry without verifying any fact. The assessee explained before A.O. that the amount in his Bank account reflected on credit side pertain to sales, share application money, income and amount received back from the parties i.e., paid for purchases. Therefore, A.O. did not apply his mind to the information received from Investigation Wing. vide letter Dated 13.03.2006 which is also not produced before the Tribunal for examination as it was not part of the record. It has also shown that the credit side of the assessee Bank account contain several items, therefore, entire amount could not have been representing share application money. The A.O. ultimately accepted this fact and did not make addition of the entire amount reflecting on the credit side of Bank account of the assessee. It may also be noted here that out of the total addition, Rs.29 lakhs in which shares have been allotted to 04 parties pertain to the preceding assessment year as no amount have been received in assessment year under appeal of Rs.29 lakhs which fact have been accepted by the Ld. CIT(A). The assessee also explained before the authorities below that Rs.80,50,000/- in respect of 16 parties have not been mentioned in the information supplied by the Investigation Wing, then there were no reason for the A.O. to say that both these amounts are accommodation entries received by the assessee in assessment year under appeal. These facts clearly show that A.O. recorded incorrect facts in the reasons recorded for reopening of the assessment. The Hon'ble Punjab & Haryana High court in the case of Atlas Cycle Industries 180 ITR 319 (P & H) held that "when incorrect facts are mentioned in the reopening of the assessment, the reopening of the assessment is not valid and liable to be quashed." In the present case, as noted above the reasons to believe contain no reasons but conclusion of the A.O. one after other. The A.O. recorded incorrect facts in the reasons. Thus, there is no independent application of mind by the A.O. to any tangible material which form the basis of reasons to believe that income chargeable to tax has escaped assessment. The conclusion of the A.O. are at best re-production of the conclusion of investigation report. The A.O. in the reasons has not recorded as to from whom assessee has received unaccounted money. The A.O. has merely referred to Annexure-A in the reasons which is credit side of the bank account of the assessee which ultimately found to be correct that the entire bank deposits are not accommodation entries. There were no proceeding pending before the A.O. at the time of recording of reasons, thus, there was no reason for assessee to establish the creditworthiness of the Investors as is noted in the reasons. The A.O. merely on doubts or suspicion recorded the reasons that amount of Rs.10,24,42,961/- represents income of assessee chargeable to tax which has escaped assessment. The issue is, therefore, covered by Judgment of Hon'ble Delhi High Court in the case of G and G Pharma India Ltd., Meenakshi Overseas Pvt. Ltd., and RMG Polyvinyle (I) Ltd., (supra). Considering the totality of the

facts and circumstances of the case, we are of the view that assumption of jurisdiction under section 147/148 by the A.O. is invalid and bad in law and is liable to be quashed. In view of the above discussion, we set aside the Orders of the authorities below and quash the reopening of the assessment in the matter which resulted into deletion of all the additions. [Para 9.1]

14. M/s. Ganesh Ganga Investments Pvt. Ltd. v. ITO (ITA No.1579/Del./2019)(07/11/2019)

SECTION 147/148 – INCORRECT FACTS IN THE REASONS- THE ASSESSING OFFICER BEING A QUASI JUDICIAL AUTHORITY IS REQUIRED TO FORM INDEPENDENT SUBJECTIVE SATISFACTION – THE REASONS WERE MERELY ON THE BASIS OF INFORMATION FROM INVESTIGATION WING WITHOUT VERIFICATION OF FACTS – PR.CIT GRANTING APPROVAL WITHOUT APPLICATION OF MIND – REOPENING WAS HELD TO BE INVALID

Held, The statement of Shri Himanshu Verma is also filed on record which did not find mention if M/s. Shubh Propbuild Pvt. Ltd., as mentioned in the reasons belong to Shri Himanshu Verma. There is no investor exist in the name of M/s. Management Services Pvt. Ltd., and no addition in respect of the same company have been made by the A.O. The A.O, therefore, recorded incorrect facts in the reasons for reopening of the assessment. Thus the same cannot be approved under the Law. It is well settled Law if wrong facts and wrong reasons are recorded for reopening of the assessment, reopening of the assessment would be invalid and bad in Law. We rely upon Judgment of Hon'ble Punjab & Haryana High Court in the case of Atlas Cycle Industries 180 ITR 319 (P&H). It is well settled Law that note already filed with return disclosing nature of capital receipt and no other tangible material found, therefore, reopening of the assessment under section 148 was quashed. We rely upon Judgment of Hon'ble Delhi High Court in the case of CIT vs., Atul Kumar Swami [2014] 362 ITR 693 (Del.) and Judgment of Hon'ble Allahabad High Court in the case of Kanpur Texel P. Ltd., 406 ITR 353 (Alld.). Similarly, in the case of CIT vs., Vardhaman Industries [2014] 363 ITR 625 (Raj.), the Hon'ble Rajasthan High Court has held that "reasons must be based on new and tangible materials. Notice based on documents already on record, 148 not valid." In the instant case under appeal, the A.O. has reproduced the information received from Investigation Wing and reproduced the same in the reasons recorded under section 148 of the I.T. Act. This information shows that assessee has received the amount of credit from 06 parties, but, one of the party i.e., M/s. Management Services Pvt. Ltd., do not exist and that M/s. Shubh Propbuild Pvt. Ltd., do not belong to Shri Himanshu Verma. It, therefore, appears that A.O. has not gone through the details of the information and has not even applied his mind and merely concluded that he has reason to believe that

