आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री आर. के. पांडा, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI R.K. PANDA, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 746/PN/2013
निर्धारण वर्ष / Assessment Year : 2009-10

Ram Infrastructure Ltd.,
6, Shreyas Building, Ganesh Wadi,
Near Radhakrishna Mangal Karyalaya,
Jalgaon – 425001

PAN : AACCR2739N

.......अपीलार्थी / Appellant

बनाम/Vs.

Joint Commissioner of Income Tax,
Range – 2, Jalgaon

......प्रत्यर्थी / Respondent

Assessee by	: Shri Rakesh Joshi
Revenue by	: Shri Suhas Kulkarni

सुनवाई की तारीख / Date of Hearing	: 05-12-2016
घोषणा की तारीख / Date of Pronouncement	: 30-12-2016

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-II, Nashik dated 23-01-2013 for the assessment year 2009-10.

2. The brief facts of the case as emanating from records are: The assessee company is engaged in infrastructure development activity,

mainly construction of roads and bridges on Built Operate and Transfer (BOT) basis. The assessee filed its return of income for the assessment year 2009-10 on 30-09-2009 declaring total income as 'Nil', by claiming deduction of ₹2,74,37,354/- u/s. 80(IA) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The case of the assessee was selected for scrutiny under CASS and accordingly first statutory notice u/s. 143(2) of the Act was issued to the assessee on 18-08-2010. The assessee is a holding company of M/s. Hari Infrastructure Pvt. Ltd. and the assessee has floated two companies i.e. M/s. Nagar Kopergaon Infrastructure Pvt. Ltd. and M/s. Pranjal Infrastructure Pvt. Ltd. as Special Purpose Vehicle to carry out the project allotted by state Government. During the course of scrutiny assessment, the Assessing Officer observed that the assessee has made investment to the tune of ₹65,65,64,310/- in shares as on 31-03-2008. The Assessing Officer further observed that the assessee has utilized borrowed funds for making investment in shares and repayment of loan of one of its subsidiary company. The Assessing Officer invoked the provisions of section 14A r.w. Rule 8D and made disallowance of ₹5,63,75,093/- in respect of interest paid. Apart from the above, the Assessing Officer made addition/disallowance of ₹5,72,150/- on account of unproved expenditure and ₹4,600/- on account of difference in the books of assessee and Raisoni Brothers.

Aggrieved by the assessment order dated 09-12-2011, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) vide impugned order upheld the addition made u/s. 14A r.w. Rule 8D. The Commissioner of Income Tax (Appeals) made further addition of ₹7,37,68,681/- u/s. 2(22)(e) of the Act. Against the additions

made/confirmed by the Commissioner of Income Tax (Appeals), the assessee is in appeal before the Tribunal.

3. The assessee has raised following grounds of appeal assailing the findings of Commissioner of Income Tax (Appeals).

1) *"In the facts, circumstances and position of law, especially when no tax liability (sum payable by assessee) is determined either in assessment order framed under section 143(3)(ii) of I.T. Act, 1961 or in demand notice issued under section 156 of LT. Act, 1961 learned Commissioner of Income Tax (Appeals)-II, Nashik erred in not annulling the assessment order under appeal being bad in law and void ab initio.*

2) *In the facts, circumstances and position of law learned CIT Appeal erred in confirming the disallowance under section 14A at Rs.5,63,75,093/- in respect of interest paid.*

3) *In the facts, circumstances and position of law learned CIT Appeal erred in confirming the addition of Rs.72,150/- on account of purchases of dubber from Shri. Arun B. Shewale.*

4) *Without prejudice to ground No.2 & 3 in the facts, circumstances and position of law CIT Appeals erred in not allowing the deduction under section 801A in respect of disallowance made on account of expenditure incurred on account of interest of Rs.5,63,75,093/- which is disallowed under section 14A of LT. Act, 1961 r.w. Rule 8D of LT. Rules, 1962 and disallowance of Rs.72150/- on account of purchase of dubber which are forming part of the Profit & Loss A/c in respect of income eligible to deduction under section 801A.*

5) *In the facts, circumstances and position of law learned CIT Appeals erred in making addition of Rs. 7,37,68,681/- under section 2(22)(e) of LT. Act, 1961 by searching a new source of income.*

6) *Without prejudice to ground No.5, in the facts, circumstances and position of law learned CIT Appeals exceeded his power in making addition under section 2(22)(e) in the garb of power of enhancement by discovering a new source of income which has not been considered by the Assessing Officer during the course of assessment proceedings while framing the assessment order U/s.143(3)(ii).*

7) *Appellant craves leave to add, alter, amend or substitute to above grounds of appeal at the time of hearing."*

4. Shri Rakesh Joshi appearing on behalf of the assessee submitted at the outset that he is not pressing ground Nos. 1 and 3 raised in the grounds of appeal.

