FORM NO.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present:
Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Sudip Ahluwalia

ITA NO. 168 of 2011
GA No.1541 of 2012

COMMISSIONER OF INCOME TAX, CENTRAL- I, KOLKATA
Versus
M/S. J. L. MORRISON (INDIA) LTD.

Advocate for the Appellant: Md. Nizumuddin, Advocate.
.
Advocate for the Respondent: Mr. N. K. Poddar, Senior Advocate
Mr. A. Gupta,
Advocate,
Mr. V. Tibrewal, Advocate.

Heard on: 24.2.2014, 19.3.2014, 1.4.2014, 2.4.2014, .4.2014, 4.4.2014, 7.4.2014, 8.4.2014, 9.4.2014, 16.4.2014, 17.4.2014, 21.4.2014, 22.4.2014 and 23.4.2014.

Judgment delivered on: 15.05.2014

GIRISH CHANDRA GUPTA J. The subject matter of challenge in this appeal preferred by the Revenue is a judgement and order dated 13th April, 2011 by which the learned Tribunal allowed the assessee's appeal setting aside the order dated 1st March, 2010 passed by the Commissioner of Income Tax in exercise of power under Section 263 of the Income Tax Act (hereinafter referred to as 'the Act').

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It is a fact that the assessment under Section 143(3) of the Act for the assessment year 2006-07 was completed on 28th March, 2008 without any discussion whatsoever. The return filed by the assessee was accepted in toto. Proceedings thereafter under Section 154 of the Act were started by a notice dated 8th May, 2008. The particulars of mistakes, appearing from the notice, proposed to be rectified were as follows:

> " a) *Amount received from BDF (Rs.18 Crores) as Compensation is taxable under the head "other source of income".*
>
> b) *Excess deduction allowed u/s.80IB amounting to Rs.1,24,45,885/-.*
>
> c) *Excess debit of Royalty Rs.46,61,828/-.*
>
> d) *Excess allowance of Royalty paid by Rs.24,77,129/-.*
>
> e) *Excess debit on account of consumption of Raw Materials by Rs.1,56,59,363/-."*

The proceedings under Section 154 were, however, dropped by an order dated 9th November, 2009 holding that the issues were debatable and also required further investigation/enquiry.

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A notice, thereafter, under Section 263 of the Act was issued on 26th November, 2009 by the CIT proposing to revise the order dated 28th March, 2008 due to the following defects:-

> "I) During the said A.Y., you have received a sum of Rs.18.00 Crore from MYS Beierdorf AG., Germany (BDF) as an one-time settlement for termination of contracts of producing and selling of the products of the latter company in India as well as issuing a NOC for setting up a 100% subsidiary by them in India. The said receipt should have been considered as income in the ambit of either Sec. 28 or Sec. 56, if the same is considered as voluntary payment on a goodwill gesture as pointed out by you. But, the said receipt has been allowed to be transferred directly to Capital Reserve Account while passing the assessment order for the A.Y. 2006-07.
>
> 2) You have been allowed to debit Rs.1,32,11,353/- as Royalty paid to BDF during the said A.Y. for exclusive use of their Trade Mark, copy rights, know-how to manufacture their products etc. in India as per agreements entered into time to time. But, as per the guidelines laid down by the Ministry of Commerce & Industry, Govt. of India, the amount of Royalty required to be allowed for payment in such a case is 1% of 'Net Sales Value', which comes to Rs.84,49,525/- in your case. So, you have been allowed an additional amount of Rs.46,61,828/- to be debited under the said head while passing the assessment order for the A.Y. 2006-07.
>
> 3) It is now judicially well settled that the expenditure towards payment of Royalty for the reasons discussed above is partly capital in nature and hence, one-fourth i.e.25% of the same is required to be disallowed for being capital in

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nature. But, no such disallowance has been made while passing the assessment order for the A.Y. 2006-07.

4) You have been allowed to debit an amount of Rs.9,29,14,375/- towards cost of 'Raw & Packing Material consumed', which can be bifurcated as Rs.5,14,48,363/- towards Raw Materials & Rs.4,14,66,012/- towards Packing Materials consumed as per Sch.10 to the Accounts. However, from Sl.14(D) of Sch. 17 of Notes forming part of the Accounts, value of Raw Materials consumed appears to be Rs.3,57,89,000/-. Hence, an additional amount of Rs.1,56,59,363/- has clearly been allowed to be debited in the assessment order for the A.Y. 2006-07."

After the assessee replied to the notice dated 26th November, 2009, the matter was heard and ultimately the CIT passed the order dated 1st March, 2010 under Section 263 of the Act, the operative portion whereof reads as follows:-

"*It is clear that the assessment order passed is both erroneous vis a vis legal provisions and also prejudicial to the interests of revenue. Hence recourse to action u/s 263 is warranted as per conditions set out by the Apex Court in Malabar Industrial Company Ltd. V. CIT (2000) 243 ITR 83 (SC). Moreover, non application of mind by the AO to the issues stated above also justifies action u/s 263 CIT V. Emery Stone Mfg. Co. (1995) 213 ITR 843 (Raj.)*

In view of the discussions made in the earlier paragraphs, the assessment order u/s 143 (3) passed by the AO on 28/03/2008 is considered to be erroneous and prejudicial to the interest of the revenue so far as the above mentioned

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issues are concerned. Accordingly, the assessment order is set aside on the above mentioned issues and the AO is directed to pass fresh assessment order after giving reasonable opportunity of being heard to the assessee on such matters."

Challenging the aforesaid order dated 1st March, 2010, the assessee approached the learned Tribunal. By the impugned judgment and order dated 13th April, 2011 the Tribunal has set aside the order dated 1st March, 2010. The appeal in the circumstances has been preferred by the revenue.

The questions of law raised in the appeal by the Revenue, are as follows :-

" i) Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in quashing the order of the CIT passed under Section 263 of the I.T. Act, 1961, by disregarding that the assessment order passed by the Assessing Officer under Section 143(3) of the I.T. Act, 1961, was erroneous and prejudicial to the interest of the revenue within the meaning of Section 263 of the Income Tax Act, 1961 ?

ii) Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in quashing the order of the CIT passed under Section 263 of the I.T. Act, 1961, by disregarding that the assessing officer failed to conduct its duty of examination/verification of the claim of the assessee and by not adding the receipts to the total

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income which should have been added and by allowing excessive allowances ?

iii) Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in failing to distinguish between the scope of and ambit of section 154 and Section 263 of the I.T. Act ?

iv) Whether on the facts and in circumstances of the case the Ld. Tribunal has erred in law in quashing the order of the CIT passed under Section 263 of the I.T. Act, 1961, without going into the merit of the case and by holding that the assessing officer had called for certain details and had kept on record and had taken a possible view by disregarding that mere calling for details and keeping on record would not automatically establish that the same were verified and examined by the assessing officer for coming to a particular view ?

v) Whether on the facts and in the circumstances of the case conclusion arrived at by the Ld. Tribunal in granting the aforesaid relief to the assessee, is perverse ?”

The submissions, made by Mr. Nizamuddin, are five in number:

(a) the assessment order is bad because it does not disclose any reasons; (b) In exercise of power u/s. 263, the CIT is not obliged to demonstrate conclusively that the receipt was taxable; (c) the order under challenge is bad because the Tribunal did not deal with all the four points raised by the CIT in exercise of power u/s. 263; (d) proceedings under section 154 cannot prevent the Commissioner from

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exercising power under section 263 and (e) the Commissioner can exercise power under section 263 even though the issues involved are debatable.

After hearing the learned advocates, the questions which arise for determination have been formulated as follows :-

(a) Whether the Tribunal was justified in taking the view that the Assessing Officer by the order dated 28th March, 2008 passed under Section 143(3) of the Act took a possible view?

(b) In case the answer to the above question is in the affirmative, can it still be said that the order is erroneous and prejudicial to the interest of revenue?

(c) Whether the assessment order dated 28th March, 2008 was passed by the Assessing Officer without application of mind?

(d) Whether the Tribunal was justified in setting aside the order passed by the Commissioner of Income Tax under Section 263 without examining all the four issues appearing from the notice under section 263 ?

(e) Whether the order passed by the Tribunal is perverse ?

The main thrust of the arguments advanced on behalf of the Revenue by Mr. Nizamuddin, is directed against the third question

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formulated above, whereas the main thrust of the arguments of the assessee are directed against the first and the second questions formulated above.

The first judgment relied upon by Mr. Nizamuddin is a judgment in the case of CIT vs. M. M. Khambhatwala reported in 198 ITR 144 wherein the following views were expressed :-

> *"...the Tribunal took the view that the Commissioner could not have invoked the provisions of section 263 of the Act since two views are possible on the question whether the assessee was entitled to weighted deduction under Section 35B of the Act. This is a strange view taken by the Tribunal and it is conceded that this view taken by the Tribunal is not supported by any provision of the Act or any decision. The Commissioner would be entitled to revise the order of the Income-tax Officer if he is of the view that the order of the Income-tax Officer is erroneous and prejudicial to the interests of the Revenue. The Commissioner can exercise the power under section 263 even in a case where the issue is debatable. Revisional power under section 263 is not comparable with the power of rectification of mistake under section 154 of the Act. It was only in the context of section 154 of the Act that the Supreme Court has in T. S. Balaram, ITO v. Volkart Brothers [1971] 82 ITR 50, observed that, when the issue is debatable, the power of rectification cannot be exercised. This decision of the Supreme Court has no application whatsoever so far as powers under section 263 are concerned. Therefore, with respect, the view taken by the Tribunal is patently erroneous*

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and illegal. We, therefore, answer question No.2 in the negative and against the assessee."