income chargeable to tax has escaped assessment. In the reasons A.O. has recorded that assessee has received accommodation entry of Rs.2.45 crores, but, ultimately made an addition of Rs.11.05 crores without bringing any material against the assessee. The reasons to believe are, therefore, not in fact reasons, but, only conclusion of the A.O. In the case of Meenakshi Overseas Pvt. Ltd., (supra), the A.O. in the reasons has even mentioned that he has gone through the information received which is lacking in the present case. The A.O. being a quasi-judicial authority is expected to arrive at subjective satisfaction independently on his own. The A.O. however, merely repeated the report of the Investigation Wing in the reasons and formed his belief that income chargeable to tax has escaped assessment without arriving at his satisfaction. Thus, there is no independent application of mind by the A.O. to the report of Investigation Wing to form the basis for recording the reasons. The reasons recorded by the A.O. are also incorrect as noted above. The reasons failed to demonstrate the link between the alleged tangible material and the formation of reasons to believe that income chargeable to tax has escaped assessment. The decisions relied upon by the Learned Counsel for the Assessee in the cases of Pr. Commissioner of Income Tax vs., RMG Polyvinyl (I) Ltd., 396 ITR 5 (Del.), Pr. Commissioner of Income Tax vs., Meenakshi Overseas (P) Ltd., 395 ITR 677 (Del.), Pr. Commissioner of Income Tax vs., G and G Pharma India Ltd., 384 ITR 147 (Del.) and Sarthak Securities Co. (P) Ltd., 329 ITR 110 (Del.), clearly apply to the facts and circumstances of the case. Learned Counsel for the Assessee also relied upon Order of ITAT, Delhi Bench in the case of Pioneer Town Planners Pvt. Ltd., (supra) in which on identical facts reopening of the assessment have been quashed. The Ld. D.R. relied upon certain decisions in support of the contention that reopening of the assessment is justified, but, the same are distinguishable on facts of the present case. Considering the facts and circumstances of the case in the light of above discussion and decisions referred to in the Order, we are of the view that reopening of the assessment is bad in law and that sanction/approval granted by Pr. Commissioner of Income Tax is also invalid. We may also note that vide Order sheet Dated 23.08.2019 the case was re-fixed for hearing because the Ld. D.R. argued that approval have been granted by Commissioner of Income Tax after due discussion of the matter and perusal of the relevant information and thereafter approval in prescribed proforma sent to the A.O. and he has mentioned that I am satisfied. However, no record was produced. Therefore, this case was re-fixed for fresh hearing. However, on the date of hearing no such record have been produced for the inspection of the Bench. Therefore, satisfaction recorded by the Pr. Commissioner of Income Tax is invalid and without application of mind. Therefore, the reopening of the assessment is invalid and bad in Law and cannot be sustained in Law. We, accordingly, set aside the Orders of the authorities below and quash the reopening of the assessment under section 147/148 of the I.T. Act, 1961. [Para 8.5]

15. **Naresh Kumar Garg vs ACIT (ITA No. 5706/Del/2016)(AY 2009-10)(14.11.2019)**

SECTION 143(3) R.W.S 147: WHETHER ADDITION CAN BE SUSTAINED IF THE CIT(A) HAS DELETED THE ADDITION, ON THE BASIS OF WHICH THE ASSESSMENT WAS REOPENED- HELD, FOLLOWING THE DECISION OF THE HON'BLE HIGH COURT IN THE CASE OF ADHUNIK NIRYAT ISPAT LTD AND RANBAXY LABORATORIES LTD , THE ADDITIONS MADE ON ACCOUNT OF THE ITEMS OTHER THAN THE ITEMS IN REASONS RECORDED , CANNOT SURVIVE

It is evident that the Assessing Officer himself did not make addition inrespect of the first part of the items of reason recorded i.e. freight to M/sHaryana Concrete. The addition made by the Assessing Officer on the secondpart of the reason recorded i.e. disallowance of crane charges and bokicharges has been deleted by the Ld. CIT(A). Thus we find that no addition onaccount of the items of reasons recorded is in existence after the order of theLd. CIT(A). As per the record, the Revenue is not in appeal against saiddeletion by the Ld. CIT(A). In the circumstances, following the decision of theHon'ble High Court in the case of AdhunikNiryatIspat Ltd (supra) andRanbaxy Laboratories Ltd (supra) , the additions made on account of the itemsother than the items in reasons recorded , cannot survive. We direct the AO todelete the additions accordingly. The issue in dispute involved in the groundsraised by the assessee is accordingly allowed in favour of the assessee. Sincewe have allowed the appeal on legality of the addition made in reassessmentproceedings, we are not adjudicating on merit of the additions. (para 10)

16. **N.K. Associates vs DCIT (ITA.No.4798, 4799 & 4800/Del./2016)(AY 2013-2014)(13.11.2019)**

SECTION 154 -INCOME TAX ACT - AO PASSED THE INTIMATION U/S 154, LEVYING THE LATE FEES UNDER SECTION 234E - ASSESSEE CONTENDED BEFORE THE CIT(A) THAT A.O. HAS ERRED IN MAKING INTIMATION UNDER SECTION 154 WITHOUT ANY INTIMATION UNDER SUB-SECTION (1) OF SECTION 200A, IN RESPECT OF TDS RETURN- HELD, AMENDMENT TO SECTION 200A, RELATING TO LEVYING OF FEE U/S 234E HAVE BEEN INSERTED W.E.F. FROM 01.06.2015- NO ORDER OF INTIMATION U/S 200A HAS BEEN BROUGHT ON RECORD- IN THE ABSENCE OF ANY ORDER OR INTIMATION UNDER SECTION 200A(1) OF THE I.T. ACT, NO AMENDMENT UNDER SECTION 154 COULD BE DONE BY THE AUTHORITIES BELOW- THEREFORE ASSESSEE APPEALS ARE ALLOWED

We have considered the rival submissions and do not find any justification to sustain the Orders of the authorities below. The ITAT, Delhi and Pune Benches in the above cases have considered the Amendment to Section 200A of the I.T. Act in which sub-clause (c) have been inserted in the Section w.e.f. 01.06.2015 which includes that while processing of the statement of tax deducted at source the fee, if any, shall be computed in accordance with the provisions of Section 234E of the I.T. Act. Therefore, the issue is covered by the above decisions of the ITAT, Delhi and Pune Benches. Further, no order of intimation under section 200A(1) have been brought on record and virtually the A.O. has shown his inability in giving any factual position in this regard. Therefore, contention of assessee is justified that no intimation under section 200A(1) have been issued in the present case. Therefore, there is no question of making any rectification in any of the orders. Since rectification under section 154 could be made in some order already existing, therefore, in the absence of any Order or intimation under section 200A(1) of the I.T. Act, no amendment under section 154 could be done by the authorities below. Further, Section 154(3) of the I.T. Act provides that an amendment which has the effect of enhancing the assessment or reducing refund or otherwise including liability of assessee or the deductor or the collector, shall not be made under this Section unless the authority concerned has given notice to assessee or deductor or collector or of its intimation to do so and he shall allow the assessee or the deductor or the collector a reasonable opportunity of being heard. In the present case, the intimation under section 154 have been issued automatically without giving any opportunity of being heard to the assessee. Therefore, there is violation of principles of natural justice as well as violation of Section 154(3) of the I.T. Act. In this view of the matter, the Order passed in the absence of assessee without giving opportunity shall have to be quashed. Considering the above discussion in the light of decisions of ITAT, Delhi and Pune Benches (supra), we set aside the Orders of the authorities below and quash the impugned orders. All the appeals of the Assessee are allowed (para 5)

17. M/s. Oscar Investments Ltd. vs. Pr.CIT (ITA No. 2823/Del/2016)(04/11/19)

SECTION 263 – REVISION BY PR.CIT - THE ISSUE FOR CONSIDERATION IN REVISION PROCEEDING IS ALREADY SUBJECT MATTER OF APPEAL BEFORE CIT(A) AND ITAT - DOCTRINE OF MERGER SHALL APPLY AND PR.CIT IS OUSTED OF ITS JURISDICTION TO REVISE THE ASSESSMENT ORDER U/S 263