4.1 In respect of ground Nos. 2 and 4 relating to disallowance u/s. 14A r.w. Rule 8D, the ld. AR submitted that the assessee has not received any dividend income from investment in shares. The investments are made by the assessee in group concerns and are strategic investments, therefore, no disallowances u/s. 14A could be made on such investments. To support his submissions the ld. AR placed reliance on the following decisions :

i. Cheminvest Limited Vs. Commissioner of Income Tax, 378 ITR 33 (Delhi);
ii. Commissioner of Income Tax Vs. Oriental Structural Engineers Pvt. Ltd. in ITA 605/2012 decided on 15-01-2013 (Delhi-HC);

4.2 The ld. AR further submitted that the assessee is eligible to claim deduction u/s. 80(IA) even if addition is made u/s. 14A of the Act in view of CBDT Circular No. 37/2016 dated 02-11-2016.

4.3 In respect of ground Nos. 5 and 6 raised in the grounds of appeal, the ld. AR submitted that the Commissioner of Income Tax (Appeals) has made addition of ₹7,37,68,681/- u/s. 2(22)(e) of the Act by searching a new source of income. The Commissioner of Income Tax (Appeals) under the provisions of section 251 of the Act as power to confirm, reduce, enhance or annulle the assessment but has no power

to make addition by searching a new source of income which is neither discussed in assessment order nor mentioned in the return filed by the assessee. The ld. AR pointed that a perusal of assessment order would show that there is no discussion by the Assessing Officer with respect to any addition u/s. 2(22)(e) of the Act. The Commissioner of Income Tax (Appeals) has gone beyond his jurisdiction in enhancing the assessment by searching a new source of income. The ld. AR in support of his submissions placed reliance on the following decisions :

i. Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry, 44 ITR 891 (SC);
ii. Commissioner of Income Tax Vs. Rai Bahadur Hardutroy Motilal Chamaria, 66 ITR 443 (SC);
iii. Commissioner of Income Tax Vs. Sardari Lal & Co., 251 ITR 864 (Delhi)(SB).

4.4 In respect of addition u/s. 2(22)(e) of the Act on merits, the ld. AR submitted that the assessee company is holding company of M/s. Hari Infrastructure (P) Ltd. The assessee has invested in the preference share of the company. The Auditors in the audit report have not qualified as to whether the share application is for equity shares or preference shares. The provisions of section 42 of the Companies Act, 1956 does not bar the assessee to make investment in preference shares. Even if there is any violation of the provisions of Companies Act, the Authorities administering Income Tax cannot go beyond the provisions of Income Tax Act and take action for violation of the provisions of the Acts which do not fall within their domain. To support his argument the ld. AR placed reliance on the decision of Mumbai Bench of the Tribunal in the case of Credit Suisse Business Analysis (India) Pvt. Ltd. Vs. ACIT in ITA No. 993/Mum/2015 for

assessment year 2010-11 decided on 05-08-2016. The ld. AR further submitted that where the investment has been made in share application money and the shares have not been allotted against the application money, the provisions of section 2(22)(e) are not attracted. In support of his contentions the ld. AR placed reliance on the following decisions :

i. Commissioner of Income Tax Vs. Sunil Chopra in ITA 106/2011 decided on 27-04-2011 (Delhi-HC);
ii. ITO Vs. Direct Information P. Ltd., 18 ITR 562 (Mum-Trib.);
iii. DCIT Vs. Vikas Oberoi in ITA 4362/M/2011 for assessment year 2002-03 decided on 20-03-2013.

5. Shri Suhas Kulkarni representing the Department vehemently supported the findings of Commissioner of Income Tax (Appeals) in confirming the addition u/s. 14A r.w.r. 8D as well as making addition u/s. 2(22)(e) of the Act. The ld. DR submitted that the assessee agreed for the addition u/s. 14A. The ld. DR referred to the concession granted by the assessee and recorded by the Assessing Officer in assessment order. The ld. DR submitted that although the assessee has agreed for the addition the matter can be restored back to the Assessing Officer for verification and to ascertain, whether disallowance can be made u/s. 14 or u/s. 36(1)(iii) of the Act. The ld. DR in support of his contentions placed reliance on the decision of Mumbai Bench of the Tribunal in the case of Assistant Commissioner of Income Tax Vs. Tamil Nadu Silk Producers Federation Ltd. reported as 105 ITD 623 (Chennai).