The second judgment cited by Mr. Nizamuddin is in the case of CIT vs. Ralson Industries Ltd. reported in 288 ITR 322 (SC) wherein the following views were expressed:-

"The decision of the Madhya Pradesh High Court in Chunnilal Onkarmal (P) Ltd.'s case (supra) is also not apposite. Initiation of a proceeding under Section 263 of the Act cannot be held to have become bad in law only because an order of rectification was passed. No such hard and fast rule can, in our opinion, be laid down. Each case is required to be considered on its own facts. In a given situation, the High Court may be held to be entitled to set aside both orders and remit the matter for consideration of the matter afresh. But in our opinion, it would not be correct to contend that only because a proceeding for rectification was initiated subsequently, the revisional jurisdiction could not have been invoked under any circumstances whatsoever. If such a proceeding was initiated, in our opinion, the contesting parties could bring the same to the notice of the Commissioner so as to enable him to take into consideration the subsequent events also. It goes without saying that if and when the Commissioner of Income-tax takes up for consideration a subsequent event, the assessee would be entitled to make its submission also in regard thereto."

Mr. Poddar contended that the real issue is, (a) whether the Assessing Officer took a possible view and (b) whether the order of the

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Assessing Officer is unsustainable in law as regards which not one submission was made by the appellant.

The case of the CIT in his notice dated 26th November, 2009 under Section 263 of the Act reads as follows :-

"1. During the said A.Y., you have received a sum of Rs.18.00 Crore from M/s. Beierdorf AG., Germany (BDF) as one-time settlement for termination of contracts of producing and selling of the products of the latter company in India as well as issuing a NOC for setting up a 100% subsidiary by them in India. The said receipt should have been considered as income in the ambit of either Sec.28 or Sec.56, if the same is considered as voluntary payment on a goodwill gesture as pointed out by you. But, the said receipt has been allowed to be transferred directly to Capital Reserve Account while passing the assessment order for the A.Y. 2006-07."

Mr. Poddar contended that the CIT has not been able to demonstrate that the sum of Rs.18 crores received by the assessee from the German concern can be treated as an income from business under Section 28 or can be treated as an income from other sources under Section 56. In either case, the principal question is whether the sum of Rs.18 crores received from the German concern is a revenue receipt. He contended that the CIT himself is in doubt as to whether the sum of Rs.18 crores received by the assessee is chargeable and if so, under which Section of the Act. He contended that the receipt has

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not at all been demonstrated by the CIT to be chargeable to tax. The receipt of the sum of Rs.18 crores from the German concern has the following background :-

An agreement dated 14th September, 1995 between the assessee and Beiersdorf AG., hereinafter referred to as the German concern, was entered into, wherein the German concern was described as the licensor and the assessee was described as the Licensee. The object of the agreement was as follows :-

> *"(B) The licensor has agreed to grant the licensee a licence to use the Trade Marks, the Know-How and the Copyrights in the Territory (as hereinafter defined) for the period and on the terms and conditions hereinafter contained."*

The aforesaid agreement was for a period of five years with a renewal clause for another period of five years. To be precise, Clause 11.1 provided as follows :-

> *"11.1. Subject to the provisions of Clauses 11.2 or 11.3., this Agreement may be terminated at any time by the Licensor giving the Licensee not less than twelve (12) calendar months' written notice or the Licensee giving the Licensor not less than twelve (12) calendar months' written notice provided that such notice may not be given by either party so as to be effective prior to 31st December, 2000. If by 31st December, 2000 the Licensee achieves annual sales of twenty (20) million German Marks equivalent in the local currency both parties commit themselves to either enter into a Joint Venture Agreement or, if no agreement on a Joint*

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Venture is reached, continue the Licence Agreement with another assured period of five (5) years based on five per cent (5%) royalties per annum."

The contract between the assessee and the German concern continued for another term of five years after expiry of the initial five years and was thus to come to an end on 31st December, 2005.

Before the contract came to an end on 31st December, 2005, an agreement dated 22nd March, 2005 was entered into between the assessee and the German concern whereunder the German concern agreed to pay a sum of Rs.180 millions for the following reasons appearing from the agreement dated 22nd March, 2005 :-

"i. JLM has agreed to BDF establishing a wholly owned subsidiary in India (hereinafter referred to as "BDF India" for the purpose of this Agreement) for the purpose of carrying on the business of manufacturing, marketing and sale, importing and exporting of various products, in particular cosmetics and toiletries and other Beiersdorf consumer products (hereinafter referred to as the "Products"). JLM hereby acknowledges the above and further confirms that it shall provide all necessary support and assistance that may be required by BDF to set up its subsidiary in India and to carry out its operation in India; in particular by executing all necessary documents in this regard. JLM further agrees to provide BDF with a No-objection certificate to BDF (which shall be handed over to BDF by JLM on the same day as execution of this document) for facilitating the setting up of a wholly owned subsidiary in India.

ii. In consideration of the covenants/obligations imposed on JLM by virtue of this Agreement BDF shall pay JLM a sum of Indian Rupees 100 (one hundred) million, which shall become payable within 21 days after BDF has obtained the FIPB approval for setting up BDF India for the purpose mentioned above. In addition BDF shall pay JLM a sum of Indian Rupees 80

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Million (eighty million Indian rupees) for repositioning consequent to termination of the Said Agreements within 31st of December, 2005. The above-mentioned amounts are being paid by BDF on its own free will and BDF has agreed to pay JLM as a one time settlement towards termination of the Said Agreements and also providing a No-objection certificate to BDF to facilitate BDF to file an application with Foreign Investment Promotion Board (FIPB) to facilitate BDF to set up a 100% subsidiary in India.

iii. Both the parties hereby agree that upon the FIPB approval being granted and payment of the said Indian Rupees 180 Million (One hundred and eighty million Indian Rupees) the said Agreements will stand terminated with effect from close of business on 31st December, 2005. It is further agreed between the parties that upon termination of the said Agreements neither party shall have any claim of any nature whatsoever and for any reason whatsoever on the other with regard to the Said Agreements except to the extent as mentioned in this Agreement."

Needless to mention that the original agreement between the parties dated 14th September, 1995 including the supplementary agreements, which it is not necessary to refer to because the same is not relevant for the present purpose, did not contemplate payment of the sum of Rs.18 crores or any other sum. The agreement to pay the sum of Rs.18 crores to the assessee as evidenced by the agreement dated 22nd March, 2005, is according to the assessee, a payment by way of goodwill gesture. Mr. Poddar contended that the fact that this payment of a sum of Rs.18 crores was by way of goodwill gesture had not been disputed by the CIT as would appear from the ground no.1, in the notice under Section 263 of the Act. Mr. Poddar contended that

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the question, therefore, is whether this sum of Rs.18 crores is a receipt in the nature of capital or in the nature of revenue. In case it is a receipt in the nature of capital, it is not taxable. If it is a receipt in the nature of revenue, it is certainly taxable.

In seeking to answer this question, Mr. Poddar commenced by submitting that all sorts of receipts are not income. He drew our attention to the case of Parimisetti Seetharamamma vs. Commissioner of Income-tax reported in [1965] 57 ITR 532, in support of his aforesaid submission, wherein the following view was expressed :-

"By sections 3 and 4, the Indian Income-tax Act, 1922, imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision."

Mr. Poddar then took us through the Sections 28 and 56 of the Income Tax Act and contended that the receipt in question of a sum of Rs.18 crores does not fall within any of the sub-sections of either Section 28 or Section 56.

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As to the nature of receipts which have judicially been interpreted to be of a capital nature, Mr. Poddar cited the following decisions.

In the case of Divecha (P.H.) vs. Commissioner of Income-tax reported in [1963] 48 ITR 222 (S.C.) the following view was taken :-

"We shall begin by considering whether the payment made in this case be related to the termination of the agreement of 1938 and can be said to arise from that termination in the shape of compensation in lieu of profits. The agreement of 1938 did not state that on the termination of the agreement in the way provided there compensation was payable to the firm. For temporary suspension of supplies no compensation was payable. These terms of the agreement show that though the agreement was to run its course as long as it proved profitable to the parties, at least the firm was not entitled to be compensated either for a temporary suspension of the benefits under the agreement or a complete termination of those benefits. The payments cannot, therefore, on the terms of the agreement be connected with loss of estimated profits. It was said a long time ago in the well-known case of Glenboig Union Fireclay Co. Ltd. v. Commissioner of Inland Revenue (5) that there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of application of that test. Here, the amount is large but there is nothing to show that it was even in adequate measure of the profits that were expected to be made during the three years in which the amount was to paid. Even if it had been there would have been no inference in law. But in the absence of any proof that this was the likely profits it is difficult to say that the payment replaced those profits."

The conclusion in the aforesaid facts arrived at by Their Lordships was as follows :-

"Without attempting to give it a name we are satisfied that the payment was token of appreciation and was not related to any business done or to loss of profits and it was not recompense for service

past or future. It was a payment out of gratitude and must be regarded as a payment which does not bear the character of income, profits or gains which alone are taxable under the Income-tax Act. In our opinion, the High Court, with all due respect, was in error in holding that this amount was taxable. The answer to the first question must therefore be against the department."

The next judgement cited by Mr. Poddar was in the case of Kettlewell Bullen & Co. Ltd. vs. Commissioner of Income-tax reported in [1964] 53 ITR 261 (SC) wherein the following views were expressed :-

"On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed. Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

The third judgment cited by Mr. Poddar in this regard is in the case of Gillanders Arbuthnot and Co. Ltd. vs. CIT reported in 53 ITR 283 (SC). What had happened in that case and the decision rendered by the apex court appearing from the Head Note of the judgment are as follows:-

> *"The appellant-company carried on business in diverse lines: besides acting as managing agents, shipping agents, purchasing agents, and secretaries, the company also acted as importers and distributors on behalf of foreign principals and bought and sold on its own account. Under an unwritten*

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agreement which was terminable at will the appellant acted as sole agents and distributors of explosives manufactured by the Imperial Chemical Industries (Export) Ltd. That agency was terminated and by way of compensation the Imperial Chemical Industries (Export) Ltd. paid for the first three years after the termination of the agency two fifths of the commission accrued on its sales in the territory of the appellant's agency computed at the rates at which the appellant had formerly been paid and in addition in the third year full commission for the sales effected in that year at the same rates. The Imperial Chemical Industries (Export) Ltd. had intended to take a formal undertaking from the appellant to refrain from selling or accepting any agency for explosives or other competitive commodities, but no such agreement in writing was taken or insisted upon. The question was whether the amounts received by the appellant for those three years were of the nature of capital or revenue:

Held, that, having regard to the vast array of business done by the appellant as agents, the acquisition of agencies was in the normal course of business and determination of individual agencies a normal incident not affecting or impairing its trading structure. The amounts received by the appellant for the cancellation of the explosives agency therefore did not represent the price paid for the loss of a capital asset: they were of the nature of income.