Held, We have heard the rival submissions and have also perused the material available on record. The undisputed facts are that for the year under consideration, dividend income of Rs.1,10,58,833/- was earned by the assessee which was claimed as exempt and not liable to tax. In the return of income, the assessee had, suo moto made a disallowance u/s 14A of the Act to the tune of

Rs.2.13 crores. The AO, in his order u/s 143(3), recomputed the disallowance u/s 14A by invoking provisions of Rule 8D to Rs.4,05,51,458/-. The Ld. CIT (A) deleted this disallowance and the appeal of the department against the order of the Ld. CIT (A) before this Tribunal was also dismissed vide order dated 9th February, 2017 in ITA No. 4088/Del/2014. It is our considered view that on the factual matrix of the case, the doctrine of merger will apply. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative order governing the same subject-matter at a given point of time. In the case of CIT vs. Narpat Singh Malkhan Singh (1981) 128 ITR 77 (MP), the Hon'ble Madhya Pradesh High Court has very illustratively considered the doctrine of merger. In this case, the Income Tax Officer (ITO) had completed the assessment u/s 143(3) of the Act against which the assessee preferred an appeal before the AAC confining his objections to certain disallowances of expenses by the ITO. The AAC partly allowed the assessee's appeal resulting in partial reduction in the total income of the assessee. The Ld. CIT, thereafter, served a notice u/s 263 of the Act on the assessee to show cause why the assessment order be not set aside as it was erroneous and prejudicial to the interest of the Revenue in as much as the AO had not charged interest u/s 217 (1A) of the Act and had also not initiated penalty proceedings u/s 273(c) of the Act. The assessee's objection to initiation of revisionary proceedings on the ground of doctrine of merger was rejected by the Ld. CIT. The Ld. CIT did not find any defect in any particular item decided by the ITO which was not the subject matter of appeal before the AAC but only in the omission to charge interest u/s 217(1A) and initiate penalty proceedings u/s 273(c). The assessee appealed successfully before the Tribunal. On department's appeal, the question before the Hon'ble Madhya Pradesh High Court was whether the Ld. CIT, while exercising power u/s 263, could set aside the assessment order after the appellate order was made by the AAC. The Division Bench took the view that the Ld. CIT could not have invoked power u/s 263 as the ITO's order had merged with the order of the AAC. In the present appeal before us, going by the doctrine of merger, since the Ld. CIT (A) had already decided the issue in favour of the assessee, the Ld. Pr. CIT could not have exercised his revisionary powers u/s 263 of the Act. If the department was aggrieved by the order of the Tribunal deleting the disallowance, proper recourse would have been to approach the higher forum. Therefore, we are of the considered opinion that the jurisdiction u/s 263 of the Act could not have been invoked by the Pr. CIT in this case. Accordingly we quash the assumption of jurisdiction u/s 263 of the Act by the Ld. Pr. CIT. [Para 5]

18. M/s. I Strate Software P. Ltd. v. ACIT (ITA No. 3046/Del/2019)(31/10/2019)

SECTION 271B – PENALTY FOR FAILURE TO GET ACCOUNTS AUDITED – DELAY IN FILING OF AUDIT REPORT WAS ON ACCOUNT OF CHANGE

IN MANAGEMENT AND STATUTORY AUDITOR – IT WAS HELD THAT AS PER SECTION 273B, THE SAID REASON CONSTITUTES REASONABLE CAUSE – PENALTY WAS CANCELLED

Held, I have carefully considered the rival submissions. Ostensibly, the appellant has defaulted in not getting its accounts audited in terms of Section 44AB of the Act within the prescribed time. Section 273B of the Act prescribes that in case there is a reasonable case for such default, the same would save the assessee from the rigors of Section 271B of the Act, which prescribes a penalty for not adhering to the requirement of section 44AB of the Act. In the present case, it is an undisputed position that the assessee being a corporate entity was required to get its accounts audited in terms of the provisions of the Companies Act, 1956 before the same could be subject to the audit prescribed u/s 44AB of the Act. Ostensibly, there was a delay in the conduct of the statutory audit under the provisions of the Companies Act, 1956, for which the reasons have been explained. In my considered opinion, such delay constitutes a reasonable cause in the present circumstances so as to mitigate the rigors of section 44AB of the Act on the assessee, especially considering the fact that bonafides of the reason for the delay are not in doubt. As a consequence, I direct that the penalty levied by the Assessing Officer be set aside. [Para 6]

19. **M/s Estee Advisors P. Ltd. vs. DCIT (I.T.A. No.5832/D/2018) (Dated: 30.10.2019)**

MTM LOSSES ARISEN OUT OF CONTRACTUAL OBLIGATION EXISTED ON THE REPORTED DATE CAN NOT BE REGARDED AS CONTINGENT OR NOTIONAL IN NATURE MERELY BECAUSE THE LIABILITY HAS TO BE DISCHARGED AT THE FUTURE DATE.

13. Further, in PCIT vs International Gold Company Ltd.,ITA No.1827 of 2016 dated 27.02.2019, it was held that loss on forwardcontracts is not a notional loss and, therefore, need be allowed. In this case, it is the contention of the department that such loss is a notional loss was decided against the department on the ground that in case of export and import business hedging of risk in foreign exchange is a normal course of business activity and such loss need to be allowed. In this case, Hon'ble Bombay High Court referred to instruction No.03/2010 dated 23.03.2010 to confirm that such loss is business loss allowable under the Act and held that CBDT circular/instruction has no applicability.

14. In view of the above settled position of law, we are of the considered opinion that the MTM losses arising out of contractual obligation existing on the reporting date cannot be regarded as contingent or notional in nature and merely

because the liability has to be discharged at a future date, the same cannot be regarded so. With this view of the matter, we find it difficult to sustain the addition and accordingly set aside the impugned order and direct the assessing officer to delete the addition made in this regard.

20. DCIT vs M/s. PunjLlyod Ltd. (I.T.A No.2109/Del/2017)(AY 2011-12)(11.11.2019)

PENDENCY OF MATTER BEFORE NCLT: APPEAL FILED TO ITAT – MATTER PENDING BEFORE NCLT- SECTION 14 OF THE INSOLVENCY AND BANKRUPTCY CODE 2016 HAS DECLARED A MORATORIUM-HELD, APPEAL OF REVENUE DISMISSED WITH A LIBERTY TO FILE THIS AS FRESH, ON COMPLETION OF RESOLUTION PROCESS

In the light of above decision of tribunal in the case of the assessee company, respectfully following same and in view of the specific request of the assessee, provisions of IBC, 2016 and decision of Hon`ble Supreme Court, we dismiss this appeal of revenue with a liberty to file this as fresh, on completion of resolution process, if deem fit. Accordingly, this appeal of revenue is disposed-off as dismissed. (para 6)

21. DCIT v. Mr. Geetambar Anand (ITA No. 5982&2216/D/14)(05/11/19)

RULE 27 – RESPONDENT CAN SUPPORT THE ORDER OF CIT(A) ON ALTOGETHER NEW GROUND AS WELL – THE CIT(A) HAVING DELETED THE ADDITIONS ON MERITS – THE RESPONDENT SUPPORTED THE ORDER OF CIT(A) ON THE LEGAL GROUND THAT AO DID NOT HAVE JURISDICTION TO MAKE ADDITION IN ABSENCE OF INCRIMINATING MATERIAL FOUND IN SEARCH U/S 132 – IT WAS HELD THAT RESPONDENT CAN SUPPORT THE ORDER OF CIT(A) ON NEW LEGAL GROUND WHICH DOES NOT REQUIRE FRESH FINDING OF FACT.

Held, We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly in this case the assessee has not filed any appeal against the order of the learned CIT – A. Even otherwise, the issue is not decided against the assessee but in favour of the assessee. Therefore, there was naturally no reason for assessee to file the appeal. In the present case assessee is saying that even otherwise the addition deleted by the learned CIT – A is valid but altogether on another ground. Thus assessee supporting the order of the learned CIT – A in deletion of the above addition. Honourable Delhi High Court in 123 ITR 200 has held so when the learned assessing officer did not file an appeal against the order of the learned CIT – A but assessee filed an appeal before the ITAT and ITAT did not allow revenue to support the order of the learned CIT – A, the honourable Delhi High Court has held that principles of

natural justice are violated. Even without getting any support from rule 27 of the ITAT rules, the assessee can submit, even if No appeal is filed against the order of the first appellate authority that the addition even otherwise is not tenable/sustainable. In the present case the assessment year 2006 – 07 is a concluded assessment as the date of search was 20/2/2008 and on that date no proceedings for the impugned assessment year were pending. Additions made by the learned AO were without finding any incriminating material during the course of search. Therefore for the reasons given in deciding the appeals of the said assessee for assessment year 2005 – 06, we also hold that even otherwise in absence of incriminating material there is no infirmity in the order of the learned CIT – A in deleting the above addition. Accordingly, ground numbers 1 – 4 of the appeal of the learned assessing officer are dismissed. [Para 20]