In respect of addition made by the Commissioner of Income Tax (Appeals) u/s. 2(22)(e) of the Act the ld. DR submitted that it is not a

new source of income. The ld. DR referred to the findings of Commissioner of Income Tax (Appeals) in para 16 of the impugned order.

6. We have heard the submissions made by the representatives of rival sides and have perused the orders of the authorities below. The assessee has assailed the order of Commissioner of Income Tax (Appeals) on two grounds :

i. Disallowance of ₹5,63,75,093/- u/s. 14A r.w. Rule 8D in respect of interest payment on borrowed funds for investment in shares of the subsidiaries.

ii. Addition of ₹7,37,68,681/- u/s. 2(22)(e) of the Act.

7. The ld. AR of the assessee has stated at the Bar that he is not pressing ground Nos. 1 and 3 raised in the grounds of appeal. Accordingly, the ground Nos. 1 and 3 raised in the grounds of appeal are dismissed as not pressed.

8. In ground No. 2 raised in the grounds of appeal, the assessee has assailed disallowance u/s. 14A. The assessee is a holding company of M/s. Hari Infrastructure (P) Ltd. The assessee has advanced borrowed money to the said subsidiary company for repayment of loan. It has been contended that the borrowed money has been advanced to the subsidiary on account of commercial expediency. Further, the assessee has made investment in two subsidiary companies i.e. M/s. Nagar Kopergaon Infrastructure Pvt. Ltd. (hereinafter referred to as "NKIPL") ₹26.50 crores and M/s. Pranjal Infrastructure Pvt. Ltd. (hereinafter referred to as "PIPL") of ₹3.02 crores. The assessee has formed these two new companies as Special Vehicle Purpose (SPV) to accomplish the

projects allotted by Public Works Department (PWD), Government of Maharashtra. The said projects were purportedly allotted to the assessee on the condition that each project should be carried out by separate SPV of the assessee company. The assessee has made investment in the above said two newly formed SPVs by utilizing borrowed funds. The assessee has paid interest to the tune of ₹3.44 crores on the investment made in NKIPL and ₹0.23 crores in respect of investment made in the shares of PIPL. It is the case of the assessee that the assessee has not received any exempt income in the form of dividend etc. from the aforesaid two newly formed companies.

The ld. AR has made an alternate submission in ground No. 4 of the appeal that even if disallowance u/s. 14A is sustained. The assessee is eligible to claim deduction u/s. 80(IA) on the said disallowance. To support his submissions the ld. AR has placed reliance on the CBDT Circular dated 02-11-2016.

9. We find that the Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Oriental Structural Engineers Pvt. Ltd. (supra) has upheld the order of Tribunal where disallowance made u/s. 14A r.w. Rule 8D was deleted under similar circumstances. In the said case the assessee had made investment in the subsidiary company out of borrowed funds. The said subsidiary company was formed as SPV to obtain contracts from NHAI. The Co-ordinate Bench of the Tribunal in the case of Hari Infrastructure Pvt. Ltd. Vs. Dy. CIT in ITA No. 848/PN/2013 for the assessment year 2009-10 decided on 18-01-2016, under similar circumstances by following the decision rendered in the case of Commissioner of Income Tax Vs. Oriental Structural Engineers Pvt. Ltd. (supra) deleted the disallowance made

u/s. 14A r.w. Rule 8D in respect of investments made in the subsidiary companies which were created as SPV to obtain and execute Government contracts. The relevant extract of the findings of Tribunal are as under :

> *"17. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO on the basis of his finding that interest bearing funds have been diverted to holding company for acquisition of their shares made disallowance of Rs.1,08,81,177/- u/s.14A of the I.T. Act r.w. Rule 8D of the I.T. Rules. While doing so, he rejected the contention of the assessee that the investment made in the shares of holding companies are due to commercial expediency and therefore no disallowance of interest should be made u/s.36(1)(iii) or u/s.14A. We find the Ld.CIT(A) rejecting the various submissions made before him and distinguishing the various decisions cited before him rejected the claim of the assessee that no disallowance is called for u/s.14A of the I.T. Act.*
>
> *18. It is the submission of the Ld. Counsel for the assessee that since the investments are made in shares of the holding company who in turn has invested the amount in the subsidiary company and special purpose vehicle companies, for getting contracts from the PWD department of Government of Maharashtra, therefore, the investment was for commercial expediency and therefore no disallowance of interest is called for. It is also the alternate contention of the Ld. Counsel for the assessee that since no dividend income has been received which is exempt from tax, therefore, no disallowance u/s.14A should be made. It is also another alternate contention of the Ld. Counsel for the assessee that since the entire income of the assessee is eligible for deduction u/s.80IA(4), therefore, even if any disallowance is made the business income of the assessee will go up and therefore there will be corresponding deduction of the said amount and therefore it is revenue neutral.*
>
> *18.1 We find some force in the arguments advanced by the Ld. Counsel for the assessee. We find an identical issue had come up before the Hon'ble Delhi High Court in the case of Oriental Structure Engineers Pvt. Ltd. (Supra). In that case also investments were made in the subsidiary companies out of borrowed funds. The subsidiary company had to form special purpose vehicles (SPV) in order to obtain contracts from NHAI.*