There is no immutable principle that compensation received on cancellation of an agency must always be regarded as capital.

Compensation paid for agreeing to refrain from carrying on competitive business in the commodities in respect of the agency terminated, or for loss of goodwill, is prima facie of the nature of a capital receipt."

The question as to the nature of a capital receipt was discussed by their lordships at page 287 of the report which is as follows:-

"The principal question in dispute is whether the amounts received by the appellant as compensation for loss of agency are of the nature of capital or revenue. It is necessary in the first instance to eliminate two subsidiary contentions raised by the appellant. It was urged that the amounts received by the appellant were in lieu of compensation for cancellation of the agency by the principal company, for loss of goodwill of the appellant's business, and also in consideration of the appellant's agreeing not to carry on any competitive business in explosives or other commodities in which business was carried on by the appellant under the agency agreement. It cannot seriously be disputed that compensation paid for

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agreeing to refrain from carrying on competitive business in the commodities in respect of which the agency was terminated, or for loss of goodwill would, prima facie, be of the nature of a capital receipt. But there is no evidence that compensation was paid to the appellant as consideration for giving the undertaking not to carry on a competitive business, or as compensation for loss of goodwill."

Mr. Poddar submitted that in the case before us it would appear from the agreement dated 22nd March 2005, whereunder the assessee was to receive a sum of Rs. 18 crore, that the consideration for the aforesaid payment was, inter alia, as follows:-

"The above-mentioned amounts are being paid by BDF on its own free will and BDF has agreed to pay JLM as a one time settlement towards termination of the Said Agreements and also providing a No-objection certificate to BDF to facilitate BDF to file an application with Foreign Investment Promotion Board (FIPB) to facilitate BDF to set up a 100% subsidiary in India."

The fourth judgment cited by Mr. Poddar is in the case of Oberoi Hotel Pvt. Ltd. vs. CIT reported in 236 ITR 903 (SC) wherein the following views were expressed:-

"Applying the aforesaid test laid down by this court in the present case, in our view, the Tribunal was right in arriving at a conclusion that it was a capital receipt. The reason is that as provided in article XVIII of the first agreement the assessee was having an option or right or lien, if the owner desired to transfer the hotel or lease all or part of the hotel to any other person, the same was required to be offered first to the assessee (operator) or its nominee. This right to exercise its option was given up by a supplementary agreement which was executed in September, 1975, between the receiver and the assessee. It was agreed that the receiver would be at liberty to sell or otherwise dispose of the said property at such price and on such terms as he may deem fit and was not under any obligation requiring the purchaser thereof to enter into any agreement with the operator (assessee) for the

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purpose of operating and managing the hotel or otherwise, and in its return, agreed consideration was as stated above in clause X. On the basis of the said agreement, the assessee has received the amount in question. The amount was received because the assessee had given up its right to purchase and/or to operate the property. Further it is loss of source of income to the assessee and that right is determined for consideration. Obviously, therefore, it is a capital receipt and not a revenue receipt."

Mr. Poddar submitted on the basis of the aforesaid authorities that there can be no doubt as regards the fact that the receipt of the sum of Rs. 18 crore from the German concern by the assessee is in the nature of a capital receipt, therefore, not taxable. Mr. Poddar contended, the assessing officer has accepted the case of the assessee that the receipt of a sum of Rs. 18 crore was a capital receipt. The learned Tribunal by the impugned judgment and order held that the view taken by the Assessing Officer was a possible view and the contention of the CIT was overruled. Therefore, the question to be further considered is whether the view taken by the Tribunal is in accordance with law. Mr. Poddar pointed out that in the case of Malabar Industrial Co. Ltd. vs. CIT (supra), also relied upon by Mr.

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Nizamuddin, the following views were expressed at page 88 of the report:-

> *"For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law."*

Mr. Poddar submitted that the judgments cited by him before this Court were also cited before the CIT. The CIT in his order has referred to at least one of them viz. the judgment in the case of Divecha v. CIT reported in 48 ITR SC 222, but the CIT got rid of the judgments merely by saying that "*the case laws cited by the assessee are distinguishable on facts.*" Mr. Poddar commented that the CIT in getting rid of the judgments cited by the assessee, in the manner as he did, did not disclose a judicial approach.

Mr. Poddar contended that neither in the order passed by the CIT in exercise of power under Section 263 of the Act nor before the Learned Tribunal nor even before this court any attempt has been made by Revenue to demonstrate that the receipt of the sum of Rs. 18

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crore was a revenue receipt. Unless the order of the Assessing Officer is erroneous, he submitted, the Commissioner of Income Tax does not get jurisdiction under section 263 of the Act to tinker with the order.

Mr. Poddar drew our attention to the finding recorded by the CIT in his order dated 1st March, 2010, under Section 263, as regards the receipt of a sum of Rs.18 crores which is as follows:-

> *"The submissions of the assessee on the issue have been carefully examined. It is seen from the copy of the agreement dated 22/03/2005, para-1 & 2, and also from the NOC granted by the assessee company to BDF, that the payments are not only for settlement for termination of the agreements but also for repositioning on termination w.e.f. 31/12/2005 and future business relationship. Para-2(i) stipulates that BDF will use the services of the assessee company's Waluj Plant for manufacturing of products by BDF India. The assessee company was also appointed agent for channels for the products manufactured or imported by BDF India in India. The assessee company agreed not to cause any hindrance to BDF successfully setting up 100% subsidiary and indirectly consented not to share the know how etc. and not to manufacture similar products. In the NOC vide para-3 it is mentioned that the new proposal would not in any way jeopardise the interest of the assessee company.*
>
> *Therefore, the contentions of the assessee that the receipts can not be taxed as income u/s 28 or 56 are not tenable. Besides, admittedly the amount received is a voluntary payment by BDF as a goodwill gesture. The case laws cited by the assessee are distinguishable on facts. Moreover, it is apparent from the record that the AO did not examine/verify or consider the matter at the time of passing the order."*

Mr. Poddar contended that the views expressed by the CIT do not bring the receipt of the sum of Rs.18 crores either within the purview of Section 28 or within the purview of Section 56 of the Act.

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The contract between the assessee and the German concern was due to expire on 31st December, 2005 without any further exercise on either side. Therefore, it cannot be said, according to him, that this payment of a sum of Rs.18 crores is relatable to the termination of the contract on 31st December, 2005. The stipulations in the agreement dated 22nd March, 2005 that BDF will use the services of the assessee's Waluj plant or that the assessee would be appointed agent for the products to be manufactured by the German concern, are all in the nature of agreements to agree in future. It is nobody's case that the Waluj plant of the assessee was either leased out or licensed to the German concern in consideration whereof the sum of Rs.18 crores was received, nor is it anybody's case that the sum of Rs.18 crores was paid to the assessee because the assessee was proposed to be appointed the agent of the German concern for sale of its goods to be manufactured in future. He submitted that in case the assessee is to be appointed agent of the German concern, in the normal course, in that event, the assessee has to pay and not the other way round. He

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submitted that the fact that all these stipulations were in the nature of agreement to agree would be evident from the following stipulation appearing from the agreement dated 22nd March, 2005 which provides for a separate agreement as follows:-

i. *JLM has agreed to BDF establishing a wholly owned subsidiary in India (hereinafter referred to as "BDF India" for the purpose of this Agreement) for the purpose of carrying on the business of manufacturing, marketing and sale, importing and exporting of various products, in particular cosmetics and toiletries and other Beiersdorf consumer products (hereinafter referred to as the "Products"). JLM hereby acknowledges the above and further confirms that it shall provide all necessary support and assistance that may be required by BDF to set up its subsidiary in India and to carry out its operation in India,* ***in particular by executing all necessary documents in this regard.*** *JLM further agrees to provide BDF with No-objection certificate to BDF (which shall be handed over to BDF by JLM on the same day as execution of this document) for facilitating the setting up of a wholly owned subsidiary in India.*

ii. *In consideration of the covenants/obligations imposed on JLM by virtue of this Agreement, BDF shall pay JLM a sum of Indian Rupees 100 (one hundred) million, which shall become payable within 21 days after BDF has obtained the FIPB approval for setting up BDF India for the purpose mentioned above. In addition BDF shall pay JLM a sum of Indian Rupees 80 Million (eighty million Indian rupees) for repositioning consequent to termination of the Said Agreements within the 31st of December 2005. The above-mentioned amounts are being paid by BDF on its own free will and BDF has agreed to pay JLM as a one time settlement towards termination of the Said Agreements and also providing a No-objection certificate to BDF to facilitate BDF to file an application with Foreign Investment Promotion Board (FIPB) to facilitate BDF to set up 100% subsidiary in India.*

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The assessee agreed not to put up any hindrance nor to prevent the German concern from setting up its 100% subsidiary but the fact is that the assessee was not entitled to put up any hindrance or to continue to use the technical know-how transferred to the assessee by the agreement dated 14th September, 1995 even for an hour after expiry of the period limited thereby. The assessee was liable in the facts and circumstances of the case to issue a no objection certificate to the German concern in any case. He submitted that it is precisely for this reason that the payment of a sum of Rs.18 crore was considered to be a payment by way of goodwill gesture. Mr. Poddar concluded by saying that in the facts and circumstances of the case the views expressed by the CIT in exercise of power under Section 263 were altogether erroneous and not sustainable in law.

