आयकर अपीलीय अधिकरण, मुंबई "ई" खंडपीठ
Income-tax Appellate Tribunal "E"Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह,न्यायिक सदस्य
Before S/Sh. Rajendra,Accountant Member & Pawan Singh, Judicial Member

आयकर अपील सं./I.T.A./2913/Mum/2015, निर्धारण वर्ष /Assessment Year: 2007-08

M/s. Oricon Enterprises Limited 1076, Dr.E. Moses Road, P.B. No.6584, Worli, Mumbai-400 018. **PAN:AAACO 0480 F**	Vs.	ACIT, CC-3(3) Aayakar Bhavan, Mumbai-400 020.
(अपीलार्थी **/Appellant**)		(प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Manjunath Swamy-CIT-DR
Assessee by: Shri Arvind Sonde

सुनवाई की तारीख **/ Date of Hearing: 11/04/2018**
घोषणा की तारीख **/ Date of Pronouncement: 16/05/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार -PER RAJENDRA, AM-

Challenging the order,dated 16/02/2015,of CIT(A)-51,Mumbai, the assessee has filed the present appeal.Assessee-company,engaged in the business of manufacturing of aluminium caps, metal containers,petrochemicals etc., filed its return of income on 15/11/2007,declaring total income at Rs.NIL.The original assessment was completed on 29/12/2009,wherein the Assessing Officer (AO)made disallowance u/s.14 A read with rule 8D. Subsequently,he issued a notice u/s.148 of the Act,as he was of the opinion that certain income had escaped assessment.

2.First ground of appeal is about validity of reopening.We would deal with it in the subsequent paragraphs.

3.Next ground of appeal is about confirming the disallowance of Rs. 1.23 crores on account of provision for gratuity and Rs. 39.80 lakhs on account of provision for leave wages transferred to Oriental Containers Ltd.(OCL) on account of transfer of packing divisions.During the re assessment proceedings,the AO observed that the assessee had submitted that due to transfer of packing divisions the liability of gratuity and leave wages transferred to OCL was no longer liability of the assessee company,that same was considered as paid /discharged.Before the AO the assessee stated that claim made by it u/s.40A(7)and 43B of the Act should be allowed.However he rejected the claim made by the assessee.

3.1.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA) and made elaborate submissions.After considering the available material,he held that the assessee had not made actual payment of the statutory liabilities.Referring to the provisions of section 36(1)(v)of the Act,he held that the assessee had neither actually paid the amount nor had met the conditions stipulated in the said section,that case of the assessee did not fall under section 43B of the Act,that clauses b and f of the section deduction was to be allowed on actual payment.Finally,he upheld the order of the AO.

3.2.Before us,the Authorised Representative(AR)stated that the payment of gratuity and leave wages was made by the OCL,that the assessee had made constructive payment of both the liabili -ties,that it was entitled to claim the deduction.He relied upon the case of W T Suren & Co. Ltd. (230 ITR 643)and stated that as per the provisions of section 43 B the departmental authorities should have allowed the claim made by the assessee.

The Departmental Representative(DR)supported the order of the AO and argued that no payment was made by the assessee,that as per the provisions of section 43B of the Act for making any claim the assessee had to make payments.

3.3.We have heard the rival submissions and perused the material before us.We find that the assessee had claimed that the payment of gratuity and the leave wages by OCL should be considered as constructive payment of these liabilities by it.We find that the basic question of treatment given by OCL in its books of accounts has not been considered by both the lower authorities.It is one of the established principle of taxation that for one payment deduction cannot

be claimed by two entities.Besides,nothing is on record as to what was decided by the purchaser and the seller of the packing divisions about the gratuity and leave wages.In short,issue needs further verification.Therefore,in the interest of justice we remit back the issue to the file of the AO for fresh adjudication.He is directed to decide the issue after affording a reasonable opportunity of hearing to the assessee and after considering the judgment of W T Suren & Co. Ltd.(supra),relied upon by the assessee.The assessee would furnish the copy of agreement,if any, entered in to with regard to unpaid gratuity and leave wages.Second ground of appeal is decided in favour of the assessee,in part.

4.Third ground of appeal is about confirming the disallowance of Rs. 45.70 lakhs u/s.14A read with rule 8D of the Rules.During the reassessment proceedings, the AO observed that while completing the original assessment the then AO had made a disallowance of Rs. 1.02 lakhs under rule 8D (2) (ii) of the Income Tax Rules, 1962 (Rules), that the AO had inadvertently considered interest expense of Rs. 5.50B lakhs instead of net interest expense of Rs. 1.86 crores, that there was no cogent discussion in the order as to why the then AO had adopted the figure contrary to the figure furnished by the assessee.

Before the AO,the assessee contended that rule 8D was applicable only from the assessment year 2008-09,that the paid-up capital and reserve of the assessee as on 31/03/2007 were 88.73 crores, that the investments were to the tune of Rs. 2.01 crores excluding the investment of Rs. 63.27 crores received on amalgamation/demerger for consideration other than cash. However the AO did not agree with the assessee and held that for the purpose of disallowance u/s.14A expenditure incurred by the assessee had to be considered, that reference to capital reserve had no meaning, that there was nothing wrong in following the guidelines prescribed in rule 8D of the rules. Accordingly he made disallowance u/s.14A read with rule 8D of Rs. 51.98 lakhs. He further observed that in the original assessment proceedings the then AO had made a disallowance of Rs. 18.28 lakhs, that the difference of Rs. 33.69 lakhs was to be added to the income of the assessee as per the provisions of rule 8D (2) (ii) of the Rules.

4.1. During the appellate proceedings,before the FAA,the assessee contended that while deciding the appeal for the assessment year 2004-05,the then FAA had restricted the disallowance to 10% of dividend income, that while deciding the appeal for the assessment year 2009-10 the FAA had confirmed that major part of investment had been allotted in consideration for amalgamation/for

transfer of business for which no loan was taken and that no cash payment was involved, that he had also held that there was no interest outgo for those investments. Alternatively it was argued that dividend income was 0.29% of the profit before tax so interest expenditure in the same proportion should be disallowed. It was also argued that net interest expense for the year under consideration was Rs.1.52 crores only.

After considering the assessment order and the submissions of the assessee, the F AA held that in the original assessment a disallowance u/s.14 a of Rs. 18.28 lakhs was made, that the disallow - ance included disallowance of Rs. 1.02 lakhs as per the provisions of rule 8D (2) (ii), that the addition made during the reassessment proceedings related to the interest expenditure, that during the original proceedings the then AO had taken the figure of Rs. 5.50 lakhs instead of Rs.1.86 crores, that the assessee had stated that net figure was Rs. 1.52 crores. He directed the AO to replace the figure of interest expenditure at Rs.1.52 crores as against Rs. 1.86 crores.He gave proportionate relief to the assessee.

4.2. Before us,the AR argued that Rule 8D(ii)was not applicable from next assessment year,that AO and the FAA wrongly applied the said rule and made the disallowance,that assessee would have no objection if proportionate disallowance was made considering the orders of the FAA.s for the earlier years.The DR supported the order of the FAA.

4.3. We have heard the rival submissions.We find that during the assessment and reassessment proceedings the AO had applied the provisions of section 8D(2)(ii)of the Rules,though the same were not applicable for the year under consideration. The principle governing the 14 A is that no expenditure should be allowed to an assessee if he claims exemption for such income.Thus,the first and foremost pre- condition to invoke section 14A r.w.r. 8D is incurring of expenditure for exempt income.In the case under consideration the AO has mechanically applied the formula without bringing the basic facts i.e. amount of expenditure incurred for earning exempt income.Therefore,we are of the opinion,that matter should be restored back to the file of the AO for fresh adjudication.Here,we would like to mention that a reasonable disallowance can be made if it is found that expenditure was incurred for earning tax free income.The disallowance should not be more than 2% of the exempt income.We order accordingly.Ground no.3 is partly allowed.

5.Last ground of appeal is about computing and charging to tax Long-Term Capital Gain (LTCG),u/s.50B of the Act,on transfer of packing division at Rs. 27.35 crores as against Rs. 2.95

crores.During the re-assessment proceedings, the AO observed that the assessee had entered into a Business Transfer Agreement (BTA),dated 25/02/2006 with OCL for sale of packing division in lieu of 29,90,000shares of Rs. 10/-each,that in the notes to accounts it was mentioned that the value of 29.90 lakhs lakhs equity shares of OCL,received in consideration instead of its real value,was not ascertained and that there was no sale/loss from sale of packing divisions,that the assessee had reflected the value of said 29.90 lakhs equity shares in its balance sheet at Rs. 27.62 crores, that it calculated the LTCG on the said transaction based on its audit report wherein the net worth of the said division was declared at Nil,that as per the assessee the net worth of the assets transferred was in negative i.e. at Rs.(-) 24.40 crores. Accordingly it calculated the LTCG subject to tax at Rs. 2.95 crores,being the face value of 29.90 lakhs shares. The AO observed that during the reassessment proceedings above referred facts had been reiterated and he confirmed by the assessee as per its letter dated 18/01/2013.

He observed that as per Form 3 CAE, furnished by the assessee, the aggregate value of total assets of division transferred was Rs.1,27,39,43,942/-,that the aggregate value of liabilities relating to the division was at Rs.1,51,79,73,235/-, that it resulted in excess transfer of liabilities of Rs. 24.40 crores i.e. a negative balance transferred under slump sale, that the assessee received equity shares of face value of Rs. 2.95 crores as consideration. The AO held that the total gain to the assessee in the transaction was of Rs. 27.35 crores (24.40 crores +2.5 crores).As the assessee had already offered to tax Rs. 2.95 crores, so the balance amount of Rs. 24.40 crores was added as LTCG on account of sale of packing division.

5.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA and made elaborate submissions. After considering the available material, he held the assessee had transferred the net liability of Rs. 24.40 crores on account of slump sale, that in lieu thereof it had received 29,90,000 shares of OCL with face value of Rs. 2.95 crores, that the net effect of the slump sale was that the assessee was benefited by Rs. 27.35 crores (Rs. 24.40 crores plus Rs. 2.95 crores), that at one hand it had been relieved of discharging the liability of Rs. 24.40 crores and on the other hand it received shares with face value of Rs.2.50crores without payment of any sum. He referred to the case of Summit Securities Ltd. (19 taxmann.com 102) of the special bench of the tribunal wherein various aspects of provisions of section 50B were considered. He further observed that the assessee itself had recognised the value of 29.90 lakhs lakhs shares as sale consideration at Rs. 27.62 crores, as against their face value of Rs. 2.50 crores, which if sold

at a later date might result in long-term capital loss in its books, that if the contention of the assessee was to be accepted it would escape tax in the year of slump sale and on the other hand it had got potential to book huge losses in its books.

Vide its letter, dated 26/05/2014,the assessee filed an application to raise additional grounds before the FAA stating that it should be allowed to raise an additional grounds as same had not been raised inadvertently at the time of filing of appeal, that the additional ground raised was in relation to a question of law and did not involve fresh investigation of facts. The FAA forwarded the same to the AO to offer his comments.He afforded an opportunity to the assessee to file objections, if any, as regards to the remarks of the AO communicated through his letter dated 14/08/2014.In its reply,the assessee pointed out that the grounds were inadvertently left out to be raised while filing the grounds of appeal. It relied upon the judgment of the honorable Bombay High Court delivered in the case of Prithvi Brokers And Shareholders Private Ltd (349 ITR 336).

After considering the submission of the assessee and comments of the AO, the FAA observed that as per section 250(5),the FAA might allow an appellant to go into any ground of appeal if not specified in grounds of appeal if the appellate authority was satisfied that the omission of the ground from the form of appeal was not wilful or unreasonable, that the FAA had power to admit an additional ground and to allow relief if material was already available on record, that what was to be examined was as to whether the additional ground raised involve fresh investigation of facts or it could be adjudicated upon based on the facts already on record, that the assessee had filed a return of income offering to tax income under the head capital gains on sale of its packing division to its subsidiary,that the assessee had paid taxes voluntarily while filing the return, that the capital gain was assessed in the original assessment,that the AO had initiated the reassess - ment proceedings as he had reason to believe that there had been under assessment under the head capital gains arising from the slump sale,that the dispute before the AO in the reassessment proceedings was with regard to mode of computation, that there was no dispute as regards as to whether the transaction was a slump sale or not, that at the time of filing of appeal it was an admitted fact that there had been a slump sale and that the assessee had computed tax on capital gain, that it had voluntarily paid tax on the same when the return was filed u/s.139(1),that the above admitted fact remained so even when the return was filed in response to notice u/s.148, that subsequent to the reassessment proceedings the dispute or the grievance of the assessee was confined to the computation as per section 50B of the Act, that the transaction in question was a

slump sale was a foregone conclusion on the part of the assessee, that during the appellate proceedings the assessee had raised additional ground contending that transaction was not a slump sale and that the provisions of section 50B will not apply, that it was an entirely new contention raised by the assessee, that the new contention did not stem of flow from the grounds of appeal originally filed, that it could not be said that there was an omission to raise the said grounds, that the assessee has raised the issue stating that there was no ingredients of sale on the transfer of its packaging division, that it involved investigation to new facts, that the case laws relied upon by the assessee were not applicable to the facts of the case,that it was not a simple case of a deduction being otherwise allowable inadvertently not claimed in the return of income.Finally,he held that the additional ground raised by the assessee could not be entertained.

He further observed that the contention raised in the additional ground was based on the judgment pronounced by the honorable jurisdictional High Court in the case of Bharat Bijlee Ltd.(365 ITR 258),that the basic contention of the assessee was that its case was not covered by slump sale within the meaning of section 2(42C) of the Act that the assessee argued that it was a case of exchange and not of sale, that it was contended that the transfer of undertaking was not slump sale and that same was not liable to capital gains tax under the provisions of the Act, that the honorable Bombay High Court had,in the case of Bharat Bijalee Ltd had decided the applica -bility of the provisions of section 2(42C) and 50B of the Act, that the honorable court had held that transfer of an undertaking in exchange of preferential shares/bonds would not constitute sale, that the assessee argued that that the facts of the case under consideration were in parity with the case of Bharat Bijalee Ltd.

The FAA,after considering the submissions of the assessee,held that dispute in the case originally was only with regard to the determination of capital gain in the backdrop of negative net worth,that the negative net worth had to be added to the full value of consideration for the purpose of computation of capital gains, that the computation of LTCG, as made by the AO in the reassessment proceedings, had to be confirmed.He referred to facts of the case of Bharat Bijalee Ltd and stated that in that case the argument from the very beginning was that the transaction was not a sale,that in the case under consideration there was no dispute as regards the applicability of section 2(42C) and section 50B of the Act, that in the case under consideration the entire dispute related to the determinability of total taxable gain in the backdrop of negative net worth,that the assessee had filed the original return disclosing the income under the head

capital gains arising from the transfer of its packing division.The FAA referred to the BTA where the parties had been referred as seller and purchaser.After referring to various provisions of the BTA, he held that the real intention of the transaction was that of sale and not of exchange, that the purchase consideration, being fully paid-up 29.90 lakhs lakhs equity shares of OCL, that the transaction was a slump sale, that while filing the return in response to reassessment notice the assessee had appended a note with the return stating that it had received the consideration of some of Rs.2.95 crores by way of 29.90 lakhs lakhs equity shares of Rs. 10 each which was offered as LTCG on sale of packaging division u/s.50B, that the conduct of the assessee was in consonance with the clauses of the BTA,that the BTA was never construed as a case of exchange.He further observed that the original assessment was completed u/s.143 (3) wherein the long-term capital gain on slump sale at Rs. 2.95 crores was excepted, that in the reassessment proceedings the long-term capital gain on some say had been assessed at Rs. 27.35 crores as against Rs.2.95 crores,that the reassessment proceedings initiated by issue of notice u/s.148 were only for the benefit of the revenue, that the proceedings had been reopened by the AO to bring to tax income that had escaped assessment, that it was not open for the assessee to claim a benefit or a deduction.The FAA referred to the cases of Sun Engineering Works Private Ltd. (198 ITR 297),K Sudhakar S Shanbhag (241 ITR 65)and Modi Industries Ltd.(216 ITR 759)and finally held that the transaction entered into by the assessee was a slump sale within the meaning of section 2(42C), that the provisions of section 50B were applicable, there was no infirmity in the order of the view in treating the transaction is a slump sale.

5.2. Before us,the AR contended that no new facts were required to be investigated about the additional ground raised,that the FAA had to decide the issue whether the transfer,as per the BTA,was for money or for thing/things,that as per the agreement the concideration value was 29.90 lakhs lakh shares,that the assessee was contesting addition of Rs. 24.40 crores was made in the reassessment proceedings, that assessee was not challenging the income already offered i.e. Rs.2.95 crores in light of the judgment of the Sun Engineering (supra),that the FAA had rejected the claim made by the assessee on the ground that it had made a concession, that no concession could be made against law,that the FAA had ignored the substance over format,that the FAA in paragraph 8.4 at page number 17 of his order has mentioned that no payment was made by the assessee,that when no price was paid for the transaction in question it could not be a case of sale,that without sale there could not be any slump sale,that the assessee had filed appeal before

the FAA in the month of April, 2013 i.e. on 18/04/2013, that the judgment in the case of Bharat Bijalee Ltd was delivered by the honorable Bombay High Court on 09/05/ 2014,that there was no estoppel against law.He relied upon the cases of Mayank Poddar (262 ITR 633),Nirmal Mehta (269 ITR 268), P Nallammal and Another(6SCC 559), Motor And General Stores (66 ITR 692), Kalidas Dhanjibhai vs. State of Bombay(AIR 1955 SC 62, dtd. 29.10.1954)and Bennett Coleman & Company Ltd (89 taxmann.com 415).

The DR supported the order of the FAA and stated that the assessee was not entitled to raise the issue of sale versus exchange during the appellate proceedings.He relied upon the cases of Anand Electricals (1998-LL-1105-3),Nagpur Electrical (65CTR 223), Wockhard hospital (2017 tax publication),Equinox Solution (393ITR 566)and stated that in the cases of P Nallammal (supra)and Kalidas Dhanjibhai(supra)nothing had been laid down about the provisions of the Act,that both the cases did not deal with taxing the income,that one of them was a criminal appeal,that the assessee should have made a claim in the original return,that it was prevented from raising the issue of sale versus exchange once such claim was not made by it during the AO or FAA,that additional ground raised by it was an afterthought.

5.3. We have heard the rival submissions and perused the material before us. We find while filing the original return of income the assessee had offered Rs. 2.95 crores for taxation on account of sale of packing divisions,that the AO had reopened the assessment on three counts, that one of the reasons was that assessee had not offered the full value of LTCG, that in the reassessment proceedings,the AO made an addition of Rs. 24.40 crores to the income of the assessee,that during the appellate proceedings it had raised additional ground referring to the judgment of the honorable Bombay High Court delivered in the case of Bharat Bijalee Ltd (supra),that the FAA rejected the additional ground raised by the assessee and held that AO was justified in taxing Rs. 24.40 crores,that he further held the transaction in question was sale and not an exchange, that he also held that the provisions of section 2(42C) and section 50B were applicable, that as per the FAA the assessee could not raise the issue of sale versus exchange in the re-assessment proceed - ings,that as per the assessee it was a case of exchange and not of slump sale considering the judgment of Bharat Bijalee Ltd (supra).

5.3.1. We are of the opinion that in the appeal before us,two basic questions have to be answered. The first issue to be addressed is as to whether the assessee could have raised the ‘sale versus

exchange'controversy in the reassessment proceedings at appellate stage-especially when it had made no such claim before the AO.Besides,it is also to be decided is as to what was the real nature of the transaction in question.

5.4. To answer the first question,we would like to deliberate upon the basics of principle of Estopple and some of the cases dealing with the said concept.Some of the principles,culled out from judgments of the Courts,dealing with it can be summarised as under:

i.'Estopple'is a rule of evidence and section 116 of Indian Evidence Act recognises this rule.The section stipulates that where a person has,by his declaration, act or omission permitted another to believe a thing to be true and to act upon such belief,neither he nor his representative is allowed to deny its truth.The basis of estopple is that it would be unfair or unjust to allow a party to depart from a particular state of affair which another has taken to be correct.

ii. Before applying the general principle that a party cannot be allowed to approbate and repro -bate,one must ascertain that there has to be estopple in one form or the other.If there is no estopple,there would be no question of the doctrine coming into operation.

iii. There are different types of estopple,including,promissory-estoppel and issue-estoppel,which may arise during legal proceedings.But,the common thread between them is that a person is restrained from asserting a particular position in law where it would be inequitable to do so.

iv. There could not be estopple against the statute/law.One cannot be prevented by any estopple from ascertaining one's rights under a particular Act so long the Act continues to be the law in force.There may be many reasons like wrong advice,ignorance, confusion or not correctly under -standing the law or the rights,for a party to take pleadings against his rights under the Act or statute,which he/it can always correct either in the same proceeding or in any subsequent proceed -ing and take a plea according to his/its rights under the Act/statute.

v.As estoppel is an equitable doctrine,so,the person wishing to assert it,must normally come to the court with "clean hands".It cannot be equated with the doctrine of waiver,as it relates to relinquishing a right once it has arisen.There cannot be any estopple against the statute,as stated earlier,but once a provision is made for the benefit of an individual,such benefit can always be waived as there is no public interest involved in waiving such right.Estopple is distinct from the

equitable doctrine of laches.In the case of Haresh Kochar,Bharat Ice Factory ,the Hon'ble Patna High Court has held that there cannot be any estopple against the statute,that once a provision is made for the benefit of an individual, such benefit can always be waived as there would be no public interest involved in waiving such right.(390 ITR 385)

vi. The Government cannot claim immunity based on the doctrine of promissory estoppel. It is said that in a State,governed by rule of law,no one is above the law.There is, however,no estopple in law against a party in a taxation matter.If a particular income is not taxable under the Act,it cannot be taxed on the basis of estopple or any other equitable doctrine.Equity is out of place in tax law-a particular income is either exigible to tax under the taxing statute or it is not. If it is not,it cannot be subjected to tax.

vii. If an assessees,being not very clear about the provisions under which they are exempted, made attempts to refer and rely on or other provisions then the mistake of law in pleading status or claiming a particular advantage under a provision is neither an admission nor will attract the principle of estopple or acquiescence.When law requires something and provides a particular status with particular description,it is to be treated accordingly.A mistaken claim will not make any difference,either for affirmance or denial.

viii. In British Paints India Ltd.(188 ITR 44),the Supreme Court observed that there was no estopple in the matter of method of accounting consistently followed by the assessee and the Assessing Officer is not bound by the method followed in the earlier years, if correct profits cannot be deduced therefrom. However, it is also well settled that the Department should not ordinarily depart from its earlier decision, more so, where such departure would result in injustice to the assessee and the Department is bound to treat the accounts of a continuing business in a consistent manner.

ix. It is trite law that the principle of estopple has no application in the Income-tax Act.In the case of Bharat General Reinsurance Co. Ltd.(81 ITR 303)Hon'ble Delhi High Court has held as under:

> *"It is true that the assessee itself had included that dividend income in its return for the year in question but there is no estopple in the Income tax Act and the assessee having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quite apart*

from it, it is incumbent on the Income-tax Department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the Department to tax that income in that year even though legally such income did not per tain to that year. We are therefore of the view that the income from dividend was not assessable during the assessment year 1958-59, but it was assessable in the assessment year 1953-54. It cannot, therefore, be taxed in the assessment year 1958-59."

x.In the matter of Uptron India Ltd. v. Shammi Bhan,(AIR 1998 SC 1681)it has been held that a wrong concession on question of law made by counsel is not binding on his client and such concession cannot constitute a just ground for a binding precedent.

5.5.a. Now we would like to discuss some of the cases pertaining to estoppel and tax-proceedings. First among them is the case of J K Synthetics Ltd.(105 ITR 864)of the Hon'ble Allahabad High Court.In that matter the assessee had its registered office at Kanpur. It was running a mill for the manufacture of synthetic fibre like nylon filament yarn, nylon staple fibre, etc. The company's accounting year used to end on June 30 each year. On 14/06/1971, it applied to the AO for permission to change the previous year so that it might end on December 31.He granted the permission in June,1971,subject to certain conditions, one of which was that the previous year for the AY.1972-73 would comprise of a period of 18 months commencing from 1/07/ 1970, and ending on 31/12/1971, to be assessed as one unit. Accordingly, the company filed its return for the AY.1972-73 on 30/09/1972, for a period of 18 months. The company had started two more units from 15/11/1972 and 19/11/1971 for the production of nylon stable fibre and nylon tyre cord. Separate accounts were maintained for these two units, which accounts were closed on 31/12/1971. The profit and loss from these two units were also included in the return filed. On 16/04/1974, the company filed a revised return. On April 10/04/1975, the AO informed the petitioner that it would not be possible to accept the change of the previous year as granted already, for certain reasons, and allowed time till 14/04/1975, to file its objections. On that day, the company filed a written reply and requested for further time to file a detailed reply after consulting its counsel at Delhi. The AO refused to grant further time and made an assessment order on the same day, i.e. on 14/04/1975. He refused to accept the change of the previous year and, after computing the profits for 18 months on the basis of the assessee's accounts, he determined proportionate profits for the 12 months ending on 30/06/1971,and made an assess - ment accordingly. In doing so, he ignored completely the loss and depreciation relating to the newly added units. He held that as the company had failed to comply with two of the conditions

imposed by the AO,the permission already granted for the change of the accounting period stood withdrawn. As against the income of Rs. 1,63,28,627/-returned by the assessee the Income-tax Officer computed the income at Rs. 11,47,13,978/-.The company filed a writ petition challenging this order.Before the Hon'ble Court it was argued on behalf of the department that the assessee had accepted the conditions voluntarily and with eyes open and it should not be allowed to challenge their validity. Negating the said argument, the Hon'ble Court held as under:

"This is not a correct proposition. It is well settled that there is no estoppel against law…."

Finally,the court allowed the writ petition and it also held that there was violation or principle of natural justice.

5.5.b. Next is the matter of Assam Company (India) Ltd.(256 ITR 423),wherein the Hon'ble Gauhati High Court has also deliberated upon the issue of estopple.In that matter the assessee had filed its return of income on 30/07/1982, declaring an income of Rs. 51,81,550B/-for the AY. 1982-83.It was engaged in the business of cultivation, manufacture and sale of tea and also derived income from rent,tea made out of the green leaves purchased during the year and substantial export of tea made. In the return, it claimed deduction u/s. 35B of the Act in respect of warehouse charges paid abroad.The original assessment was completed by the AO u/s. 143(3) of the Act on 31/03/1985,and while making such assessment, he allowed weighted deduction of warehouse charges u/s.35B(1)(b)(iv) of the Act read with rule 6AA of the Income-tax Rules, 1962 (Rules). The CIT, in exercise of his power u/s. 263 of the Act,by order dated 13/03/1987, withdrew the said deduction allowed by the AO,with a direction to redo the assessment in accordance with law after affording an opportunity to the applicant-company.Thererfore,it preferred an appeal before the Tribunal against the revisionary order of the CIT.The Tribunal,however,dismissed the appeal and confirmed the order of the CIT.In the fresh assessment proceeding which followed,the assessee objected to the withdrawal of the weighted deduction in respect of the warehouse charges.It argued that Rule 6AA was inserted with effect from August 1/08/1981, and was there -fore in operation as on the first day of the AY.1982-83,that the law in force on the first day of an AY.covers the assessment for the said year,that (iii) Rule 6AA of the Rules authorised grant of weighted deduction u/s. 35(1)(b)(ix) on expenditure incurred on maintenance outside India of a warehouse and it did not specify that such deduction could be allowed only on expenditure incurred after 1/08/1981.The AO in the fresh assessment rejected the contention of the assessee and refused the benefit of weighted deduction on

warehouse charges as claimed by it.An appeal was preferred against the said order before the FAA,who in his order held that the AO was not justified in disallowing the export markets development allowance as claimed by the assessee and directed that the claim made by it for such allowance be allowed in respect of all assessments made after 1/08/1981.He took note of the three contentions raised before the AO. Referring to the provisions of section 35B of the Act and rule 6AA,he observed that the provision of granting export markets development allowance as provided u/s. 35B of the Act is to be read with rule 6AA of the Rules which provided granting of such allowance in respect of warehouse charges,that rule 6AA was introduced by the Income-tax(Eighth Amendment) Rules,1981,with effect from 1/08/1981,that the dispute between the assessee and the Revenue on the issue was as to whether the allowance was to be given only in respect of warehouse charges incurred after August 1981,or whether such allowance was to be given in respect of assessments made after the said date irrespective of the date on which the warehouse charges were actually incurred.Finally,he held that it was entitled to such allowance to all assessments made after 01/ 08/1981.

In the appeal before the Tribunal,the Revenue,placed reliance on judgments of Bishnauth Tea Co.Ltd.(197 ITR 150B)and Assam Frontier Tea Ltd.(224 ITR 398).The only ground urged on behalf of the Revenue was as under :

> *"…. the Commissioner of Income-tax (Appeals) was not justified in holding that the claim of the assessee u/s.35B(1)(b)(ix) should be given to all assessment proceedings on 01/08/1981, and thereby directing the Assessing Officer to allow the same."*

It was explained on behalf of the Revenue that the dispute between the applicant-company and the Revenue was as to whether the grant of export markets development allowance was to be given only in respect of the warehouse charges incurred after 01/08/1981, or such allowance is to be made available in respect of the assessment made after that date,irrespective of the date on which the warehouse charges were actually incurred. According to the Revenue, the benefit of such allowance can be extended only in respect of warehouse charges incurred after 01/08/1981, in view of the fact that rule 6AA was introduced only with effect from 01/08/1981 and was prospective in operation.On the other hand, it was urged on behalf of the applicant-company that in terms of the judgment of this court reported in Assam Frontier Tea Ltd. (supra),it was entitled to the benefit of such allowance in respect of the warehouse charges u/s. 35B(1)(b)(iv) of the Act.

The Tribunal after considering the rival submissions of the parties reversed the order of the FAA and upheld the order of the AO holding that rule 6AA of the Rules,incorporated with effect from 01/08/1981,did not have any retrospective effect and therefore would not apply to expenses incurred on or before 30/06/1981,that the said provision of the Rules would not be applicable in respect of assessments pending as on 01/08/1981.With regard to the contention of the assessee that the judgment of Assam Frontier Tea Ltd. (supra) could also be relied upon for holding that the expenses involved in the case were covered by section 35B(1)(b)(iv) of the Act, the Tribunal was of the opinion that such contention was not acceptable in the absence of any appeal or cross-objection by it.According to the Tribunal,the assessee not having contended before the FAA that the expenses in connection with the warehouse were eligible for weighted deduction u/s.35B(1)(b)(iv) of the Act,such a plea was beyond the subject -matter before it and therefore it was not permissible for the Tribunal to entertain the same in the absence of any appeal or cross-objection by the applicant-company**.**It referred to a decision of the apex court in the case of Hukumchand Mills Ltd.(63 ITR 232).It further observed that such a plea on behalf of the assessee was not acceptable also on the ground that the benefit of deduction allowed earlier u/s.35B(1)(b)(iv) of the Act was withdrawn by invoking the power u/s. 263 of the Act. Challenging the order of the Tribunal,the assessee filed a reference application u/s. 256(1) of the Act before the Tribunal requiring it to refer certain questions of law. It drew up a statement of the case and referred only one question to Hon'ble High Court ,u/s.256(1) of the Act and it read as under:

> *"Whether, on the facts and in the circumstances of the case, the Tribunal erred in not considering the contention of the assessee that the warehouse charges incurred prior to 01/08/1981, are covered by clause (iv) of section 35B(1)(b) of the Act in the absence of appeal or cross-objection by the assessee?"*

Before the Hon'ble High Court the counsel of the assessee made detailed submissions.The counsel for the department argued that in the reassessment proceedings, the case of the assessee was wholly based on rule 6AA and section 35B(1)(b)(ix) of the Act and there was no reference to any claim u/s. 35B(1)(b)(iv) of the Act,that it was abundantly clear from the recital of facts and the discussion in the above mentioned orders, the contentions of the assessee were all related to section 35B(1)(b)(ix) of the Act and rule 6AA of the Rules,that it was not open for it to raise any plea pertaining to the claim for such allowance u/s. 35B(1)(b)(iv) of the Act,that the subject matter of the appeal before the Tribunal was wholly confined to the examination of the claim of the assessee u/s.35B(1)(b)(ix) of the Act,that it was not permissible under the law to enlarge the scope of the subject matter of the appeal that the Tribunal was fully justified in refusing to

consider the plea of the assessee with regard to its claim u/s.35B(1)(b)(iv) of the Act,that the assessee, in the reassessment proceeding also,did not furnish any evidence in support of its claim u/s. 35B(1)(b)(iv) of the Act,that it was too late for the applicant-company to take up such a plea in the appeal before the Tribunal more particularly when it had confined its claim to one u/s. 35B(1)(b)(ix) of the Act right from the stage of the proceeding before the Assessing Officer,that it was only after this court had pronounced the judgment reported in Assam Frontier Tea Ltd.'s case (224 ITR 398)that the assessee thought it fit to take a chance by raising a plea claiming benefit u/s. 35B(1)(b)(ix) of the Act before the Tribunal,that keeping in view the subject-matter of the appeal it was clearly not permissible in law. Drawing the attention of this court to section 253(4) of the Act which provides for filing of objections by the respondent in an appeal before the Tribunal as well as rules 11 and 27 of the Income-tax (Appellate Tribunal) Rules, 1963,he justified the action of the Tribunal.He further urged that in the case in hand the assessee had neither preferred any appeal against the order of the FAA nor had filed any cross-objection though it was open for it to do so,that in terms of rule 11 of the Appellate Tribunal Rules,even the assessee could not urge or be heard in support of any ground not set forth in the memoran - dum of appeal except with the leave of the Tribunal and therefore as in the instant case it could not be allowed in law to plead a ground not included in the memorandum of appeal. According to him, if it so permitted it would amount to enlarging the scope and the subject-matter of the appeal which in the facts and circumstances of the case was clearly not countenanced by law,that the court in answering the question referred to it u/s. 256(1) of the Act could not travel beyond the question so referred and therefore keeping in view the materials on record the conclusion of the Tribunal refusing to entertain the contention of the assessee regarding its claim u/s. 35B(1)(b)(iv)of the Act was unexceptionable.After considering the available material,including the rejoinder of the assessee,the Hon'ble Court held as under:

"We have carefully considered the rival contentions of the parties. The facts as narrated in the order of the Commissioner of Income-tax (Appeals),the order of the learned Tribunal, the reference application and the statement of case are consistent.There appears to be no dispute with regard to the narration of facts and the sequence of events right from the original assessment order till the final order of the Tribunal ……It is in this factual background that the question referred to this court has to be answered.

As noticed above, u/s. 35B of the Act certain deductions were allowable in respect of some expenditure in the matter of assessing the tax liability of an assessee, incurring the said expenditures. The different heads of expenditure for which the said deductions were made allowable are set out under clause (b) of sub-section (1) of section 35B. For ready reference, the expenditure contemplated under sub-clauses (iv) and (ix), relevant for the present case are quoted hereinbelow :

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For the purpose of explaining the activities contemplated under sub-clause (ix) above, rule 6AA was incorporated by the Income-tax (Eighth Amendment) Rules, 1981, with effect from August 1,1981. Clause (b) of the said rule, which is relevant for the purpose of this case is quoted hereinbelow :

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On a reading of sub-clauses (iv) and (ix) u/s. 35B(1)(b) and rule 6AA more particularly clause (b) thereunder,it appears to us that it is quite possible in a given case that an assessee, depending on its activities contemplated u/s. 35B and rule 6AA may claim the benefit of weighted deduction under more than one of the heads of expenditure envisaged under the said provision of law. In other words, the activities contemplated in the different sub-clauses of section 35B(1)(b) and rule 6AA are not necessarily mutually exclusive of each other. The relevant consideration in a given case would however be as to whether there are evidentiary facts in support of the claim for weighted deduction under different heads of expenditure as set out u/s. 35B as well as rule 6AA. As a corollary, therefore, if the assessee claims the benefit of weighted deduction under any of the heads of expenditure contemplated u/s. 35B he is not debarred in a particular case to claim similar benefit under a different head of expenditure as well provided the facts and circumstances justify such a claim.

Before we proceed further, it is advisable to turn to the authorities cited by learned counsel for the parties.

This court in the decision reported in CIT v. Assam Frontier Tea Ltd. [1997] 224 ITR 398 was considering the issue as to whether the Tribunal was justified in holding that the assessee was entitled to weighted deduction u/s. 35B(1)(b)(iv) as well as u/s. 35B(1)(b)(ix) of the Act for incurring the expenditure for maintaining a warehouse in a foreign country. This court held in that case, that rule 6AA was prospective in operation with effect from 01/08/1981, but further held in the facts of that case that the assessee was entitled to the benefit of section 35B(1)(b)(iv) even if the expenditure of maintaining the warehouse was incurred by the agent of the assessee but reimbursed by the assessee.The matter was taken up in appeal by the Revenue before the apex court and their Lordships of the Supreme Court in the decision reported in CIT v. Assam Frontier Tea Ltd. [2002] 253 ITR 549 held that as the warehouse was run by the agent of the assessee but the expenditure incurred therein was reimbursed by the assessee, it was the assessee which was maintaining the warehouse for the promotion of the sale of its tea outside India and therefore the requirements of section 35B(1)(b)(iv) of the Act were duly complied with. The appeal of the Revenue was thus dismissed. It may be relevant to mention here that the facts of the case clearly disclosed that the claim of the assessee in that case was both under sub-clauses (iv) and (ix) of section 35B(1)(b) of the Act.

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In the decision reported in National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 (SC), the assessee had offered the sum of Rs. 22,84,994 received as interest on some deposits made by it for tax assessment and the assessment was completed on that basis. In the appeal before the Commissioner of Income-tax (Appeals) a number of grounds were taken by the assessee challenging the assessment. However, the inclusion of the aforesaid amount was neither challenged nor considered by the Commissioner of Income-tax (Appeals). From the order of the Commissioner of Income-tax (Appeals), the assessee filed an appeal before the Tribunal. In the appeal before the Tribunal as well, the assessee did not object to the inclusion of the aforesaid amount. Subsequently, by a letter, additional grounds were sought to be raised by the assessee objecting to the inclusion of the aforesaid amount in the total income. The Tribunal declined to entertain the additional grounds. The apex court while interpreting the scope and ambit of the power of the Tribunal u/s. 254 of the Act held that where the Tribunal was only required to consider a question of law arising from the facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. It observed that the power of the Tribunal in dealing with the appeals is expressed in widest possible terms and in the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the

matter. It further observed that the purpose of the assessment proceeding before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law and so long as the relevant facts are on record in respect of that item, and if as a result of a judicial decision given when the appeal is pending before the Tribunal, a non-taxable item is taxed or a permissible deduction is denied, there is no reason why an assessee should be prevented from raising that question before the Tribunal for the first time. In that case, the apex court remanded the proceeding to the Tribunal for consideration of the new grounds raised by the assessee on the merits.

We have already culled out the contentions raised on behalf of the Revenue. The main ground urged by Mr. Joshi,learned counsel for the Revenue, is that the applicant-company in the reassessment proceedings had wholly confined its claim for weighted deduction under sub-clause (ix) of section 35B(1)(b) of the Act and at no point of time in any of the proceedings before the Assessing Officer or the Commissioner of Income-tax (Appeals) was it contended by it that it was entitled to the weighted deduction on account of export markets development allowance under sub-clause (iv) of the said section of the Act. Therefore, according to learned counsel for the Revenue, the applicant-company not having filed any appeal or cross-objection before the learned Tribunal against the order of the Commissioner of Income-tax (Appeals), it was not open for the company to raise the contentions in support of its claim for weighted deduction u/s. 35B(1)(b)(iv) of the Act.

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As already noticed by us, the facts and the sequence of events narrated in the orders of the Commissioner of Income-tax (Appeals) and the Tribunal and those set out in the statement of the case are not in dispute. The core question is whether the Tribunal ought to have considered the plea of the applicant company that it was entitled to the benefit of weighted deduction u/s. 35B(1)(b)(iv) of the Act in the absence of any appeal or any cross-objection filed by it against the order of the Commissioner of Income-tax (Appeals). The applicant-company in the reassessment proceedings had claimed the benefit of weighted deduction in respect of warehouse charges on the basis of section 35B(1)(b)(ix) read with rule 6AA. The point remains that the head of expenditure on account of which the weighted deduction is claimed by the applicant-company is "warehouse charges". The apex court in CIT v. Assam Frontier Tea Ltd. [2002] 253 ITR 549, as referred to above, had held that in a case where the warehouse in the foreign country is run by an agent of an assessee but the expenditure incurred thereon is reimbursed by the assessee to the said agent, it amounted to maintenance of the warehouse by the assessee for the promotion of sales of its tea outside India and that therefore the assessee was entitled to the benefit of the allowances u/s. 35B(1)(b)(iv) of the Act. We have already observed that in a given fact situation an assessee may be entitled to the benefit of weighted deduction under more than one sub-clause of section 35B(1)(b) of the Act. It would, however, depend on the primary evidentiary facts available in a given case. It therefore follows that only because the applicant-company had objected to the withdrawal of the benefit of weighted deduction by relying on sub-clause (ix) of section 35B(1)(b) of the Act it could not be decisively held, without reference to the entire gamut of facts on record, that the applicant-company under all circumstances could be precluded from raising a plea that it was entitled to the benefit of such deduction u/s. 35B(1)(b)(iv) of the Act as well.

Whether or not the applicant-company can be permitted to raise that plea only on the ground that it had not preferred any appeal or cross-objection against the order of the Commissioner of Income-tax (Appeals) is the question which now engages the attention of this court. It need not be over-emphasised that the Appellate Tribunal Rules framed by the Tribunal in exercise of its power u/s.255(5) of the Act are wholly for the purpose of regulating its own procedure and the procedure of the Benches of the Tribunal. The rules therefore embody the principles of procedure to be followed by the Tribunal and its Benches for the discharge of its functions. The scheme of the Rules read as a whole does not suggest that the Rules in any way have the effect of curtailing or circumscribing the power, authority and jurisdiction of the Tribunal in dealing with matters at its disposal. We have not been able to read any prohibition in the rules totally precluding the Tribunal from considering any ground beyond those mentioned in the memorandum of appeal filed by a party,whether the assessee

or the Department, in the absence of an appeal or cross-objection by the other side projecting the new ground. It is a settled principle of law that procedural law is the hand maid of justice and has to be so interpreted to advance the cause of justice and not to thwart it. Considering the language used in section 254(1) of the Act conferring powers on the Tribunal which is in the widest possible terms, we feel guided in this regard by the emphatic observations of the apex court contained in its decision of National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 . We have also taken note of the observations of the apex court to the effect that the purpose of the assessment proceeding before the taxing authority is to assess correctly the tax liability of an assessee in accordance with law. We consider it to be a solemn duty of the taxing authorities to correctly assess the tax liability of an assessee by duly following the relevant provision of law and therefore do not countenance an inflexible and mechanical adherence to the law of procedure and in the process deny an assessee a benefit to which it is otherwise entitled in law. In our considered opinion, that could not have been the purpose of framing the Appellate Tribunal Rules. There cannot be any estopple against law.
We are therefore not in favour of granting such a primacy to the rules of procedure so as to wipe off a substantial right otherwise available to the assessee in law. We find this view of ours also reinforced by the language of rule 11 which does not require the Tribunal to be confined to the grounds set forth in the memorandum of appeal or take n by leave of the Tribunal provided the party who may be affected thereby had sufficient opportunity of being heard on that ground. In taking this view, we are conscious about the observations of the Madras High Court and the Calcutta High Court made in the decisions relied upon by counsel for the Revenue but we are, in the facts and circumstances of the case, persuaded to accept the observations of the apex court made in this regard in the case of National Thermal Power Co. Ltd. [1998] 229 ITR 383.We are therefore of the view that it is permissible on the part of the Tribunal to entertain a ground beyond those incorporated in the memorandum of appeal though the party urging the said ground had neither appealed before it nor had filed a cross-objection in the appeal filed by the other party. We must however hasten to add that in order to enable either the assessee or the Department to urge a ground in the appeal filed by the other side, the relevant facts on which such ground is to be founded should be available on record. In the absence of such primary facts, in our opinion, neither the assessee nor the Department can be permitted to urge any ground other than those which are incorporated in the memorandum of appeal filed by the other party. In other words, if the assessee or the Department, without filing any appeal or a cross-objection seeks to urge a ground other than the grounds incorporated in the memorandum of appeal filed by the other side, the evidentiary facts in support of new ground must be available on record.

For the view that we have taken as above,we hold that the Tribunal erred in not considering the contention of the assessee-applicant company that the warehouse charges was covered by sub-clause (iv) of section 35B(1)(b) of the Act only on the ground that the applicant-company had not filed any appeal or cross-objection. We therefore answer the question referred, in the affirmative and remand the proceeding to the Tribunal for consideration of the said contention of the applicant-assessee on merits. We however make it absolutely clear that in case the basic facts relating to the claim of the applicant-company for weighted deduction u/s. 35B(1)(b)(iv) are not available on record, the applicant-company would not be permitted to urge that ground and the Tribunal would pass appropriate orders as it would deem fit in accordance with law."

5.5.c. In the matter of Jolly Fantasy World Ltd.(373 ITR 530),the Hon'ble Gujarat High Court dealt with the issue of not raising a ground before the appellate authorities.In that case,in consequence of an appellate order,the AO completed the block assessment u/s. 158BC of the Act against the assessee.In the appellate proceedings,the Tribunal permitted the assessee to raise

additional grounds questioning the order passed u/s.158BC r.w.s.254 as bad in law, invalid or untenable since it was not on the basis of a warrant authorising the search issued in the name of the assessee but on the basis of the warrant issued on the joint names as shown in the panchnama.After considering the arguments of the assessee the Hon'ble Court held as follows:

9. .....even if, it is considered for the sake of examination that the ground so raised before the Tribunal could also be raised before this court in the present appeals, then also, we find that it is well settled legal position that there cannot be any estopple or waiver against statute or law. We may make useful reference to the decision of this court in the case of P. V. Doshi (supra), wherein the question came up before this court for consideration as to whether any point or contention, which was expressly not pressed but if it touches to the root of the matter based on the statutory provisions or the law, can be agitated in the further proceedings before the higher forum or not and this court in the said decision, observed thus (page 30 of 113 ITR) :

> "The legal position about waiver of such a mandatory provision created in the wider public interest to operate as fetter on the juris diction of the authority is well settled that there could never be waiver, for the simple reason that in such cases jurisdiction could not be conferred on the authority by mere consent, but only on condi tions precedent for the exercise of jurisdiction being fulfilled. If the jurisdiction cannot be conferred by consent, there would be no ques tion of waiver, acquiescence or estopple or the bar of res judicata being attracted because the order in such cases would lack inherent jurisdiction unless the conditions precedent are fulfilled and it would be a void order or a nullity. The settled distinction between invalidity and nullity is now well brought out in the decision in Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, AIR 1964 SC 1300, 1304, where their Lordships had gone into this material question as to whether the act in breach of the mandatory provision is per force a nullity.

.....Even if there was inherent jurisdiction, certain provisions could not be waived. What can be waived would be only those provisions which are for the private benefit and protection of an individual in private capacity, which might be dispensed with without infringing any public right or public policy.....

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……that the revenue statutes are based on public policy.The revenue statutes protect the public on the one hand and confer power on the State on the other.Therefore, even in the context of such a revenue statute like a taxation measure such fetter on the jurisdiction being a fetter laid to protect public, on wider ground of public policy, it was held that such provisions which confer jurisdiction on assessment and reassessment could never be waived for the simple reason that jurisdiction could neither be waived nor created by consent.

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It makes a distinction between the provisions which confer jurisdiction and provisions which merely regulate the procedure by holding that such provisions which confer the jurisdiction or such mandatory provisions which are enacted in public interest on ground of public policy even in such revenue statutes could not be waived, because of the underlying principle that jurisdiction could neither be waived nor created by consent."

Finally,the Hon'ble Court held that participation by the assessee in the earlier round of litigation either before the AO or before the Tribunal or consequently before the AO could not operate as a bar to the assessee to challenge the jurisdictional authority of the AO u/s.158BC of the Act.

5.5.d.The Hon'ble Uttrakhand High Court (327 ITR 626)has also dealt with similar issue.Matter relates to AY.s 1996-97, 2000-01, 2001-02, 2002-03**.**The brief facts giving rise to the appeals filed by the Revenue were that the assessee, a non-resident company, filed its return of income declaring nil income.The assessee-non-resident company is a company incorporated in the United States of America. During the year under consideration, the assessee earned revenues under its contract with M/s.Enron Oil and Gas India Ltd.(EOGIL)for providing expatriate technicians for the Indian operations of EOGIL. The assessee offered nil income from business after claiming expenditure as per its statement of income. The assessee- company was required, vide notice u/s. 142(1) of the Act,to show cause as to why the receipts be not assessed u/s.44BB of the Act. The assessee,in its reply, contended that the company has rendered,the service on cost-to-cost basis to EOGIL in terms of the production sharing contract entered into by EOGIL with Indian concerns duly approved by the Government of India and payments received through debit notes are only reimbursement of actual expenses. It was also claimed that the income of the assessee-company is not taxable in India in view of Article7(3)of the Double Taxation Avoid - ance Agreement(DTAA)with the USA.However,the AO did not agree with it.Matter travelled up to the Tribunal and it allowed the appeal of the assessee.

While challenging the orders of the Tribunal,the counsel for the Revenue contended before the Hon'ble Court that the provisions of section 42 of the Act have no application in the case of assessees,that the AO had rightly held that the assessee had itself offered the gross contractual revenue at deemed profit rate of 10% u/s. section 44BB for the AY.1997-98 and the income was assessed accordingly.that the income for the AY.1998-99 was assessed under the provisions of section 44BB especially because profit element was involved and gross revenues received by the assessee were offered to tax at deemed profit rate of 10% in the first AY.1997-98,that the Income-tax Appellate Tribunal was not legally correct in holding that the principle of res judicata was not applicable to Income-tax proceedings when the AO had taken cognizance.Deciding the matter,the Hon'ble Court held as under:

> *"24. The principle of res judicata shall not operate on legal issues. The Tribunal has held that no objection seems to have been taken by the income- tax authorities on the basis of estopple. The Tribunal also referred to the judgment passed by the Delhi High Court in CIT v. Bharat General Reinsurance Co. Ltd. [1971] 81 ITR 303, in which the Delhi High Court has held that there is no estopple in the Income-tax Act and if the assessee includes a particular income in the return, but later puts forth the claim that it is not taxable, it must be taken that the assessee had resiled from the position which it had wrongly taken while filing the return. It was further held that quite apart from*

it, it is incumbent on the Income-tax Department to find out whether a particular income was assessable in the year or not and, merely because the assessee wrongly included the income in the return for a year, it cannot confer jurisdiction on the Department to tax that income in that year even though legally the income did not pertain to that year. On the basis of the ratio of the aforesaid judgment,the Tribunal has not committed any error in holding that the principle of res judicata shall not operate. Thus, the fact that in some of the earlier years, the assessee had offered to pay tax u/s.44BB cannot operate as estopple against it."

5.5.e. We would also like to refer to the judgment of the Hon' ble Calcutta High Court in the case of Sail DSP VR Employees Association 1998 v.Union of India [2003] 262 ITR 638. The petitioners who were employees of SAIL were subjected to voluntary retirement. SAIL had been deducting tax at source on the amount paid under their voluntary retirement scheme. On a writ petition against this the Hon'ble Court held as under:

"The question of estopple,because of option exercised with eyes open to the subsequent modification,cannot be sustained. What is not otherwise taxable cannot become taxable because of admission of the assessee. Nor can there be any waiver of the right otherwise admissible to the assessee in law. The chargeability is not dependent on the admission of or waiver by the assessee. Chargeability is dependent on the charging section, which needs to be strictly construed."

5.5.f. In the case of Ajit Chintaman Karve (311 ITR-AT-66)it was found that when the income-tax authorities carried out survey operations, the assessee declared Rs. 18 lakhs in respect of a project.The assessee included this amount in the original return,but later in the revised return he withdrew this amount.The AO computed the income as declared in the original return. The FAA held that the revised return was an afterthought and sustained the addition made by the AO.The relevant portion of the order of the Tribunal reads as under:

11.The learned authorised representative has also discussed the law of estopple and argued that an admission which is contrary on law does not create any estopple against law. He has cited the Income-tax Appellate Tribunal " B" Bench, Pune, decision in the case of Madan Developer, I. T. A. No. 329/Pn/03, the assessment year 1999-2000, the order dated March 24, 2006 and the relevant portion from paragraph 12 is reproduced below :

" It is well-settled that there could be no estopple against statute.Estopple is not a base of liability to assessment under the Income-tax Act, and, therefore, the assessment of a person for an amount of income to which he is stranger cannot be based on the ground that he himself wanted to be assessed on it. This is so because no amount of admission contrary on law can create any estopple against law. In this sense of the term, we may say that if a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estopple or any other equitable doctrine. A mistaken view of a statutory provision does not estop the Assessing Officer or the assessee from taking a correct view. There can be no estopple on a pure question of law. In short, we may say that it is an established position of law that there is no estopple by conduct against law, nor is there any waiver of the legal right. It is always open to take the plea that the figure, though shown in his return of total income, is not taxable in law. In the light of the said proposition of law, we hold that the assessment of total income of the assessee is required to be made as per the provisions of law contained in the Income-tax Act."

12. The view expressed by the respected co-ordinate Bench is a correct position of law and to be applied in the instant appeal as well. Merely because an offer was made having no cogent basis or an

approval of law that should not estop a taxpayer from correcting his mistake.Rather, it is a duty of the Revenue Department to tax the legitimate amount from a taxpayer. This is what exactly was directed by the Central Board of Direct Taxes in a very old administrative instructions for guidance of the Income-tax Officer on matters pertaining to assessment vide Circular No. 14 (XL-35), dated April 11, 1955....."

"Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the ini tiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the Department, for it would inspire confidence in him that he may be sure of getting a square deal from the Department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should—

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other ;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

The learned authorised representative has placed one more evidence on record, i.e., an assessment for the assessment year 2003-04 passed u/s.143(3) dated February 28, 2006, wherein the returned loss of Rs.63,85,038 was accepted by the Revenue Department. For two reasons, he has cited this assessment order, first, there was recession in the real estate business in the subsequent years, hence, there was no likelihood expected hypothetical income in future, hence, erroneously suggested to the assessee to make the alleged offer and, second, the accounting effect of enhanced work-in-progress further increases the loss, hence, no evasion of tax. We find force, in this argument and express our view that the alleged declaration if at all made in the expectation of future profits, then the same was a premature step, so cannot be approved.

15. In the light of the above discussion, the main ground of the assessee pertaining to confirmation of an addition of Rs. 18,00,000 is hereby allowed and rest of the grounds are decided pro tanto.

16. In the result, the appeal is allowed."

5.5.g.. In the case of Steri Sheets Ltd.(106 TTJ 460),the Tribunal has deliberated upon the doctrine of estopple.In the appeals and cross objections one of the commom issues was the computation of capital gain on sale of manufacturing division of the assessee.Now we would reproduce the relevant portion of the order of the Tribunal and it reads as under:

7.Before us,the Departmental Representative has raised a preliminary objection about the issue raised by the assessee-company in its cross-objection by submitting that the claim being sought to be made therein was not made by the assessee either before the AO or before the CIT(A). He has also submitted that even such claim was not made by the assessee-company in its return of income filed for the year under consideration and it is too late in a day to raise the same at this stage during the course of appellate proceedings before the Tribunal.

The Counsel for the assessee, on the other hand, has submitted that there is no such estopple in law and the assessee can stake the claim even during the course of appellate proceedings before the Tribunal if the same is in accordance with law. In support of this contention, he has relied on the decision of Hon'ble Delhi High Court in the case of CIT v. Bharat General Reinsurance Co. Ltd. and that of Delhi Special Bench of Tribunal in the case of Indo Java & Co. v. IAC (1989) 35 TTJ (Del)(SB) 111.

XXX

9. We have considered the rival submissions and also perused the relevant record including the case laws cited by the representatives of both the sides in support of their stand. As regards the objection raised by the Departmental Representative in the matter of this altogether new claim sought to be made by the assessee in the cross-objection, we agree with the contention of the Counsel for the assessee that there is no such estopple in raising a claim just because the same was not originally raised either before the AO or before the learned CIT(A). As held by Hon'ble Delhi High Court in the case of Bharat General Reinsurance Co. Ltd. (supra), there is no estopple in the IT Act in raising a claim in accordance with law and the assessee can even resile from a position wrongly taken while filing the return. Explaining further, Hon'ble Delhi High Court also observed that merely because the assessee wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the Department to tax that income in that year even though legally such income did not pertain to that year. In the case of Indo Java & Co. (supra), it was held by Delhi Special Bench of Tribunal that the Tribunal has the power to go into every point which has a bearing on the determination of the chargeable income and to permit the parties to take such points. It was also held that if the assessee is able to satisfy the Tribunal that the earlier admission made by him was the result of a mistake of law or fact or had been made due to ignorance or other factors, it might not come in his way of raising such claim."

Finally,the appeals were decided in favour of the assessee by the Tribunal on jurisdictional issue as well on merits

5.6.Here,we would also like to mention that there is a marked difference between collection of taxes and collection of 'due taxes'.The phrase 'due tax' presupposes the existence of approval of authority of law.In the case of (392 ITR 518)the Hon'ble Allahabad High Court has held as under:

"Under article 265 of the Constitution of India "no tax shall be levied or collected except by the authority of law". Thus, unless and until the income of an assessee is liable to be taxed, it cannot be so taxed under the Act. The taxing authority cannot collect or retain tax, that is not authorised.Any retention of tax collected, which is not otherwise payable, would be illegal and unconstitutional. There cannot be any estopple against the statute, especially in view of article 265 of the Constitution of India. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law."

Therefore,it has to be ensured that taxes levied or collected by the AO.s have legal sanction. Admission or refusal by an assessee about taxability of an item of income cannot make a non taxable item taxable or visa versa.The Supreme Court of India in Shelly Products (261 ITR 367), has held that if the assessee has by mistake or inadvertence or on account of ignorance,included in his income any amount which is exempted from payment of Income-tax or is not income within the contemplation of law, the assessee may bring the same to the notice of the AO, which if satisfied, may grant the assessee necessary relief and refund the tax paid in excess, if any.In Bharat General Reinsurance Co. Ltd.(81 ITR 303)the Hon'ble Delhi High Court,held that merely because the assessee wrongly included the income in its return for a particular year, it cannot

confer jurisdiction on the Department to tax that income in that year even though legally such income did not pertain to that year.The Bombay High Court in Balmukund Acharya (310 ITR 310)held that tax can be collected only as provided under the Act. If any assessee, under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.In our opinion,a reading of the Circular No. 14 (XL-35), dated 11/04/ 1955,shows that a duty is cast upon the AO.s to assist and aid the assessee in the matter of taxation.They are supposed to advise the assessee and guide them and not to take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the AO is to administer the statute with solicitude for public exchequer with an in-built idea of fairness to taxpayers.

5.7. In Nirmala L. Mehta (supra)the jurisdictional High Court has held that there cannot be any estopple against the statute.Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

5.7.1. In Pt. Sheo Nath Prasad Sharma (66 ITR 647)the Allahabad High Court,while determining the question,whether the assessee can, in revision question the taxability of particular amounts offered by him as income for assessment,observed as under:

> *"It seems to me, however, that the order of the Commissioner rejecting the previous applications, on the mere ground that the petitioner had shown the income in his return, is erroneous. The Commissioner was bound to apply his mind to the question whether the petitioner was taxable on that income. The Income-tax Officer is entitled u/s.23(1) to make an assessment on the basis of the return if he is satisfied, without requiring the presence of the assessee or the production of evidence in support of the return, that the return is correct and complete. But it may be that the assessee may have committed a mistake in treating a certain receipt as taxable.* ***The mere circumstance that he has shown that receipt as income in his return does not make him liable to tax thereon.An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. The law empowers the Income- tax Officer to assess the income of an assessee and determine the tax payable thereon. In doing so, he may proceed on the basis that, where an assessee discloses that a certain sum of money has been deceived by him, the fact of that receipt may be accepted without anything more as constituting an admission on the part of the asses see. That would be an admission as to a state of fact. But whether the receipt can be considered as taxable income is quite another matter, and consideration of that question leads into the realm of law. If the Income-tax Officer assesses an assessee upon a receipt which is not taxable in law, it is always open to the assessee to take the case in appeal or in revision thereafter. It is then for the Appellate Assistant Commissioner or the Commissioner of Income-tax, as the case may be, to examine the matter and determine whether, although the money has been received by the***

assessee, it is taxable in law. The assessee is then within his rights in requiring the appellate or the revisional authority to examine the validity of the assessment to tax of a receipt which, though admitted by him, is not taxable in law.*"*(emphasis added)

5.7.2. In the case of S. R. Koshti (276 ITR165)issuing 'a word of caution' the Hon'ble Gujarat High Court held that the authorities under the Act are under an obligation to act in accordance with law,that tax can be collected only as provided under the Act,that if an assessee, under a mistake,misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.

Considering the above cumulatively,it can safely be said that in the normal course, a party who makes a concession cannot be allowed to resile from it in the appellate court, but yet, under certain exceptional circumstances,when such concessions came to be made on a wrong apprecia - tion of law,the appellate court can permit in appropriate cases to resile from a concession on such exceptional grounds.The established legal position, however,remains that there can never be a concession made at the instance of counsel on a wrong appreciation of law on the principle that there can never be an estopple against the statute.

5.8. Now,coming back to the fact of the case,it is clear that during the appellate proceedings,the assessee relying upon the judgment of Bharat Bijlee Ltd(supra)raised an additional ground about taxability of Rs. 24.40 crores.As far as offering of income of Rs. 2. 95 crores is concerned,there is no doubt that the issue had attained finality,as the assessee could not challenge the taxability of said amount.But,the disputed amount of Rs. 24.40 crores rests on different footings.The AO added the said amount during re-assessment proceedings and during the pendency of appellate proceeding the Hon'ble Bombay High Court held that an exchange was not covered by the provisions of section 2(42C)and section 50B.The assessee relying upon the case raised an additional ground.But,the FAA rejected the claim.The above judgment of the Hon'ble Bombay High Court did not make any new law-it rather explained the law.Here,we would like to refer to the matter of Saurashtra Kutch Stock Exchange Ltd.(305 ITR 227)the Hon'ble Apex Court has held as under:

> *"42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the court to pronounce a "new rule" but to maintain and expound the "old one". In other words, judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an*

earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

Thus, after the judgment of Bharat Bijlee it has to be held that transactions involving exchange were not covered by the provisions of section 50B of the Act. Therefore,the assessee was entitled to raise the additional ground about the sale versus exchange controversy. The failure of the assessee to raise the issue before the AO or in the original grounds of appeal filed before the FAA cannot deprive it of its legitimate claim.In the earlier paragraphs,we have held that there cannot be any estoppels in tax proceedings.So,as far as taxability of Rs.24.40 crores is concerned,the assessee was entitled to raise it before the FAA for the first time in form of additional grounds.

5.9. Now,we issue to be decided is as to whether the transaction entered in to by the assessee was a sale or was an exchange.Clause 2.3 of the BTA reads as under:

"In consideration for the purchase of the Division,the purchaser shall,at Closing,issue to the seller 29,90,000 fully paid up shares of the purchaser of the face value of Rs.10/- each."

Considering the above,we hold that the it was a case of exchange and not of sale.The agreement clearly states that the assessee would be getting 29.9 lakhs shares of OCL.There is no doubt that the BTA talks of seller and purchaser at so many places,but the terms used in any agreement has to be seen in the context. It is said that entries in books of accounts or agreements are not conclusive-what has to be seen is the real nature of the transaction.We find that there is no mention of any money,in the BTA,to be received or paid by the parties concerned.The BAT speaks of 'issue of 29,90,000 fully paid up shares'.Therefore,we have no hesitation in holding that shares cannot be termed cash and that until and unless money is paid a transaction cannot be termed a sale.In commercial and business worlds,it is a well recognised principle that one of the mode to transfer of assets is exchange and it is different from sale.In other words,both the terms cannot be equated.Section 2(42C)and section 50B talk of sale consideration.As the assessee had received shares and not money in lieu of the transferred packaging divisons,so,the disputed transaction cannot be termed a sale or slump sale.We also hold that it was legally justified post Bharat Bijalee Ltd. case to argue before the FAA that it was a case of exchange of assets and that it was not liable to pay tax on Rs. 24.40 crores.

5.10. In the case of Bennett Coleman & Company Ltd (supra)the Tribunal,afer considering the case of Bharat Bijalee(supra)has dealt the similar issue.We are reproducing the relevant portion of the order and it reads as under:

"8. The second issue raised by the assessee is against the upholding of order of AO by Ld. CIT(A) on the issue of transfer of Planet M. division in consideration of equity shares and 6% redeemable unsecured debentures being slump sale and therefore liable for tax under section 50B of the Act.
9. The facts in brief are that assessee included an amount of capital gain of Rs.84,26,04,286/- in its total income by a giving a note in its computation of income which is extracted as under:

> "The company has w.e.f 1st November 2007 hived off its business of Planet M division consisting of leisure and retail products, on a going concern basis and transferred it to Planet M Retail Ltd. ('PMRL'), then wholly owned subsidiary of the company on a slump exchange basis. The company has been allotted the following scripts amounting to Rs.12595 lacs for transfer of this business: Nos. Face Value Amount (Rs.) Equity Shares 9,50,000 Rs.10 each 95,00,000 6% Redeemable Unsecured Debentures 1,25,00,000 Rs.100 each 125,00,00,000 125,95,50,000 The difference between the value of the shares allotted in exchange and the value of the net assets of the business transferred amounting to Rs.82,87,31,848 has been included in Computation of Income as income u1s.50B of the Income Tax Act out of abundant caution and without prejudice to the contention of the assessee that the difference is not chargeable to tax under the provisions of the Income Tax Act, 1961. In the opinion of the assessee, the transaction of hiving off the business of Planet M division is not a "Sale" but is an "Exchange". The same not being a sale therefore does not fall within the definition of "Slump Sale" u/s 2(42C) of the Income Tax Act, 1961. In the circumstances, the transfer of the division on a going concern basis being a "slump Exchange", no value can be ascribed to any asset that was transferred as part of the business. So also the cost of acquisition of the undertaking that was transferred on "Exchange" cannot be arrived at since what has been exchanged is the entire undertaking comprising of the entire division of the Planet M retail. Consequently, since the computation provisions relating to capital gain are incapable of being applied, following the ratio of the decision of the Hon'ble Supreme Court in B.C. Srinivasa Shetty (128 ITR 294), the charging provisions of capital gains are not attracted. The said ratio has also been followed by the Hon'ble Mumbai Tribunal in Avaya Global Connect Ltd. ITA No.832/Mum/07."

10.During the assessment proceeding,the AO called for the detail working of income of Rs.84,26,04,286/- which was replied by the assessee by letter dated 27.10.10 submitting that the transaction of hiving off the business of Planet M Division was an exchange of the said division and not sale as contemplated under the provision of section 50B of the Act and as such the provisions of the said section are not applicable. The assessee also relied on the decision of Hon'ble Supreme Court in the case of B.C. Srinivasan Shetty 128 ITR 294 in defense of his argument and submitted that since the cost of acquisition of the said undertaking could not be arrived at and therefore the amount of capital gain of Rs.84,26,04,286/- was not liable to tax since the computation of provision relating to capital gains was incapable of being applied and thus the charging of provision of capital gains fails.

11. The AO rejected the contention and submission of the assessee by observing as under:

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13. The Ld. A.R. vehemently submitted before us that the order of the Ld. CIT(A) is blatantly wrong and against the provisions of the Act as it affirmed the order of AO of not treating the slump exchange of assets in consideration of equity shares and 6% redeemable unsecured debentures and treated the same as slump sale thereby bringing Rs.84,26,04,286/- as long term capital gain. The Ld.

A.R. referred to para B of the business transfer agreement which is placed at page No.59 to 83A of the paper book wherein the assessee specifically pointed out that it was mentioned in the said agreement that the transferor has agreed to transfer on a going concern on slump exchange basis. The Ld. Counsel also brought to our notice the para 2.1 of the said agreement which was worded identically and described the transfer as "on a going concern slump exchange basis". The Ld. Counsel also took us through the provisions of section 50B of the Act wherein the language used was slump sale which is defined in section 2(42C) of the Act. The Ld. A.R. submitted that the assessee transferred under business transfer agreement an undertaking Planet M Division ,the cost of acquisition of which could not be arrived at and thus the charging provisions as provided under section 45 of the Act fail resulting into no income tax liability on the said long term capital gain of Rs.84,26,04,286/-. The Ld. A.R. submitted that Rs. 84,26,04,286/-, being the amount of capital gain resulting from exchange of net assets relating to one division called Planet M Division of business of the assessee , has been included in the computation of income section 50B of the Act out of abundant caution and without prejudice to the contentions of the assessee that the difference resulting from the exchange of Planet M Division is not chargeable to tax under the provision of Income Tax Act, 1961 and the necessary note was appended in the return of income filed by the assessee and also in the annual audit accounts of the assessee. The Ld. A.R. relied on number of decisions in defense of his arguments namely

1. CIT vs. Motor & General Stores (P) Ltd. 66 ITR 692 (SC)
2. CIT vs. Bharat Bijlee Ltd. 365 ITR 258 Bombay High Court
3. CIT vs. B.C. Srinivasa Setty (1981) 128 ITR 294
4. PNB Finance Ltd. vs. CIT (307 ITR 75) 14.

Finally the Ld. A.R. submitted that since undertaking has been transferred under business transfer agreement the cost thereof is not possible to be arrived at or ascertained and therefore the charging of provisions of section 45 fail and consequently the capital gain of Rs.84,26,04,286/- could not be brought to tax. Therefore, the Ld. A.R. prayed for reversal of order of Ld. CIT(A) and issuing necessary direction to the AO to exclude the said amount from the computation of income.

15. The Ld. D.R., on the other hand, vehemently submitted that the amount of Rs.84,26,04,286/- has already been taxed as there has been transfer by hiving off Planet M. division consisting of leisure and retail products, on a going concern basis. The Ld. D.R. relied upon the orders of the authorities below. The Ld. D.R. relied on the decision of CIT vs. Artex Manufacturing Co. (1997) 227 ITR 260 (SC) and CIT vs. Electric Control Gear Mfg. Co. [1997] 227 ITR 278 (SC) in which the Hon'ble Apex Court has held that surplus realized on sale of depreciable asset to the extent of the difference between the written down value and the actual cost being the depreciation actually allowed would be chargeable to tax as deemed business profits under section 41 (2) and the excess over the actual cost of the capital asset realized would be taxable as capital gain. The Ld. D.R. further argued that even if the contention of Ld. A.R. is accepted for a moment that transfer of net assets in consideration of allotment of equity/debt instruments of the other company would be a case of an "exchange" and not a "sale" the case would still be covered under the provisions of capital gains simpliciter as held by the Hon'ble Court in the two cases (supra).

16. The Ld. A.R. submitted that in the case of sale ,the consideration is often discharged or settled by issuance of shares/debentures and in that case it could not be taken to mean that the said is a case of exchange of assets and not sale and therefore, not liable to tax.

17. Finally the Ld. D.R. relying heavily on the order of Ld. CIT(A) prayed that the order being legally reasoned and devoid of any defect legal or otherwise and therefore should accordingly be affirmed.

18. We have heard the rival contentions and perused the relevant materials placed before us and also gone through the impugned order and the various decisions cited by the rival parties. The undisputed facts are that during the year the assessee hived off a division from its business on 01.11.2007 called Planet M. division consisting of leisure and retail products, on a going concern basis and transferred it to Planet M Retail Ltd., then wholly owned subsidiary of the company on a slump exchange basis for a consideration of Rs.125,95,50,000 which was discharged by way of allotment of 9,50,000 equity shares @ Rs.10/- each and 6% redeemable unsecured debentures of 1,25,00,000 @ Rs.100 each. The difference between the value of shares/debentures allotted in exchange of the said division and the net value of that division amounting to Rs.82,87,31,848/- was shown in the computation of income as income under section 50B of the Act which was stated to be out of abundant caution and without prejudice to the contentions of the assessee that the said surplus was not chargeable to tax under the provision of the Income Tax Act. According to the assessee the transaction of hiving off a business of Planet M. division was not a sale but an exchange and consequently does not fall within the meaning of definition of slump sale under section 2(42C) of the Act. According to the assessee the said transfer of division on a going concern basis being a slump exchange, therefore no value could be arrived and ascribed to any assets that were transferred as going concern in a consolidated manner. Further, the contentions of the assessee are that the computation provisions qua capital gain are incapable of being applied and therefore the charging of provisions of capital gain cannot be applied. For the purpose of better understanding of provision 2(42C) is extracted below: "(42C) "slump sale"72 means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

Explanation 1.—For the purposes of this clause, "undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA).

Explanation 2.—For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities ;]"

19. The above definition has to be analysed in the light of the ratio laid down in the various decisions infra.In the case of CIT v/s Motor & General Stores (P) Ltd (66 ITR 692) the assessee company entered into an "exchange deed" pursuant to which it transferred a cinema house owned by it to a company for a consideration of Rs.l,20,000. The consideration was discharged by the transferee company by way of allotment of 5% cumulative preference shares in the transferee company. The question before the Apex court was whether the transaction was a "sale" or an "exchange" and consequently whether it was liable to tax under the Income Tax Act. After observing that the expressions "sale", "price", and "exchange" were not defined in the Income Tax Act, the Apex court relied on the definitions in the Transfer of Property Act which were as follows: - "Sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised." "Price is the money consideration for a sale of goods ". "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the 20 transaction is called an "exchange". After noting the above definitions their Lordships at page 696 held that:- "The presence of money consideration is, therefore, an essential element in a transaction of sale. If the consideration is not money but some other valuable consideration, it may be an exchange or barter, but not a sale."

20. In the present case the consideration was not money but equity shares and debentures and hence the transaction was not a "Sale" but an "Exchange" and consequently, the provisions of Section 50B of the I.T. Act, are not attracted. In the case of CIT vs. Bharat Bijlee Ltd. (365 ITR 258) where an undertaking was transferred under a Scheme of Arrangement to a company which allotted preference shares and bonds as consideration to the Transferor company. Following the decision of the Hon'ble Supreme Court in Motor & General Stores (P) Ltd. (66 ITR 692), the jurisdictional High Court held

that the provisions of section 50B were inapplicable to the transaction. In the case of CIT v. B.C. Srinivasa Setty reported in [1981] 128 ITR 294, the Hon'ble Supreme Court held that section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. In other words, it charges surplus which arises on the transfer of a capital asset in terms of appreciation of capital value of that asset. In the said judgment, the Hon'ble Supreme Court held that the "asset" must be one which falls within the contemplation of section 45. It is further held that the charging section and the computation provisions together constitute an integrated code and when in a case the computation provisions 21 cannot apply, such a case would not fall within section 45. In the present case, the banking undertaking, inter alia, included intangible assets like, goodwill, tenancy rights, man power and value of banking licence. On the facts, we find that item-wise earmarking was not possible. On the facts, we find that the compensation (sale consideration) of Rs.10.20 crores was not allocable item-wise as was the case in Artex Manufacturing Co. [1997] 227 ITR 260. For the aforesaid reasons, we hold that on the facts and circumstances of this case, which concerns the assessment year 1970-71, it was not possible to compute capital gains and, therefore, the said amount of Rs.10.20 crores was not taxable under section 45 of the 1961 Act. Accordingly, the impugned judgment is set aside. The Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasa Shetty (128 ITR 294) laid down the following ratio at page 299:

> "Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head . ..... All transactions encompassed by section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by section 45 to be the subject of the charge..... The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section."

21. After considering the facts of the assessee's case in the light of aforesaid decisions we are of the view that the case of the assessee is squarely covered by the ratio laid down by the Hon'ble Apex Court and the various High Courts. Whereas the decision as relied upon by the Ld. D.R. in defense of his argument is actually 22 distinguishable on facts. Accordingly, we hold that the Planet M Division transferred by the assessee as on a going concern basis where no cost of acquisition is possible to be attributed individual assets in that undertaking and therefore the charging of provisions of section 45 are not attracted . We further hold that the provisions of section 50B are not applicable to this case as it is a case of slump exchange and not a slump sale. Accordingly we set aside the order of CIT(A) and direct the AO not to tax the amount of capital gain of Rs.84,26,04,286/-.

22. In the result, appeal of the assessee is allowed."

In light of the above discussion,it can safely held that it is a case of exchange and not of a sale,that the provisions of section 2(42)r.ws.50B are not applicable to the facts of the cases.

5.11.Before deciding the issue of reopening,we would like to deal with the cases relied upon by the DR.In the case of Nagpur Electric Light and power company(supra),the issue before the Hon'ble Court was whether there was any sale within the meaning of section 41(2).In the matter of Anand Electric Co.Ltd.(supra)the main question raised was as whether the taking over of company was slump sale or sale of individual assets of the undertakings.In Wockhardt Hospital Limited(supra),the Hon'ble Court dealt with the issue of adjustment of negative net worth in

slump sale cases.Thus,none of the cases deal with the issue we are dealing i.e.as to whether it is a case of exchange or of sale considering the peculiar facts of the matter.

Considering the above,ground no.4 is decided in favour of the assessee.We want to make it clear that the matter has been adjudicated considering the peculiar facts and circumstances of the case for the year under appeal.So,it should not be treated as a precedent.

6.Now,we would like to adjudicate the issue of reopening of the assessment.Referring to the reasons recorrded by the AO for reopening the assessment,the AR stated that no new material had come in possession of the AO to issue notice u/s.148, that the AO had mentioned that on verification of records he had come to the conclusion that taxable income had escaped assess - ment.He referred to pages 3, 8, 10, 16 (paragraphs iv and vi), 18 (paragraph 8.b), 25 (item 3.b)and 30 of the paper book and stated that the AO had discussed 14 A in the original assess - ment proceedings,that the AO had made no query about two of the issues raised in reassessment proceedings, that it was a case of change of opinion, that the AO was revising his own order,that the assessee had made full disclosure of all the facts.He relied upon the case of Kelvinator of India Ltd.(320 ITR 561)and stated that reopening was bad in law.

6.1. The DR stated that facts of Kelvinator India (supra) were not applicable to the facts of the case under consideration, that the AO had not formed an opinion, that he did not apply his mind.He referred to the cases of Rajesh Jhaveri (291 ITR 50B0), EMA India Ltd (266 CTR 659), (315 ITR 84)and Ameen Pathology (252 ITR 673).

6.2. We have heard the rival submissions and perused the material before us.We find that while issuing notice u/s.148 of the Act the AO had observed that income had escaped on three counts. It is found that on two issues no queries were made during the original assessment proceedings. So,there is no question of changing of opinion,as argued by the assessee.On those two issues no opinion was formed.For initiating proceedings u/s.147-148,there should be prima facie satisfaction that income had escaped assessment.At that stage the AO is not supposed to have concrete proof of escapement.The reasons to believe should be such that a common man in similar circumstances would fell that stand taken by the AO is possible view.Considering the peculiar facts of the case under consideration,we are of the opinion that the order of the FAA does not suffer from any legal infirmity.So,upholding the same,we decide ground no.1 against the assessee.

As a result,appeal filed by the assessee stands partly allowed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.
Order pronounced in the open court on 16th May, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 16 मई , 2018 को की गई।

Sd/-	**Sd/-**
(पवन सिंह /Pawan Singh)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 16.05.2018.
Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :
1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " E " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**