The disallowance u/s.14A r.w. Rule 8D was restricted by the CIT(A) which was upheld by the ITAT. On further appeal by the Revenue, the Hon'ble High Court dismissed the appeal filed by the Revenue by observing as under :

> *"This appeal has been preferred by the revenue against the order dated 02.12.2011 passed by the Income Tax Appellate Tribunal, New Delhi in ITA No.4245/Del/20 11 in respect of the assessment year 2008-09. The issue before the Tribunal, which is also an issue before us, was whether in the facts and circumstances of the case the Commissioner of Income Tax (Appeals) had erred in restricting the disallowance under section 14A of the Income Tax Act, 1961 to 2% of dividend income of Rs.20,27,812/-.*
>
> *It was the contention of the revenue that Rule 8D of the Income Tax Rules, 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under: -*
>
> *6.3 We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of Rs 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further, Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of Rs 6,07,775,000/- made in subsidiary companies as per documents produced before him, they are attributable to commercial expediency, because as per submission made by the assessee, it had to form Special Purpose Vehicles (SPV) in order to obtain contracts from the NHAI and the SPVs so formed engaged the assessee company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the PSVs can be disallowed u/s. 14A r.w. Rule 80 because it cannot be termed as expense/ interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum Rs 40,556/- calculated @ 2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals), hence we uphold the same.*
>
> *On going through the above observations we are of the view that this is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income. The disallowance, therefore, was rightly limited to*

> *a sum of Rs 40,556/-. The question of interpreting Rule 8-D is not in dispute and the only dispute is with regard to facts which have been settled by the Tribunal.*
>
> *The appeal is dismissed."*

19. We also find merit in the alternate contention of the Ld. Counsel for the assessee that since assessee is entitled to deduction u/s.80IA(4), therefore, the addition, if any, has to be allowed u/s.80IA(4) and therefore, the same is revenue neutral. Admittedly, the income of the assessee is eligible for deduction u/s.80IA which the AO himself has allowed in the body of the assessment order. The returned business income has been allowed by the AO as deduction u/s.80IA as per the claim. Therefore, once a part of the interest expenditure is disallowed then the corresponding business income will go up. Therefore, the request of the Ld. Counsel for the assessee that the AO may be directed to increase the deduction u/s.80IA(4) to the extent of disallowance u/s.14A which increases the business profit to that extent is acceptable. In this view of the matter, we set aside the order of the CIT(A) and direct the AO to delete the disallowance made u/sa.14A. Ground of appeal No.1 as well as the first issue in the additional ground raised by the assessee are accordingly allowed."

10.. We further observe that the CBDT vide Circular No. 37/2016 dated 02-11-2016 has clarified that where disallowance has been made u/s. 32, 40(a)(ia), 40A(3), 43B etc., of the Act and other specific disallowance relating to business activity deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance. The relevant extract of the circular is as under :

"Chapter VI-A of the Income-tax Act, 1961 ("the Act"), provides for deductions in respect of certain incomes. In computing the profits and gains of a business activity, the Assessing Officer may make certain disallowances, such as disallowances pertaining to sections 32, 40(a)(ia), 40A(3), 43B etc., of the Act. At times disallowance out of specific expenditure claimed may also be made. The effect of such disallowances is an increase in the profits. Doubts have been raised as to whether such higher profits would also result in claim for a higher profit-linked deduction under Chapter VI-A

2. The issue of the claim of higher deduction on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows :

> *(i) If an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 40 (a)(ia) of the Act would qualify for deduction under section 80-IB of the Act. This view was taken by the courts in the following cases:*
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> - *Income-tax Officer - Ward 5(1) vs. Keval Construction, Tax Appeal No. 443 of 2012, December 10, 2012, Gujarat High Court.*
> - *Commissioner of Income-tax-IV, Nagpur vs. Sunil Vishwambharnath Tiwari, IT Appeal No. 2 of 2011, September 11,2015, Bombay High Court.*
>
> *(ii) If deduction under section 40A(3) of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled for deduction under section 80-IB of the Act. This view was taken by the court in the following case:*
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> - *Principal CIT, Kanpur vs. Surya Merchants Ltd., I.T. Appeal No. 248 of 2015, May 03, 2016, Allahabad High Court.*
>
> *The above views have attained finality as these judgments of the High Courts of Bombay, Gujarat and Allahabad have been accepted by the Department.*

3. In View of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter Vl-A is admissible on the profits so enhanced by the disallowance."