The second ground appearing from the notice under Section 263 is as follows:-

> *"2) You have been allowed to debit Rs.1,32,11,353/- as Royalty paid to BDF during the said A.Y. for exclusive use of their Trade Mark, copy rights, know-how to manufacture their products etc. in India as per agreements entered time to time. But, as per the*

> *guidelines laid down by the Ministry of Commerce & Industry, Govt. of India, the amount of Royalty required to be allowed for payment in such a case is 1% of 'Net Sales Value', which comes to Rs.84,49,525/- in your case. So, you have been allowed an additional amount of Rs.46,61,828/- to be debited under the said head while passing the assessment order for the A.Y. 2006-07."*

Mr. Poddar contended that the ceiling as regards payment of royalty fixed at 1% is applicable to those cases where prior permission of the Reserve Bank of India was not obtained. The ceiling at 1% of the net sales was imposed by virtue of the guidelines dated 8th September, 2000 issued by the Ministry of Commerce and Industries, Government of India. He drew our attention to the press note No.9 (2000 series) which provides as follows:-

> *"III. Payment of royalty upto 2% for exports and 1% for domestic sales is allowed under automatic route on use of trademarks and brand name of the foreign collaborator without technology transfer."*

The aforesaid guidelines was revised on 24th June, 2003 by press note No.2 (2003 series) which provides as follows:-

> *"3. With a view to further liberalizing the foreign technology collaboration agreement policy and extending a uniform policy dispensation, it has now been decided that all companies, irrespective of the extent of foreign equity in the shareholding, who have entered into foreign technology collaboration agreements may henceforth be permitted on the automatic approval route, to make royalty payments at 8% on exports and 5% on domestic*

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sales without any restriction on the duration of the royalty payments. The ceiling on payment of lumpsum fee/royalty on the automatic route would continue to apply in all cases.”

He contended that the guidelines dated 24th June, 2003 was obviously operational during the assessment year 2006-07. Therefore, the question of application of the old guidelines dated 8th September, 2000 did not and could not arise. In any event, the guidelines dated 8th September, 2000 was never applicable to the case of the assessee in view of the fact that the Reserve Bank of India, by its letter dated 3rd March, 1996 approved payment of royalty at the rate of 5% of the net sales. Identical approval was also granted by the Ministry of Commerce and Industries, Government of India by its letter dated 12th June, 2001 which provides as follows:-

“4. Payments authorised herein under :

(a) Royalty	% age	(Net of/sub. to taxes)
(i) Internal sales	5.00% (Five percent)	Subject to taxes
(ii) Exports	5.00% (Five percent)”	

Mr. Poddar contended that in the facts and circumstances, the following views expressed by the CIT with respect to the second ground are altogether unmeritorious.

> "The contentions of the assessee-company are not reasonable since technology transfer is not the same thing as allowance of use of know-how. Besides, it is apparent from the record that the AO did not examine/verify or consider the matter at the time of passing the order."

The third ground appearing from the Notice under Section 263, issued by the CIT, reads as follows :-

> *"It is now judicially well settled that the expenditure towards payment of Royalty for the reasons discussed above is partly capital in nature and hence, one-fourth i.e. 25% of the same is required to be disallowed for being capital in nature. But, no such disallowance has been made while passing the assessment order for the A.Y.2006-07."*

The findings given by the CIT with regard to the third ground are as follows :-

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"The assessee has contended that royalty paid is simply for use of trade mark of foreign collaborator with use of know-how for a short period only and there is no enduring benefit. The royalty paid is for use of trade mark & know-how and not for setting up a factory. The user was not available after termination of the agreement. Hence, there is no capital expenditure in payment of royalty by the assessee.

The contentions of the assessee are not reasonable since it has been held by the Hon'ble Supreme Court in the case of Southern Switch Gear Ltd. V. CIT, 224 ITR 342 that expenditure towards payment of royalty for exclusive right to manufacture and sale in India or to obtain know-how was partly capital in nature and 25% was to be disallowed. Besides, it is apparent from the record that the AO did not examine/verify or consider the matter at the time of passing the order."

Mr. Poddar contended that reliance placed by the CIT on the judgment of the Supreme Court in the case of Southern Switch Gear Ltd. vs. CIT, reported in 224 ITR 342 was altogether misconceived because the views expressed by the Apex Court in the aforesaid case are as follows :-

"We have perused the order of the High Court. We have also seen the agreement. We are not persuaded to hold that the view

taken by the High Court is erroneous; the appeals are dismissed. There will be no order as to costs."

He submitted that the Supreme Court in the aforesaid case had really affirmed the views of the High Court. The High Court on its part in the case of Commissioner of Income Tax vs. Southern Switchgear Ltd., reported in (1984) 148 ITR 272 had opined as follows :-

> *"Held, that a perusal of the various clauses of the agreement clearly indicated that the technical knowledge that the assessee obtained through the agreement with the foreign company secured to the assessee an enduring advantage and benefit in that the same was available to the assessee for its manufacturing and industrial process even after the termination of the agreement. The foreign company had also agreed not to manufacture in India any of the products in question or grant to make available to any other person any information relating to manufacture, licence, or rights, for any of the products in question in India thereby conferring on the assessee exclusive right of manufacture and the sale of the products. The right to manufacture certain goods exclusively in India should be taken to be an independent right secured by the assessee from the foreign company which was of an enduring nature. Consequently, the entire technical fees could not be allowed as a revenue expenditure. The Tribunal was, therefore, right in its view that 25% of the technical aid fees would have to be taken as being capital in nature."*

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Mr. Poddar contended that the aforesaid judgment of the Madras High Court has no manner of application to the facts and circumstances of this case because the contract between the assessee and the German concern provided as follows:-

> *"11.5. Upon the termination or expiry of this Agreement for whatever reason the Licensee shall cease to make any use of the Trade Marks, the Know-how or the Copyrights save that if the Licensee has a stock of Products existing or in the course of manufacture or unfulfilled orders on hand at the date of termination or expiry of this Agreement the Licensee may, but only with the Licensor's specific permission, sell such stock on the terms hereof or such other terms as may be agreed.*
>
> *11.6. Upon termination of this Agreement for whatever reason the Licensee shall forthwith deliver up to the Licensor all documents sent by or on behalf of the Licensor to the Licensee relating to the subject matter of this Agreement."*

Mr. Poddar contended that no elaborate reasoning is as such required to demonstrate that upon expiry of the agreement the assessee was no longer entitled to use the technical know-how. Therefore, the question of 25% royalty being treated as a capital expenditure could not have arisen.

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The CIT in his order also expressed the opinion that expenditure towards payment of royalty could not have been allowed in toto because the exclusive right to manufacture was given to the assessee. Mr. Poddar contended that this view is patently contrary to the views expressed by the Supreme Court in the case of Commissioner of Income Tax vs. IAEC Pumps Limited, reported in 232 ITR 316. The facts and circumstances in that case were identical as those involved in the present case. In that case the technical know-how was licensed to the assessee for a period of 10 years with the exclusive right to manufacture in India. The assessee in that case was also not entitled to disclose the document to any third party or the know-how to any third party. In such a case the Apex Court opined that :-

> *"the amounts paid to the collaborator is only a "licence fee" and not the price for acquisition of a "capital asset". It was concluded that the entire payment constitutes revenue expenditure and the questions were answered in favour of the assessee."*

The fourth point appearing from the Notice under Section 263 reads as follows :-

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"You have been allowed to debit an amount of Rs.9,29,14,375/- towards cost of `Raw & Packing Material consumed', which can be bifurcated as Rs.5,14,48,363/- towards Raw Materials & Rs.4,14,66,012/- towards Packing Materials consumed as per Sch.10 to the Accounts. However, from Sl. 14(D) of Sch. 17 of Notes forming part of the Accounts, value of Raw Materials consumed appears to be Rs.3,57,89,000/-. Hence, an additional amount of Rs.1,56,59,363/- has clearly been allowed to be debited in the assessment order for the A.Y.2006-07."

The aforesaid point was ultimately decided against the assessee by the CIT as follows :-

"4) Addition on account of Raw Material:

The contentions of the assessee are as follows:-

The difference in the figures of raw material consumed as debited in the P/L account and as shown in schedule-10 on the one hand and as shown in schedule-17 of notes on the other hand is due to the reason that as per item no. 3(ii)(a) of Part-II of Schedule-VI to the Companies Act, 1956, the quantitative details as given in schedule of notes are provided in respect of those items only which individually account for 10% or more of the total raw material consumption and not in respect of each and every item of raw material consumed and it is quite natural that the figure of only major raw material shown in schedule of notes to accounts will not match with the total figure of raw material consumed reflected in P/L account but that difference is due to disclosure requirements of quantitative details of raw materials only and does not reflect any discrepancy in accounts so as to call for any addition on this count.

The contentions of the assessee are not reasonable since there is nothing in the Notes that consumption of major raw material items only

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were reflected in Sl. 14(D) of Sch.17. Moreover, the matter was not examined/verified or considered by the AO while passing the assessment order."

Mr. Poddar contended that it is a fact that a sum of Rs.5,14,48,363/- was spent in purchasing the raw materials. The particulars of the raw materials used by the assessee are required to be disclosed in the profit and loss account but the major raw materials which are in excess of 10% of the total expenditure on that account are to be disclosed in the notes on accounts both quantitatively and value-wise as per the provisions contained in the Companies Act, in particular, in Part-II of Schedule VI to the Companies Act, 1956. He drew our attention to paragraph 3(ii)(a) which provides as follows:-

"In the case of manufacturing companies, -

(1) The value of the raw materials consumed, giving item-wise break-up and indicating the quantities thereof. In this break-up, as far as possible, all important basic raw materials shall be shown as separate items. The intermediates or components procured from other manufacturers may, if their list is too large to be included in the break-up, be grouped under suitable headings without mentioning the quantities, provided all those items which in value individually account for 10 per cent or more of the total value of the raw material consumed shall be shown

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as separate and distinct items with quantities thereof in the break-up."

Mr. Poddar contended that the actual amount spent in buying the raw materials would, inter alia, appear from the profit and loss account. But the particulars, required to be furnished in the notes on accounts, have to be in consonance with the aforesaid provisions of the Companies Act. It was altogether an erroneous exercise on the part of the CIT when he wanted to match the amount appearing in the profit and loss account with the amount appearing in the notes on accounts. The notes on accounts will only consist of those expenditures which are more than 10% of the total value of the raw materials but the profit and loss account will consist of the entire expenditure on account of raw materials. This was pointed out to the CIT. But he refused to see the reason and passed the order under section 263 of the Act holding erroneously that there was discrepancy in the accounts.

Mr. Poddar thus contended that all the points raised in the notice under Section 263 of the Act were without any merit. The

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assessee had replied to the notice under Section 263 and also made his submissions. The CIT without considering the reply and the submissions advanced at the time of hearing passed the order directing the assessing officer to pass a fresh assessment order without any valid reason. Mr. Poddar contended that a statutory authority cannot clothe itself with the jurisdiction to pass an order by deciding the basic question wrongly. The questions raised by the CIT in his notice were adequately answered. He chose to decide them wrongly and on that basis assumed jurisdiction to exercise power under Section 263 of the Act.

Mr. Poddar in support of his submission drew our attention to the judgment in the case of Raza Textiles Ltd. vs. ITO, reported in 87 ITR 539 (S.C) wherein the following views were expressed:

> *' 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*

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done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee 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. In our opinion, the Appellate Bench is wholly wrong in opining that the Income-tax Officer can "decide either way".'

The order passed by the CIT directing the assessing officer to pass a fresh assessment order is, in the facts and circumstances, without jurisdiction. Naturally the order was appealed against and the learned Tribunal accepted the contention of the assessee and set aside the order.

Mr. Poddar contended that the appeal preferred by the Revenue is altogether unmeritorious. He added that the Revenue has not been able to demonstrate that any of the submissions advanced by him is incorrect or is not backed by adequate evidence.

The documents indicated above, it is not in dispute, were also filed before the Assessing Officer, the CIT and the learned Tribunal.

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Mr. Nizamuddin did not make any attempt to demonstrate that the sum of Rs.18 crores received by the assessee is taxable either under Section 28 or under Section 56 of the Act, nor did he make any attempt to demonstrate that the aforesaid receipt was a revenue receipt. If the receipt is not in the nature of a Revenue receipt, the question of the same becoming taxable does not arise. The CIT in his order under Section 263 did not demonstrate that the receipt of sum of Rs.18 crores was in the nature of a revenue receipt. The objection, raised by the CIT with regard to the expenditures were not shown by Mr. Nizamuddin to have any substance nor did he make any attempt to meet the submissions of Mr. Poddar.

Mr. Nizamuddin contended that the CIT in exercising power under Section 263 was not required to express a final opinion as regards taxability of the receipt either under Section 28 or under Section 56 of the Act. He in support of his submission relied upon the judgment in the case of CIT versus Assam Tea House reported in 344

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ITR 507 (Punjab and Haryana) wherein the Division Bench expressed the following views:-

> *"10. A perusal of the reasons given by the Tribunal as also the Commissioner quoted above shows that the Tribunal assumed it to be the requirement that the Commissioner should have recorded final conclusion on taxability. This view is legally erroneous. The Commissioner could have proceeded under section 263 of the Act if the Assessing Officer had made assessment without application of mind. The Commissioner held that as per the order sheet no record was produced while in the order a contrary statement was made. The order of the Assessing Officer did not show the verification of closing stock, purchases and transportation and other items mentioned above. These reasons were valid reasons for exercise of power under section 263 of the Act. The Tribunal held that the Assessing Officer was not required to discuss these aspects in its order and that the assessee had explanation to the points made by the Commissioner. This approach of the Tribunal cannot be sustained."*

The aforesaid judgment does not really help the revenue because the Division Bench of the Punjab and Haryana High Court in that case interfered with the order of the Tribunal because the High Court was satisfied that the assessment order was passed without application of mind.

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An order passed without application of mind by a judicial or a quasi-judicial authority can have no claim to legitimacy. The question whether the assessment order in this case was passed without application of mind is yet to be considered by us.

We are, at this stage only concerned with the question as to whether the Assessing Officer in allowing the claim of the assessee with respect to the four questions raised by the CIT including the receipt of sum of Rs.18 crores from the German Concern took a possible view of the matter. There was absolutely no attempt on the part of Mr. Nizamuddin to demonstrate that the Assessing Officer did not take a possible view in accepting the contention of the assessee. The parent contract dated 14th September, 1995 did not provide for payment of any compensation or any sum on any account whatsoever. Upon expiry of the contract, the assessee was liable to surrender the technical know-how and to cease to manufacture the goods. The assessee was not entitled in any event, upon expiry of the contract, to

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prevent the German Concern from setting up its 100% subsidiary for the purpose of manufacturing and marketing its goods. In case the German Concern paid the aforesaid sum for the purpose of securing an NOC from the assessee, even if it is assumed that by agreeing to issue the same the assessee agreed to have his manufacturing and trading structure impaired resulting in loss of his source of income, the receipt in that case according to the views of the Apex Court in the case of Kettlewell Bullen & Co. (supra) would be a capital receipt. If on the other hand it was a gratuitous payment as indicated in the agreement dated 22nd March, 2005 "amounts are being paid by BDF on its own free will" the receipt would still be a capital receipt following the judgment in the case of Divecha (P.H.) vs. CIT (supra).

The point raised by the CIT with respect to disallowance of royalty in excess of 1% is patently contrary to the revised guideline dated 24th June, 2003.

The point as regards disallowance of 25% of the royalty paid by the assessee is evidently based on omission on the part of the CIT to

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notice that the assessee was not entitled to use the technical know-how after expiry of the contract as discussed above. The point as regards excess sum of Rs.1,56,59,363/- having been allowed to be debited on account of raw material consumed is obviously based on a misunderstanding of the nature and purpose of notes on accounts required under the Companies Act.

We are, as such of the opinion that the Tribunal was justified in holding that the Assessing Officer took a possible view. The first question is thus answered in the affirmative and in favour of the assessee.

The second question formulated above is now taken up for consideration.

Mr. Nizamuddin learned advocate submitted on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable.

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He in support of his submission relied upon a judgment of the Gujarat High Court in the case of CIT vs. M. M. Khambhatwala reported in 198 ITR 144 wherein the following views were expressed :-

> *"...the Tribunal took the view that the Commissioner could not have invoked the provisions of section 263 of the Act since two views are possible on the question whether the assessee was entitled to weighted deduction under Section 35B of the Act. This is a strange view taken by the Tribunal and it is conceded that this view taken by the Tribunal is not supported by any provision of the Act or any decision. The Commissioner would be entitled to revise the order of the Income-tax Officer if he is of the view that the order of the Income-tax Officer is erroneous and prejudicial to the interests of the Revenue. The Commissioner can exercise the power under section 263 even in a case where the issue is debatable. Revisional power under section 263 is not comparable with the power of rectification of mistake under section 154 of the Act. It was only in the context of section 154 of the Act that the Supreme Court has in T. S. Balaram, ITO v. Volkart Brothers [1971] 82 ITR 50, observed that, when the issue is debatable, the power of rectification cannot be exercised. This decision of the Supreme Court has no application whatsoever so far as powers under section 263 are concerned. Therefore, with respect, the view taken by the Tribunal is patently erroneous and illegal. We, therefore, answer question No.2 in the negative and against the assessee."*

Mr. Nizamuddin added that it cannot be said that the exercise of power under Section 263 of the Act was bad because the assessing

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officer had already exercised power under Section 154 of the Act. He in support of his submission relied upon a judgment of the apex court in the case of CIT vs. Ralson Industries Ltd. reported in 288 ITR 322 (SC) wherein the following views were expressed:-

> *"The decision of the Madhya Pradesh High Court in Chunnilal Onkarmal (P) Ltd.'s case (supra) is also not apposite. Initiation of a proceeding under Section 263 of the Act cannot be held to have become bad in law only because an order of rectification was passed. No such hard and fast rule can, in our opinion, be laid down. Each case is required to be considered on its own facts. In a given situation, the High Court may be held to be entitled to set aside both orders and remit the matter for consideration of the matter afresh. But in our opinion, it would not be correct to contend that only because a proceeding for rectification was initiated subsequently, the revisional jurisdiction could not have been invoked under any circumstances whatsoever. If such a proceeding was initiated, in our opinion, the contesting parties could bring the same to the notice of the Commissioner so as to enable him to take into consideration the subsequent events also. It goes without saying that if and when the Commissioner of Income-tax takes up for consideration a subsequent event, the assessee would be entitled to make its submission also in regard thereto."*

Mr. Poddar submitted that the Supreme Court has authoritatively laid down that in order to exercise power under Section 263 of the Act, the order of the assessing officer must be

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unsustainable. Unless the order is unsustainable, it is not possible to rob the order passed by the assessing officer of its finality. He in support of his submission drew our attention to the judgment of the apex court in the case of Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83 wherein the following views were expressed:-

> "*The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC).*
>
> *In the instant case, the Commissioner noted that the Income-tax Officer passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the Income-tax Officer failed to apply his mind to the case in all perspective and the order passed by him was*

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erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the Income-tax Officer was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under Section 263(1) was justified."

He also drew our attention to the judgment of the apex court in the case of CIT v. Max India Ltd. reported in 295 ITR 282 wherein the views expressed in the case of Malabar (supra) were reiterated.

The judgment cited by Mr. Nizamuddin in the case of CIT vs. M. M. Khambhatwala does not really help him because it was conceded that the view taken by the Tribunal was not supported by any provision of the Act or any decision. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case were the issue is debatable was a mere passing remark which is again contrary to the view taken by the Apex Court in the

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case of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. The judgment in the case of CIT vs. Ralson (supra) is also of no assistance to the revenue because it is not the contention of the assessee that exercise of power u/s. 263 was not permissible after proceedings were started u/s. 154 of the Act. Therefore the second question formulated above is answered in the negative and in favour of the assessee.

The third question as to whether the assessment order dated 28th March, 2008 was passed by the Assessing Officer without application of mind is now taken up for consideration.

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Mr. Nizamuddin submitted that the question has to be answered in the affirmative because the order does not disclose any reasons. He relied upon the following judgments in support of his submissions:-

(A) An unreported judgment of the Allahabad High Court in the case of Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., wherein the following views were expressed:-

> *"It was incumbent upon the Assessing Officer to have examined the cash credit entries appearing in the accounts of the petitioner assessee in detail keeping in view the explanation furnished by the petitioner. Having failed to do so, it is but obvious that the assessment order is erroneous and prejudicial to the interest of the Revenue."*

(B) The second judgment cited by Mr. Nizamuddin is a judgment of the Cochin Bench of Income Tax Appellate Tribunal passed in ITA No. 116/Coch/2012. He drew our attention to paragraphs 8 and 11 which read as follows :-

> *"8. We have considered the rival submissions on either side and also perused the material available on record. We have also gone through the assessment order as well as the order of the Administrative Commissioner. The assessment order*

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does not contain any reasoning. The assessing officer without any discussion accepted the return filed by the assessee. It is not in dispute that the proceedings before the assessing officer are judicial proceedings. A decision in a judicial proceeding shall be a speaking one. In other words, the order of the assessing officer shall contain reasons for the conclusion reached therein. This Tribunal is of the considered opinion that the assessment order shall indicate the application of mind of the concerned assessing officer to the materials available on record. It is well settled principles of law that judicial/administrative orders shall speak for themselves. The reason for the conclusion shall contain in the order itself. The reason for the conclusion reached in an order cannot be substituted either by way of an affidavit or document in appeal/revisional proceedings. Therefore, this Tribunal is of the considered opinion that in the instant case the order of the assessing officer is a non speaking one. It does not disclose the application of mind. As such, it is not only erroneous but also prejudicial to the interest of the revenue. Therefore, in the given circumstances, this Tribunal is of the considered opinion that the judgment of the Apex Court in the case of Malabar Industrial Co. Ltd. (supra) may not be of any assistance to the assessee.

11. It may not be out of place to point out that the order of assessment being quasi judicial order, the assessing officer is expected to record his own reasoning for the conclusion reached therein. Unless such reasons are recorded, the purpose of providing revisional/appellate jurisdiction in the Income-tax Act would be defeated. In other words, the revisional/appellate authority may not be able to appreciate the reasons for the conclusions reached by the assessing officer. Therefore, to make the appellate/revisional jurisdiction

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> *effective, the assessing officer is bound to record his own reasoning for the conclusion arrived at."*

(C) The third judgment cited by Mr. Nizamuddin is in the case of CIT vs. Infosys Technologies Ltd. reported in 341 ITR 293 (Karnataka) wherein the following views were expressed:-

> *"27. The assessing authority performs a quasi-judicial function and the reasons for his conclusions and findings should be forthcoming in the assessment order. Though it is urged on behalf of the assessee by its learned counsel that reasons should be spelt out only in a situation where the assessing authority passes an order against the assessee or adverse to the interest of the assessee and no need for the assessing authority to spell out reasons when the order is accepting the claim of the assessee and the learned counsel submit that this is the legal position on authority, we are afraid that to accept a submission of this nature would be to give a free hand to the assessing authority, just to pass orders without reasoning and to spell out reasons only in a situation where the finding is to be against the assessee or any claim put forth by the assessee is denied.*
>
> *28. We are of the clear opinion that, there cannot be any dichotomy of this nature, as every conclusion and finding by the assessing authority should be supported by reasons, however brief it may be, and in a situation where it is only a question of computation in accordance with the relevant articles of a double taxation avoidance agreements and that should be clearly indicated in the order of the assessing authority, whether or not the assessee had given particulars or details of it. It is the duty of the assessing authority to do*

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> *that and if the assessing authority had failed in that, more so in extending a tax relief to the assessee, the order definitely constitutes an order not merely erroneous but also prejudicial to the interest of the revenue and therefore while the commissioner was justified in exercising the jurisdiction under Section 263 of the Act, the tribunal was definitely not justified in interfering with this order of the commissioner in its appellate jurisdiction."*

(D) The fourth judgment cited by Mr. Nizamuddin is in the case of S.N. Mukherjee vs. Union of India reported in AIR 1990 SC 1984. He drew our attention to the following observations made therein:-

> *"For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision."*

The fifth judgment cited by him is in the case of A. A. Doshi vs. JCIT reported in 256 ITR 685 in support of his aforesaid contention wherein the following views were expressed :-

> *"It is needless to emphasize that the order or judgment should be self-explanatory. It should not keep the higher court guessing for reasons. Reasons provide a live-link between conclusion and evidence. That vital link is the safeguard*

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against arbitrariness, passion and prejudice. Reason is a manifestation of the mind of the Court or Tribunal. It is a tool for judging the validity of the order. It gives an opportunity to the higher court to see whether the impugned order is based on reasons and that the reasons are based on adequate legal and relevant material. Giving reasons is an essential element of administration of justice. A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the authority itself. Therefore, stating of reasons is one of the essentials of justice. In this case, the appellate authority being the final authority on the facts was obliged to appreciate the evidence, consider the reasoning of the primary or lower authority and assign its own reasons as to why it disagreed with the reasons and findings of the primary or lower authority. Unless adequate reasons are given, merely because it is an appellate authority it cannot brush aside the reasoning or finding recorded by the lower authority."

The sixth judgment relied upon by Mr. Nizamuddin is in the case of Hindustan Tin Works Limited vs. CIT reported in 275 ITR 43 (Del). He relied upon paragraph 5 of the judgment which reads as follows:-

"It is true that the Tribunal has referred to the submissions made by the counsel as well as the Departmental Representative. However, while reversing the order made by the CIT (A) no reasons have been given by the Tribunal. If a detailed reasoned order is made by the appellate officer and

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the Tribunal is in agreement therewith, then one may say that no detailed discussions are required but, when the Tribunal is reversing the order made by the appellate officer, then detailed reasons are required to be given particularly when the decision of the Tribunal is considered to be final on facts."

Mr. Poddar, on the other hand drew our attention to the judgment and order of the CIT passed under Section 263 of the Act. He in particular drew our attention to the following sentence from the judgment of the CIT:- "*Moreover, it is apparent from the record that the AO did not examine/verify or consider the matter at the time of passing the order."* Mr. Poddar contended that this was not a ground or one of the grounds, for exercise of power under Section 263 of the Act, appearing from the notice under Section 263 of the Act which we already have set out hereinabove. He added that the ground of non-application of mind assigned by the CIT in his order under Section 263 of the Act is not to be found in the notice issued by him. It was not, therefore, open to him to pass an order setting aside the assessment order dated 28th March 2008 on the ground that the same was passed without application of mind. The aforesaid ground, he

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contended, has been added to all the four grounds, appearing from the notice under Section 263 of the Act, as a matter of ritual. He contended that neither it is a fact that the order dated 28th March 2008 was passed by the Assessing Officer without application of mind nor is it a fact that the said order of assessment is erroneous or prejudicial to the interests of the Revenue.

He drew our attention to the notice under Section 142(1) of the Act and in particular to the annexure thereto from which it would appear that the assessing officer wanted the assessee to "*furnish in writing and verified in the prescribed manner information called for as per annexures and on the points or matters specified therein before me at my office at 18, Rabindra Sarani, Poddar Court, 5th Floor, on 04.02.2008 at 11.30 AM.*". The annexure to the notice under Section 142(1) of the Act reads as follows:-

" *Requisition u/s 142(1) of the IT Act '61.*
M/s. J. L. Morison (India) Ltd. – AY 06-07.

(1) A write-up on receipt of Rs.18 crore from foreign co.

(2) A write-up on Sales Tax Department loan from Maharastra Govt.

(3) Details of addition to Fixed Assets.

(4) Name & Address of S/Cr.

(5) Details of Bank A/c with address & A/c No. of Bank.

(6) Details of Advances & other deposits.

(7) Name & address of S/Cr.

(8) Details of other deposits – proof of payment of 43B items.

(9) Proof of payment of dividend tax if any.

(10) Details of Misc Income.

(11) <u>Details of purchases for more than Rs. One lakh.</u>

(12) " " of Trading Goods.

(13) " of Repair to others.

(14) " of Travelling Expense – if foreign Travel details thereof.

(15) <u>Name & address of commission of Royalty payees.</u>

(16) Details of Damages.

(17) " of Misc Expenses."

Mr. Poddar also drew our attention to the reply dated 19th March 2008 given by the assessee to the notice, dated 21st January 2008, under Section 142(1) of the Act. He contended that all the requisite particulars were furnished together with documents. Thereafter, the matter was heard from time to time by the assessing officer as would appear from the List of Dates submitted by Mr. Nizamuddin, learned advocate for the appellant. From the list of dates it appears that on 21st January, 2008 notice under Section 142(1) was

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issued. On 4th February, 2008 the Assessee appeared and filed details and particulars. On 18th February, 2008, 4th March, 2008, 19th March, 2008 and 26th March, 2008 the matter was heard. The Assessing Officer has recorded in the order sheet that the case was discussed and the official documents and particulars were filed by the Assessee.

Mr. Poddar contended that the fact that the Assessing Officer had issued the notice under Section 142(1) of the Act requiring the assessee to give particulars and to furnish documents in respect of seventeen items indicates that the Assessing Officer had in fact applied his mind. Without application of mind, according to him, the aforesaid notice itself could not have been issued. The fact that all the requisite papers required by the Assessing Officer were duly furnished and the matter was discussed from time to time on the various days indicated above, appearing from the assessment records produced by Mr. Nizamuddin, leave no scope for any doubt as regards the fact that

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the Assessing Officer after satisfying himself passed the order dated 28th March, 2008.

Mr. Poddar also drew our attention to the impugned judgment of the learned Tribunal which reads as follows:-

> *"Therefore, on combined reading of the assessment order for the assessment year under consideration along with the order sheet entries, it can be said that the A.O. had carried out such enquiry as the circumstances warranted and permitted before accepting the claim of the assessee and passing assessment order accordingly. It was an entirely different matter that the Commissioner did not agree with the conclusion derived by the A.O. from the enquiries made. Failure to carry out an enquiry is one thing and in such cases the commissioner would be justified in saying that the mere failure to make any enquiry was erroneous and prejudicial to the interests of the Revenue. But it would not be open to him to hold that the assessment order was erroneous and prejudicial to the interests of the revenue merely because he is of the opinion that some more enquiries are requuired to be made and he could not agree with the conclusion arrived at by the A.O. from the enquiries made. It was after verifying the books of account and various materials gathered from the assessee during assessment proceeding and after considering the explanation offered by the assessee that the A.O. had exercised a judicial discretion in the matter while completing the assessment u/s 143(3) of the Act. In such circumstances, the view taken by the A.O. cannot be said to be prejudicial to the Revenue nor can it be said to be erroneous simply because*

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in his order the A.O. did not make any elaborate discussions in that regard."

Mr. Poddar contended that neither before the Tribunal nor in the present appeal has any question has been suggested that the assessment order was bad because the same did not disclose any reasons. The contention raised and the judgments cited by Mr. Nizamuddin, as regards exercise of power u/s. 263 of the Act, are misconceived, and also out of the context.

Mr. Poddar contended that the finding of the learned Tribunal that the order dated 28th March, 2008 was not passed without application of mind has not been challenged before this Court. No attempt far less any serious attempt was made on behalf of the revenue to demonstrate that the order passed on 28th March, 2008 by the Assessing Officer was wrong either on facts or law. The appellant has also not been able, nor in fact has made any attempt to establish that the finding of the learned Tribunal that the order dated 28th March, 2008 was not passed without the application of mind is based otherwise than on evidence. On the contrary, the records of

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assessment, the list of dates produced by Mr. Nizamuddin go to establish that the assessment order was passed after due application of mind.

Mr. Poddar contended that there is no provision in the Income Tax Act which requires the Assessing Officer while accepting the claim of the assessee to pass a reasoned order. The reasons, according to him, are required only when an issue is decided against the assessee. He also drew our attention to the judgment in the case of Gadgil (SS) vs. Lall & Co. , reported in 53 ITR 231 (S.C), wherein the Apex Court held as follows :-

> *"A proceeding for assessment is not a suit for adjudication of a civil dispute. That an income tax proceeding is in the nature of a judicial proceeding between contesting parties, is a matter which is not capable of even a plausible argument. The Income Tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State: they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on*

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the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the proceeding with the character of an action between the citizen and the State."

He also drew our attention to the judgment in the case of CIT Vs. Gabriel India Ltd., reported in 203 ITR 108 (Bom.)

"The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order, he did not make an elaborate discussion in that regard."

The aforesaid views expressed by the Bombay High Court was quoted in the case of CIT vs. Sunbeam Auto Ltd., reported in 332 ITR 167.

He also drew our attention to a judgment of the Punjab & Haryana High Court in the case of Hari Iron Trading Co. Vs. CIT, reported in 263 ITR 437, wherein the following views were expressed:-

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"The expression "record" has also been defined in clause (b) of the Explanation so as to include all records relating to any proceedings available at the time of examination by the Commissioner. Thus, it is not only the assessment order but the entire record which has to be examined before arriving at a conclusion as to whether the Assessing Officer had examined any issue or not. The assessee has no control over the way an assessment order is drafted. The assessee on its part had produced enough material on record to show that the matter had been discussed in detail by the Assessing Officer. The least that the Tribunal could have done was to refer to the assessment record to verify the contentions of the assessee. Instead of doing that, the Tribunal has merely been swayed by the fact that the Assessing Officer has not mentioned anything in the assessment order. During the course of assessment proceedings, the Assessing Officer examines numerous issues. Generally, the issues which are accepted do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made. As already observed, we have examined the records of the case and find that the Assessing Officer had made full inquiries before accepting the claim of the assessee qua the amount of Rs.10 lakhs on account of discrepancy in stock. Not only this, he has even gone a step further and appended an office note with the assessment order

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to explain why the addition for alleged discrepancy in stock was not being made. In the absence of any suggestion by the Commissioner as to how the inquiry was not proper, we are unable to uphold the action taken by him under section 263 of the Act."

Whether the assessment order dated 28th March, 2008 was passed without application of mind is basically a question of fact. The learned Tribunal has held that the assessment order was not passed without application of mind. The records of the assessment including the order sheets go to show that appropriate enquiry was made and the assessee was heard from time to time. In deciding the question Court has to bear in mind the presumption in law laid down in Section 114 Clause - e of the Evidence Act:-

"that judicial and official acts have been regularly performed;"

Therefore, the Court has to start with the presumption that the assessment order dated 28th March 2008 was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard

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thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated.

The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons.

The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us

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to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact the order was passed by the assessing officer after due application of mind.

The judgments cited by Mr. Nizamuddin do not really support his contention. The judgment in the case of Meerut Roller Flour Mills Pvt. Ltd. vs. CIT (supra) does not apply because the High court in that case was satisfied that the assessment order was passed without enquiry.

The judgment of Cochin Bench of Income Tax Appellate Tribunal in ITA No. 116 /Coch/ 2012 relied upon by Mr. Nizamuddin is evidently based on an erroneous impression that "the proceedings before the Assessing Officer are judicial proceedings". This impression, which is patently contrary to the views expressed by Apex Court in the case of Gadgill (S.S.) Vs. Lall & Company (supra), was

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responsible for the views taken by the Tribunal. When the premise is wrong, the conclusion is bound to be wrong.

The judgment in the case of CIT vs. Infosys Technologies Ltd. (supra) is distinguishable on facts. The step taken by the CIT under Section 263 in that case was justified because the Income Tax records produced before him did not show that the assessing officer had considered the double taxation avoidance agreement on the basis whereof the claims were made by the assessee. Therefore, that was a clear case to show that the assessment order was passed without considering the relevant pieces of evidence.

The judgment in the case of A. A. Doshi vs. JCIT (supra) does not apply because the High Court in that case was dealing with the need on the part of the learned Tribunal to give reasons in support of its order.

The judgment in the case of Hindusthan Tin Works Ltd. Vs. CIT (supra) also does not apply because there the Delhi High Court was

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dealing with the duty of the learned Tribunal to disclose reasons in support of its appellate order.

The judgment in the case of S. N. Mukherjee vs. U.O.I. (supra) is clearly distinguishable. The point for consideration in that case was whether it was incumbent for the Chief of Army Staff while confirming the findings and the sentence of the General Court Martial, and for the Central Govt. while rejecting the post confirmation petition of the appellant, to record reasons for the orders passed by them.

The function of an Assessing Officer is to estimate the income of the assessee and to recover tax on the basis of such estimate as laid down by the Apex Court in the case of Gadgil (SS) vs. Lall & Co., (supra). Their Lordships opined that the income tax proceedings do not partake the character of a judicial proceeding between the State and the citizen. Therefore, the principles applicable to a proceeding before a judicial or a quasi-judicial authority where there are two

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contesting parties cannot be made applicable to the proceedings before an Assessing Officer.

Mr. Nizamuddin contended the judgments cited by Mr. Poddar indicate that the Assessing Officer is not required to write an elaborate judgment. He contended that the assessing officer may not have any such obligation but it cannot be said, according to him, that the Assessing Officer is under no obligation to record anything in his assessment order. It is not in the first place a fact that he has not recorded anything. From the assessment order, the following facts and circumstances appear:-

"Return was filed on 29/11/06 showing total income of Rs.3,80,66,940/-. In response to notices u/s. 143(2) and 142(1) of the I. T. Act, 1961, Sri P. R. Kothari, A/r appeared from time to time and explained the return. Necessary details and particulars were filed. The business of the assessee is manufacturing and trading of cosmetics and dental care products as in earlier years. In view of above total income is computed is under:"

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Unless the aforesaid recital is factually incorrect or the computation is legally wrong, it is not possible to hold that the assessment order was passed without application of mind. On the top of that when the Assessing Officer accepted the contention of the assessee there was no occasion for him to make any discussion in his order.

If the assessing officer cannot be shown to have violated any form prescribed for writing an assessment order, it would not be correct to hold that he acted illegally or without applying his mind. The third question is, for the reasons discussed above, answered in the negative.

With regard to the fourth question Mr. Nizamuddin contended as follows:-

The learned Tribunal erred in passing the order under challenge without dealing with all the four questions raised by the CIT in his notice under Section 263 of the Act. Therefore, the order is bad

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and is liable to be set aside. In support of his submission he drew our attention to a judgment of the High Court of Gujarat in the case of RCM Luthra vs. ACIT reported in 257 ITR 460, wherein the following views were expressed :-

> *"4. It appears from the order of the Tribunal that it has not bestowed its attention to the above material reasoning adopted by the Commissioner (Appeals) for deciding the appeal. It was incumbent on the Tribunal before upsetting the order of the Commissioner (Appeals) to consider the reasons given by that authority for its decision. As held by the Supreme Court in Omar Salay Mohamed Sait v. CIT [1959] 37 ITR 151 it is necessary that every fact for and against the assessee must have been considered with due care by the Tribunal and it must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. This Court in Rajesh Babubhai Damania v. CIT [2001] 251 ITR 541 observed that it was the duty of the Tribunal to ascertain the reasons which were given by the Commissioner (Appeals) in whose order, the order of the Assessing Officer had merged.*
>
> *5. Since the Tribunal has not appropriately considered the reasoning given by the Commissioner (Appeals) and has given its finding without dealing with the reasoning of the Commissioner (Appeals) reproduced hereinabove we are of the view that the impugned order of the Tribunal cannot be sustained and the Tribunal should consider the matter on merits in accordance with law. This appeal is accordingly*

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allowed and the impugned order of the Tribunal is set aside with a direction to it to reconsider the revenue's appeal No.IT Appeal No.3125 (Ahd.) of 1995 and take a fresh decision thereon in accordance with law expeditiously."

Mr. Poddar disputed the submission that the learned Tribunal had set aside the order of the CIT without considering all the four issues. It would appear from paragraph 8 of the judgment of the learned Tribunal that the following views were expressed:-

"In view of our above discussions and considering the facts and circumstances of the case and evidences produced by the assessee during assessment as well as 154 proceedings, it cannot be said that the view taken by the A.O. is not one of the possible views. The Ld. C.I.T, may be of the view that some more disallowance/addition would have been justified considering the expenditure as capital in nature and receipts as revenue in nature and/or additional amount has been allowed to be debited for the assessment year under appeal. However, that by itself will not make the assessment to be erroneous and prejudicial to the interests of the Revenue. The course adopted by the A.O. is certainly one of the possible views. Similarly, it is also not pointed out before us that the expenditure and other transactions were not recorded in the books of accounts which were produced before the A.O. It is now settled law that if, while making the assessment, the AO examines the accounts and other details, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the Ld. C.I.T., while exercising his power under sec.263 of the Act, is not permitted to substitute his own view about the computation of income in place of the income assessed by the A.O., unless the order of the A.O. is patently unsustainable in law."

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It does not appear from the aforesaid conclusion of the Tribunal that all the four issues were not examined by the learned Tribunal. After examining all the four issues the Tribunal was of the opinion that the Assessing Officer took a possible view. The fact that the aforesaid opinion of the Tribunal is not related to only one of the issues would be evident from the following sentence:-

"The Ld. CIT, may be of the view that some more disallowance/addition would have been justified considering the expenditure as capital in nature and receipts as revenue in nature................."

The opinion expressed by the Tribunal in paragraph 8 has to be read in conjunction with paragraph 5 of the judgment wherein the submissions of the assessee were recorded.

For the aforesaid reasons we hold that the learned Tribunal did not set aside the order of the CIT without examining all the four issues.

The 5th question is now taken up for consideration.

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Mr. Nizamuddin in support of the 5th question relied upon the following judgments:-

(a) CIT versus D. M. Kothari reported in 331 ITR 301 (All). In paragraph 6 of the judgment the Division Bench held as follows:-*"In the present case, the Tribunal had not discussed the controversy involved and adjudicated by unreasoned order. The Tribunal should have given brief and precise description of controversy decided by it in earlier appeal vide order dated December 14, 2000, and thereafter the resemblance in controversy of previous appeal with the year in dispute, i.e., 1989-90. The judgment and order passed by the Tribunal on the face of record seems to be perverse and not sustainable. The Tribunal had neither discussed the statutory provisions nor the disputed question of fact or finding of fact of subordinate authorities. The learned Tribunal has failed to exercise the jurisdiction vested in it. In view of the above, the appeal stands allowed. The order dated May 14, 2003, is set aside. The matter is remitted back to the Tribunal to decide*

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afresh keeping in view the observations made hereinabove expeditiously."

This judgment does not apply to the facts of the case for the reasons given by us in answering the fourth question.

The second judgment relied upon by him is in the case of O.S.M. Sait vs. CIT reported in 37 ITR 151 (SC), wherein the following views were expressed:-

> *"We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assesse should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of*

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the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

The third judgment relied upon by him is in the case of A. Venkata Rao vs. CIT reported in 203 ITR 64 (Orissa) wherein the following views are given:-

"This was a case where the conclusions were in favour of the assessee. The Tribunal has merely noted the arguments advanced on behalf of the department and the assessee. No definite conclusions on the vital aspects have been arrived at by the Tribunal as is evident from the paragraphs quoted above. The Tribunal was duty-bound to examine the point raised by the parties and to record definite conclusions in respect of each one of them. The Tribunal having failed to do so, we feel that the matter should be reheard by it. It has to indicate reasons in support of its conclusions and merely saying that the paper books have been gone through or facts have been examined is not sufficient. No reasons were indicated as to why the conclusions of the first appellate authority were unreasonable or perverse. Presumptive conclusions cannot take the place of reasons. Our interference should not be construed to be an expression about the merits of the case. We remit the matter to the Tribunal because its judgment is unreasoned and no definite conclusions have been indicated in support of the order of reversal passed by the Tribunal. The tax amount being minimal, the Tribunal would do well to dispose of the appeals as expeditiously as practicable. The Tribunal shall give full opportunity to the parties to place their respective cases when it hears the appeals again."

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The fourth judgment relied upon by him is in the case of Raichand Kothari (HUF) vs. CIT reported in 223 of ITR 250 wherein the following views were expressed:

> *"We have gone through the judgment of the Tribunal. The Tribunal had written a very lengthy judgment quoting the submissions made from the assessee as well as the revenue. Mr. Bhuyan has drawn our attention to paragraphs 33 and 37 of the judgment in which the Tribunal stated that the Commissioner (Appeals) was wrong in allowing the appeal. But the Tribunal did not consider the materials available in the record. No reason was given as to how the conclusions arrived at by the Commissioner (Appeals) were erroneous. The Tribunal is the last authority so far as the facts are concerned. The Tribunal is required to consider each and every fact and discuss the evidence available on record. It may not always be necessary to discuss each and every piece of evidence in detail while affirming the order. But in case of reversal the Tribunal is duty bound to discuss each piece of evidence placed before it and come to an independent finding by giving reasons. In this connection Mr. Bhattacharjee has drawn our attention to a decision of the Apex Court in Udhavdas Kewalram V. CIT[1967] 66 ITR 462. In the said case the Apex Court observed thus:*
>
> *'The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act: It is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the*

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contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.' (p.464)

The Apex Court further observed thus:

'…The Tribunal was undoubtedly competent to disagree with the view of the Appellate Assistant Commissioner. But in proceeding to do so, the Tribunal had to act judicially, i.e., to consider all the evidence in favour of and against the assessee. An order recorded on a review of only a part of the evidence and ignoring the remaining evidence cannot be regarded as conclusively determining the questions of fact raised before the Tribunal.' (p.465)

In this case the Tribunal did not discuss any evidence whatsoever and after quoting the submissions made by both sides the Tribunal disagreed with the conclusions arrived at by the Commissioner (Appeals). In our opinion this is not correct. The Tribunal failed to discharge its obligation as per the Act."

Mr. Nizamuddin also drew our attention to an unreported judgment of this Court in the case of CIT vs. Binani Industries Ltd. (ITAT No.174 of 2013) wherein the following views were expressed:-

"Whether the power under Section 148 was exercised by the Assessing Officer due to any change of opinion or the income had really escaped assessment was essentially a question of fact. The contention of the assessee was that tax was not deducted because it was not deductible. Therefore, some amount of exercise in order to find out whether the

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contention of the assessee was correct was required both on the part of the CIT(A) and the Tribunal, regard being had to the fact that they are the fact finding authorities. Surprisingly they did not think it necessary to do any such thing and proceeded to dispose of the matter merely on the basis that the exercise of power was based on change of opinion.

We have no doubt in our mind that without application of mind they had disposed of the matter. In the circumstances, both the orders passed by the CIT(A) and the Tribunal are set aside. The matter is remanded to the CIT (A) for a decision afresh. The CIT(A) shall decide the question as regards the legality of exercise of power under Sections 147 and 148 after going into the claims and contentions raised by the assessee including the submission that no tax was deductible at source."

Mr. Poddar, learned Senior advocate drew our attention to the judgment in the case of Collector of Customs vs. Biswanath Mukherjee reported in 1974 CLJ 251 wherein this Court opined as follows:-

"A. N. Sen J. on the basis of the various decisions of the Supreme Court on the point has laid down the circumstances where the Court will interfere with the Tribunal's findings on the questions of fact on the ground of perversity in an application under Article 226 of the Constitution. Learned Judge has observed:

"It is, however, equally well settled that even in a writ petition under Article 226, the Court is entitled to interfere with the finding of the Tribunal on any question of fact which the Tribunal is competent to decide, if the Court is satisfied that the finding of the Tribunal is perverse and the finding of the Tribunal is considered to be perverse, if–

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(a) The Tribunal has come to the finding on no evidence.

(b) The Tribunal has based the finding on materials not admissible and has excluded relevant materials.

(c) The Tribunal has not applied its mind to all the relevant materials and has not considered the same in coming to the conclusion.

(d) The Tribunal has come to the conclusion by considering material which is irrelevant or by considering material which is partly relevant and partly irrelevant.

(e) The Tribunal has disabled itself in reaching a fair decision by some considerations extraneous to the evidence and the merits of the case.

(f) The Tribunal has based its finding upon conjectures, surmises and suspicion.

(g) The Tribunal has based the finding upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found.

(h) If the Tribunal in conducting the enquiry has acted in flagrant disregard of the rules of procedure or has violated the principles of natural justice, where no particular procedure is prescribed.

81. *In any of the above cases and in any other case where the Court, in the particular facts of the case, considers the finding of the Tribunal to be perverse and where the Court is of the opinion that justice of the case so requires, the Court is entitled to interfere and set aside the finding of the Tribunal on any question of fact. In such cases, the Court holds that there is an error of law on any of the above grounds."*

Mr. Podder submitted that it is not possible to bring the impugned order of the Tribunal within the four corners of any of the

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grounds laid down in the aforesaid judgment of this Court. The views expressed by the learned Tribunal are evidently on the basis of the evidence. The Tribunal had before them the records of both the Assessing Officer and the CIT. After examining the records both of the CIT and the Assessing Officer, the Tribunal reached the conclusion that the order of the Assessing Officer was not passed without application of mind. Mr. Nizamuddin is unable to point out any part of the finding, recorded by the learned Tribunal, which has been quoted above to have been based otherwise than on evidence.

Mr. Podder also drew our attention to the judgment in the case of CIT vs. Mulchand Bagri reported in 108 CTR 206 (Cal) wherein the Division Bench opined that in the absence of any challenge to the finding of the Tribunal that the ITO had actually made an enquiry the Revenue was precluded from challenging the order of the Tribunal setting aside an order passed in exercise of power under Section 263.

The ground as regards perversity is relatable to a finding on a question of fact. Mr. Nizamuddin did not draw our attention to any

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part of the finding of the Tribunal which according to him was perverse. The judgments cited by him are naturally of no assistance because in the absence of factual basis, the judgments can have no application. For the aforesaid reasons the fifth question is answered in the negative.

The appeal for the aforesaid reasons is dismissed.

The parties shall however bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

I agree.

(SUDIP AHLUWALIA, J.)

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