11. The Co-ordinate Bench of the Tribunal in the case of Hari Infrastructure Pvt. Ltd. Vs. Dy. CIT (supra) has already decided the issue with respect to disallowance u/s. 14A has accepted the contentions of the assessee in respect of disallowance u/s. 14A on both the grounds. Thus, in view of the facts of the case, the order of Co-ordinate Bench and the CBDT Circular, we direct the Assessing Officer to delete the disallowance made u/s. 14A of the Act. Accordingly, ground Nos. 2 and 4 raised in the grounds of appeal by the assessee are allowed.

12. In ground Nos. 5 and 6 the assessee has assailed the addition of ₹7,37,68,681/- made u/s. 2(22)(e) of the Act by the Commissioner of Income Tax (Appeals). The Assessing Officer in his order has not touched upon the issue of deemed dividend. The Commissioner of Income Tax (Appeals) has observed that the assessee has violated the provisions of section 42 of the Companies Act. The subsidiary of the company has made investment in the share capital of the assessee (a holding company). The ld. AR of the assessee has made two fold submissions. The first contention of the assessee is that the Commissioner of Income Tax (Appeals) cannot made addition on the basis of new source of income during first appellate proceedings. The Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry (supra) has held that AAC is not competent to enhance assessment in appeal by discovering new source of income not mentioned in return or consider by the Assessing Officer in assessment. The relevant extract of the judgment of Hon'ble Apex Court in the aforesaid case is as under:

> *"8...............The only question is whether in enhancing the assessment for any year he can travel outside the record, that is to say, the return*

made by the assessee and the assessment order passed by the Income tax Officer with a view to finding out new sources of income, not disclosed in either. It is contended by the Commissioner of Income tax that the word " assessment " here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words " enhance the assessment " are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be overlooked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal.

9. The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 and specified the other intention in express words. The Income tax Act was amended several times in the last 37 years, but no amendment of section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible."

13. The Hon'ble Apex Court thereafter in the case of Commissioner of Income Tax Vs. Rai Bahadur Hardutroy Motilal Chamaria (supra) has reaffirmed its view taken in the case of Commissioner of Income Tax Vs.

Shapoorji Pallonji Mistry (supra). The Hon'ble justice V. Ramaswami speaking for the court stated:

> *"As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income tax Officer with a view to find out new sources of income and the power of enhancement under section 31(3) of the Act is restricted to the sources of income which have been the subject matter of consideration by the Income tax Officer from the point of view of taxability. In this context " consideration " does not mean " incidental " or " collateral " examination of any matter by the Income tax Officer in the process of assessment. There must be something in the assessment order to show that the Income tax Officer applied his mind to the particular subject matter or the particular source of income with a view to its taxability or to its non taxability and not to any incidental connection".*

The law laid down by the Hon'ble Apex Court has been reiterated by the full Bench of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Sardari Lal & Co. (supra). The Hon'ble Delhi High Court held :

> *"Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority".*

Thus, in view of the well settled law laid down by the Hon'ble Apex Court and subsequently followed by the Hon'ble Delhi High Court we hold that the Commissioner of Income Tax (Appeals) has exceeded his jurisdiction in making addition u/s. 2(22)(e) of the Act as there is no reference of such income either in the return of income or in the assessment proceedings. Thus, the addition made u/s. 2(22)(e) by

Commissioner of Income Tax (Appeals) is not sustainable and is therefore set aside being void ab-initio.

Since, the addition made by the Commissioner of Income Tax (Appeals) u/s. 2(22)(e) of the Act has been held to be void ab-initio, the arguments raised by the ld. AR of the assessee on merits have become academic and are thus, not dealt with. The ground Nos. 5 and 6 raised by the assessee in grounds of appeal are allowed, accordingly.

14. In the result, the appeal of the assessee is partly allowed in the aforesaid terms.

Order pronounced on Friday, the 30th day of December, 2016.

Sd/-	Sd/-
(आर. के. पांडा / R.K. Panda)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 30th December, 2016
RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-II, Nashik
4. आयकर आयुक्त / The CIT-II, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “A” बेंच, पुणे / DR, ITAT, “ए” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune