50/100

CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH
GUWAHATI-05

(DESTRUCTION OF RECORD RULES,1990)

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O.A/T.A No. 398/2002

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4.12.24

(SEE RULE - 4)

CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH
GUWAHATI

ORDER SHEET

Original Application No. : 388/02
Misc. Petition No. /
Contempt Petition No. /
Review Application No. /

Applicant(s): J.K. Goyal

- Vs. -

Respondent(s): U.O.I & Ors

Advocate for the Applicant(s): B.K. Sharma, P.K. Tiwari, S. Sarma, I. Phukan

Advocate for the Respondent(s): Mr. Cafe, A.K. Choudhury, B. Bezbaruah

Notes of the Registry	Date	Order of the Tribunal
This application is in form but not in time Condonation petition is filed / not filed C.F. for Rs. 50/- deposited vide IPO/BP No. 76606896 Dated 9.12.02 By. Registrar.	11.12.02	List on 13.12.2002 before Single Bench. for admission. Member Vice-Chairman
Steps taken. 10/12/02	13.12.2002	Heard Mr B.K. Sharma, learned Sr. counsel for the applicant, assisted by Mr S. Sarma. Issue notice of motion, returnable by four weeks. List on 10.1.2003 for admission. Also issue notice as to why an interim order shall not be passed suspending the order dated 28.10.2002, returnable by 20.12.02. List the matter for interim order on 20.12.02. Vice-Chairman
Notice prepared and sent to D/s for issuing the respondent No. 1 to 3 by Regd. A.D. 19/12 D/No 3436 to 3438 Dtd 20/12/02	nkm 20.12.02	Let the matter be listed again on 10.1.03 as ordered for further order. Vice-Chairman
	pg	

O.A.388/2002

10.1.2003 List the case before Division Bench on 21.1.2003 for admission.

Member

bb

No reply has been filed

9/1/03

21.1.2003 Present : The Hon'ble Mr. Justice D.N. Chowdhury, Vice-Chairman.

The Hon'ble Mr. S.K. Hajra, Administrative Member.

Put up the matter again on 30.1.2003 for admission.

Member Vice-Chairman

mb

30.1.03

WS submitted by the Respondent Nos. 1, 2 & 3.

30.1.2003 Present:- The Hon'ble Mr. Justice D.N.Choudhury, Vice-Chairman

The Hon'ble Mr.S.K.Hajra, Administrative Member.

On the prayer of the counsel for the parties the case is posted on 3.2.2003 for admission along with the other connected matters.

Member Vice-Chairman

17.2.03

An affidavit or additional statement of facet submitted by the applicant

bb

03.02.2003 Heard Mr. P.K. Tiwari, learned counsel for the applicant and also Mr. A.K. Choudhury, learned Addl. C.G.S.C. for the respondents.

The respondents have filed the written statement. The application is admitted. The matter may now be posted for hearing on 20.2.2003. No fresh notice need to be issued. The applicant may file rejoinder, if any.

Member Vice-Chairman

mb

(3)

O.A. No. 388/2002

20.2.2003 Present : The Hon'ble Mr. Justice D.N. Chowdhury, Vice-Chairman.

The Hon'ble Mr. S. Biswas Administrative Member.

The case is adjourned on the prayer of Mr. S. Sarma, learned counsel for the applicant to obtain necessary instruction. List the case on 2.4.2003 for hearing.

Member Vice-Chairman

mb

2.4. Division Bench did not sit today. The case is adjourned to 27/5/2003.

8.5.2003 **The matter is already posted for hearing on 27.5.2003. List the matter again on 27.5.2003 for hearing.**

Member **Vice-Chairman**

mb

19.5.03
Additional statement submitted by the Respondents.

27/5 Heard Mr. P. K. Tiwari, learned Counsel for the applicants Mr. A. K. Chaudhury, learned Addl C.G.S.C for the respondents. Hearing concluded. Judgment reserved.

A.K. Tiwari

O.A. 388/2002

30.5.2003 Present : The Hon'ble Mr. Justice D.N. Chowdhury, Vice-Chairman.

The Hon'ble Mr. S.K. Hajra, Member (A).

Judgment delivered in open Court, kept in separate sheets. The application is disposed of in terms of the order. No order as to costs.

Member

Vice-Chairman

9.6.2003
Copy of the Judgt has been sent to the Office for issuing the same to the L/Advs for the parties.
IC

Read copy mb
11/6/03

9.2.2007 The matter is remitted back to this Tribunal by the Hon'ble High Court vide judgment and order dated 10.11.2006 for re-hearing and disposal on merit. The operative part of the said judgment and order is as follows:-

> "Since the parties are represented by their respective engaged counsel, they are directed to appear before the Tribunal within two months from today. Meanwhile, the department/ respondents are also directed to make arrangement for placement of the relevant records before the CAT without default.
>
> Till such time that the CAT passes necessary orders on appearance of the parties as indicated above, the interim order passed by this Court on 29.07.2003 shall continue.
>
> In view of the above, this writ petition stands disposed of."

24-1-07
Flag 'A' may kindly be seen in case remitted by the Hon'ble H.C. Guwahati for re-hearing.

Contd ..

Notes of the Registry	Date	Order of the Tribunal
26.2.07 Additional statement of facts submitted by the Applicant. page Contains 1 to 23. Regd.	Contd. 9.2.2007	On reading of the said judgment it is found that the Tribunal had disposed of the matte on merit for the reason that the Respondents had not produced the relevant records. The High Court also directed the Respondents to produce the relevant records without delay. Mr.P.K.Tiwari, learned counsel for the Applicant and Mr.G.Baishya, learned Sr.C.G.S.C. for the Respondents are present. Mr. Baishya requested for two weeks time to produce the relevant records. Post the matter on 1.3.2007. Let the records be produced and the further pleadings, if any, be completed by the parties by that time. Thereafter the matter shall be posted for hearing on a convenient date. Vice-Chairman
	/bb/ 01.3.07.xxx	xxxx The High Court also directed the respondents to produce the relevant records.xxx

O.A. 388 of 02

1.3.07. On 9.2.07 this Court directed to to produce the relevant records. Mr.G. Baishya, learned counsel for the Respondents to-day has produced the relevant records before this Court. If the counsel for the applicant wants to peruse the Registry will serve the copy of the documents post the matter on 28.3.07.

Member Vice-Chairman

lm

22.3.07. Counsel appearing for the parties are submitted that pleadings are completed. Counsel for the Respondents has submitted that the documents are produced in the Registry. Counsel for the respondents has submitted that he will file additional statement. Let it be done. post the matter on 24.4.07.

Member Vice-Chairman

lm

24.4.2007 Present: The Hon'ble Mr. G. Shanthappa Member (J).

The Hon'ble Mr.G.Ray, Member (A)

Learned counsel for the Applicant is absent. Mr.G.Baishya, learned Sr.C.G.S.C. submits that he needs some instruction from the Department based on Affidavit filed by the Applicant and hence he prays for adjournment. Accordingly, case is adjourned.

Post before the next Division Bench.

Member (A) Member (J)

/bb/

28.01.2008 On the prayer of learned counsel appearing for the Applicant this case stands adjourned and to be taken up on 12th February, 2008.

In the meantime, the counsel for both the parties should inspect the records to give assistance report at the time of hearing.

Call this matter on 12.2.2008.

(Khushiram)
Member(A)

(M.R.Mohanty)
Vice-Chairman

lm

12.02.2008 None appears for either of the parties. This matter of the year 2002 has come back on remand from the Hon'ble High Court.

Issue notice to the Applicant and the Respondents of this case to come ready (with all connected records) for hearing on 25.03.2008.

(Khushiram)
Member(A)

(M.R.Mohanty)
Vice-Chairman

Dt. 12.2.08
Pl. issue Notices to the Applicants and respondents.
12/2/08

order dt. 12/02/08
Send to D/Section for issuing to applicant and the respondents by post post.
pg

Clear 14/2/08 D/No-1092 to 1095 Dt= 15/2/08.

5.3.08
Additional W/S filed by the Respondents. Undertaking given for service.
W/S b'leel.
6.5.08.

25.03.2008 Call this matter on 07.05.2008.

(M.R.Mohanty)
Vice-Chairman

Pg

O.A. 388/2002

07.05.2008 Heard Mr.P.K.Tiwari, learned counsel appearing for the Applicant and Mr.G.Baishya, learned Sr. Standing counsel appearing for the Respondent department in part.

Call this matter on 08.05.2008.

(Khushiram)
Member (A)

(M.R.Mohanty)
Vice-Chairman

/bb/

08.05.2008 Heard Mr.P.K.Tiwari, learned counsel appearing for the Applicant and Mr.G.Baishya, learned Sr. Standing counsel appearing for the Respondent department further in part.

Call this matter on 09.05.2008.

(Khushiram)
Member (A)

(M.R.Mohanty)
Vice-Chairman

/bb/

09.05.2008 Heard further in part.

Call this matter on 12.05.2008.

(Khushiram)
Member (A)

(M.R.Mohanty)
Vice-Chairman

pg

12.05.2008 Heard further in part. Call this matter on 14.05.2008 for further hearing.

(Khushiram)
Member (A)

(M.R. Mohanty)
Vice-Chairman

nkm

14.05.2008 Call this matter on 26.05.2008.

(Khushiram)
Member (A)

(M.R. Mohanty)
Vice-Chairman

nkm

The case is ready.

23.5.08

26.05.2008 Neither Mr.P.K.Tiwari, learned counsel for the Applicant nor Mr.G.Baishya, learned Sr.Standing Counsel appearing for the Respondents are present.

Call this part heard matter on 03.06.2008 for hearing.

The case is ready for hearing.

2.6.08

Khushiram)
Member(A)

(M.R.Mohanty)
Vice-Chairman

lm

03.06.08 Heard counsel for the parties. Hearing concluded. Order reserved.

(Khushiram)
Member(A)

(M.R.Mohanty)
Vice-Chairman

lm

O.A. 388 of 2002

19.06.2008 Judgment pronounced in open Court. Kept in separate sheets. Application is dismissed. No costs.

(Khushiram)
Member(A)

(M.R.Mohanty)
Vice-Chairman

lm

Copy of the judgment dt 19.6.08 received on behalf of Mr G Baruah, S.C. & Sc. Regional Dev. Advocate. 25.6.08.

16.7.08
C.Copy of the Judgt collected by Ld Advocate for the applicant on 24.6.08 and copy of the same send to the D/Secy. for issuing to the respdts. by post.

Received back the original documents as per 1:37 01-20. Pradeep 27/7/2008 O/o the CCIT, GHY

15.1.09
Issued vide D/Nos 3138 to 3140 dt 21.7.08

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH

.....

Original Application No.388 of 2002.

DATE OF DECISION : 19-06-2008

Shri J.K. Goyal
.....Applicant/s

Mr P.K. Tiwari
.....Advocate for the Applicant/s

-Versus –

Union of India & Ors.
.....Respondent/s

Mr G.Baishya, Sr. C.G.S.C
.....Advocate for the Respondent/s

CORAM

THE HON'BLE MR MANORANJAN MOHANTY, VICE CHAIRMAN

HON'BLE MR.KHUSHIRAM, ADMINISTRATIVE MEMBER

1. Whether reporters of local newspapers may be allowed to see the judgment ? Yes/No

2. Whether to be referred to the Reporter or not ? Yes/No

3. Whether their Lordships wish to see the fair copy of the judgment ? Yes/No.

Vice-Chairman/Member

CENTRAL ADMINISTRATIVE TRIBUNAL, GUWAHATI BENCH

Original Application No. 388/2002.

Date of Order : This the 19th Day of June, 2008.

THE HON'BLE MR MANORANJAN MOHANTY, VICE CHAIRMAN

THE HON'BLE MR KHUSHIRAM, ADMINISTRATIVE MEMBER

Shri J.K.Goyal,
Resident of Fancy Bazar,
Guwahati-1. .....Applicant

By Advocate Mr P.K.Tiwari

-Versus-

1. Union of India,
represented by the Secretary, Govt. of India,
Department of Revenue, Ministry of Finance,
North Block, New Delhi.

2. The Chairman,
Central Board of Direct Taxes,
Ministry of Finance,
North Block, New Delhi.

3. The Under Secretary to the
Government of India, Ministry of
Finance, Department of Revenue,
Central Board of Direct Taxes,
New Delhi. .....Respondents

By Advocate Mr G. Baishya, Sr.C.G.S.C.

ORDER

KHUSHIRAM,MEMBER(A)

Dr J.K.Goyal, an Indian Revenue Service Officer of 1969 batch, has filed this Original Application alleging vindictive attitude of the Respondents against him and has cited a number of instances wherein he was not only suspended earlier but was unnecessarily harassed by the department. In the instant case, while serving as Chief

Commissioner of Income Tax at Guwahati, he was served with a show cause notice calling upon him to explain in respect of his alleged misconduct in discharging his duties as a CIT (Appeals) while posted at Bhubaneswar. The applicant was suspended on 18.02.2002 under Rule 10(2) of the 1965 Rules; which was challenged before this Tribunal in O.A.No.76/2002. During pendency of the said O.A; the impugned memorandum dated 28.10.2002 was issued to the Applicant with the following charges :-

> "That the said Sh J.K.Goyal while functioning as Commissioner of Income Tax (Appeal)-I Bhubaneswar, showed undue haste in passing appeal order in the case of block assessment of Sh Karuna Kar Mohanty and decided the appeal without exercising due diligence, so as to grant undue favours to the appellant to the detriment of the interest of Revenue. While doing so he
> (a) accepted the submissions/claims made by the appellant assessee without examining their varacity with the material facts on record, including search records and without making independent verifications or enquiries with the Assessing Officer.
> (b) Failed to afford an opportunity to the Assessing Officer, against whose order the appeal was preferred, to be heard as prescribed under the Income Tax; and
> (c) Showed lack of application of mind and predetermination of issues.
>
> By the aforesaid acts of omission and commission Sh J.K. Goyal failed to maintain absolute integrity and devotion to duty and exhibited conduct becoming of a Government servant. He thereby violated the Rules 3(1)(i), 3(1)(ii) and 3(1) (iii) of the CCS (Conduct) Rules, 1964."

The memo was communicated with statement of imputation and the list of documents in support of the charges etc.

2. The Applicant, then, filed the present O.A. No.388/2002 on the ground that the allegations/charges leveled against him did not constitute as misconduct. It was specifically stated that the alleged

charges does not reflect on his reputation, integrity or good faith or devotion to duty and that there was no whisper that the Applicant was actuated by any corrupt motives.

3. This Tribunal considered the mater at length and passed appropriate order on 30.05.2003. While disposing of that case, this Tribunal took note of the grievances of the Applicant as under:-

> "In the O.A. the applicant contended that the respondent authority without due application of mind initiated the purported disciplinary proceeding with a view of harass and victimize him with malafide intention. It was contended that the applicant all throughout was exercising quasi judicial power in exercise of the power of Appellate Authority conferred upon him by statute under the Income Tax Act, 1961. A quasi judicial authority, it was contended, is not immune from mistake and error of law or fact and such mistake or errors are subject to scrutiny by the higher authority."

4. After giving consideration to the rival arguments of the Applicant and the Respondent Department, this Tribunal specifically stated that "we are, however, purposefully not going into the merits of the proceeding at this stage in view of the fact that the disciplinary proceeding is in under way and as a matter of fact the Enquiry Officer was also appointed." After giving utmost consideration to the points raised by learned counsel for the Applicant M P.K.Tiwari, the Tribunal were not inclined to make any comment (regarding the merits) of the case at that stage, since the disciplinary proceeding in question was asked to be concluded within a time frame. The Applicant was also made free to raise all the issues (those were raised before the Tribunal) including the issue as to the conduct and credibility of the version of

the Assessing Officer. This Tribunal disposed of the present O.A as under :

> "Considering the facts and circumstances, we feel that ends of justice would be met if a direction is issued to the respondents to complete the disciplinary proceeding with utmost expedition. Considering the fact situation and the nature of the enquiry we direct the authority to conclude the enquiry within three month from the date of receipt of the order. The parties are directed to take necessary steps for concluding the enquiry within the time frame.

5 The Applicant, however, carried the matter before the Hon'ble High Court of Guwahati by way of filing WP(C) No.5747/2003. The Hon'ble High Court took a view that "CAT was not able to proceed with the case on merit, admittedly for want of records, and as such when the petitioner challenged the continuation of the disciplinary proceeding thereof, in our considered view, the CAT ought not to have directed the authority concerned to proceed with the same and it is, therefore, a fit case for remand." The Hon'ble High Court, in the interest of justice, remitted the matter back to us/CAT for "re-hearing and final disposal on merit by properly examining and appreciating the relevant records on being placed by the department/respondents."

6. In compliance of the above direction of the Hon'ble High Court of Guwahati, on remand, this case has been heard by us in this Tribunal at length.

2. The Assessment Officer of Income Tax at Bhubaneswar assessed (for the period 1990-91 to 2000-01) and passed assessment order in respect of one Shri Karunakar Mohanty and Smt Basanti Mohanty and some additions were made in a block asssessment order

and some reasons were given on the face of and the seized documents etc. in exercise of the powers conferred under the provisions of income tax laws pertaining to undisclosed income under income tax act (and provision of section 158BB(3) thereof) and adverse inference were also drawn, after looking to the facts on record viz. explanation/reply submitted by the assesses. The Assessment Officer had assessed the undisclosed income at Rs.11,12,31,133/- against the returned income at Rs.1,19,71,990 and undisclosed income at Rs.9,92,59,143/-. The Applicant, as appellate authority, allowed the appeal (of the assessees in question) partially and permitted deletion of the additional income assessed by the Assessment Officer. From the Appellate file No.196/Ors/2001-02 it appears that Form No.35 along with a copy of the Appeal petition was forwarded to AO for his report by 16.07.2001; a copy of the hearing notice was sent to the AO; the case was taken up for hearing again on 17.07.2001, 24.07.2001 and 25.07.2001; when Mr B.N.Mahapatra, Advocate was present and, finally, an order was passed by the applicant (as Appellate Authority) on 13.08.2001. There is no mention that any notice was ever sent to the Assessment Officer to explain the discrepancies with relation to the undisclosed income. From the Appellate record, however, it appears that the opinion of the assessee and the reply of the A.O was received by the Appellate Authority before the appeal was decided on 13.08.2001. The notice for personal hearing of the Assessing Officer is also not apparent from the records of the case file No.196/Ors/2001-02; although a copy of the hearing notice (given to the assessee) was sent to the A.O. But

Assessing Officer had given a statement, under oath, on 26.12.2001 that only one copy of ITS-95 was received by him which was sent back in original (without retaining any copy thereof) and that he had sought personal appearance before the CIT (Appeals). The AO noted in a clarification, that further report may be called for in the said case. Since there was no prayer to call the Assessment Officer, Applicant (as Appellate Authority) did not consider it necessary to call him for verification regarding discrepancies, if any, nor the order sheet indicated whether ITNS-95 was received or not.

8. As it appears, since records of the case were called for in connection with the matter before this Tribunal, the revenue due to the Government has not yet been finalized and Applicant has, by filing litigation before this Tribunal and the Hon'ble High Court, has neither allowed to complete the departmental proceeding against him nor, impliedly, allowed finalization of the case by Income Tax Appellate Tribunal and meanwhile the Applicant has superannuated.

9. The basic contention of the Applicant is that in deciding the appeal as Commissioner (Appeal) Bhubaneswar he had not committed any illegality nor shown favour to the assesse by partly allowing the appeal of the assessee. It has also been stated that while exercising his power as Commissioner of Income Tax (Appeal), the Applicant might have exercised it wrongly but that wrong could be corrected in appeal and that cannot form a basis for initiating disciplinary proceeding against the officer discharging quasi judicial functions. It has also been stated that to maintain a charge sheet against a quasi judicial

authority, something more has to be alleged than a mere mistake of law or of procedural irregularity or non compliance of the principles of natural justice e.g. in the nature of some extraneous consideration influencing quasi judicial order and that since nothing of this sort is alleged therein (charge memo), the impugned charge sheet is non sustainable. It has also been stated that in the imputation of misconduct/statement of allegation it has only been alleged that the Applicant was in error by partly allowing the appeal of the assessee and that the appeal of the assessee warranted dismissal; that there was no allegation of any corrupt motive or any familiarity with the party and that, therefore, there is no material to sustain the disciplinary proceeding against the Applicant. It has, in the above grounds, been stated that the charge sheet is void ab-initio. It has also been added that negligence in quasi judicial adjudication is not carelessness, inadvertence or omission, but a culpable negligence while exercising his quasi judicial powers of Commissioner of Income Tax (Appeals); there is no material to show recklessness or misconduct in discharging of his duties; that there is no prima facie evidence to show that the Applicant acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty or that he had acted in a manner which is unbecoming of a Government Servant or he omitted to act as per the prescribed conditions which are essential for the exercise of the statutory powers and that therefore, the impugned memorandum of charge has been issued in mala fide exercise of power primarily for the purpose of harassing and victimizing the Applicant. He has taken

another ground (and past events have been cited) to suggest that the Respondents are enemical to the Applicant. Therefore he has sought the following reliefs (Annexure A/5).

> i) Quash and set aside the memorandum F.No.C-14011/5/2002-V&L dated 28.10.2002 issued by the Under Secretary to the Government of India, Ministry of Finance, department of Revenue, Central Board of Direct Taxes.

10. We have heard Mr P.K.Tiwari, learned counsel appearing for the Applicant and Mr G.Baishya, learned Sr. Standing counsel for the Respondents at length. Mr Tiwari has tried to make out a case for quashing of the impugned charge sheet and has submitted the following decisions in support of his arguments.

> i) 1993(2) SCC 56, Union of India vs. K.K.Dhawan
> ii) AIR 1992 SC 33 A.N.Saxena vs. Union of India & Ors.
> iii) (1994) 3 SCC 357, Union of India vs. Upendra Singh
> iv) 1996(3) SCC 157, Secretary to Govt. Excise Department.
> v) 1999 Vol.8 SC 401, Z.V.Nagarkar vs. Union of India.
> vi) (2001) 6 SCC 491, P.C.Joshi vs. State of U.P
> vii) 2004 SC 247, R.L.Singh vs. High Court of Allahabad.

11. The basic thrust of the argument of the learned counsel for the Applicant was that the Applicant, while passing the order in question had complied with the procedural requirements as prescribed under Section 250 and 251 of the Income Tax Act, 1961. As a quasi judicial authority, he might have made some mistake but that does not call for a disciplinary action against the Applicant.

12 In (1993) 2 SCC 56, (Union of India & Ors. Vs. K.K.Dhawan), it has been held in para 28 that "disciplinary action can be taken in the following cases :

(i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;
(ii) If there is prima facie material to show recklessness or misconduct in the discharge of his duty;
(iii) If he has acted in a manner which is unbecoming of a Government servant;
(iv) If he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;
(v) If he had acted in order to unduly favour a party;
(vi) If he had been actuated by corrupt motive, however small the bribe may be, because Lord Coka said long ago "though the bribe may be small, yet the fault is great."

The Apex court further held that "for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated.

13. In (1994) 3 SCC 357, Union of India & Ors. Vs. Upendra Singh, it was held that "the Tribunal ought not to interfere at an interlocutory stage and yet the Tribunal chose to interfere on the basis of the material which was yet to be produced at the inquiry. In short, the Tribunal undertook the inquiry which ought to be held by the disciplinary authority (or the inquiry officer appointed by him) and found that the charges are not true. It may be recalled that the jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution. Therefore, the principles, norms and the constraints which apply to the said jurisdiction apply equally to the Tribunal. If the original application of the respondent were to be filed in the High Court it

would have been termed, properly speaking, as a writ of prohibition. A writ of prohibition is issued only when patent lack of jurisdiction is made out. It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like certiorari, prohibition and mandamus in United Kingdom, yet the basic principles and norms applying to the said writs must be kept in view, as observed by this Court in (1995) 1 SCR 250, T.C.Basappa v. T. T. Nagappa." It was further held in para 6 of the judgment that "in the case of charges framed in a disciplinary inquiry the tribunal or court can interfere only if on the charges framed no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The function of the court/tribunal is one of judicial review, the parameters of which are repeatedly laid down by this Court. It would be sufficient to quote the decision in 1992 Supp (2) SCC 312, H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal vs. Gopi Nath & Sons. The Bench comprising M.N. Venkatachaliah J (as he then was) and A.M.Ahmadi J. affirmed the principle thus : (SCC p. 317.para 8)

> "Judicial review, it is trite, is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorized by law to decide, a conclusion

which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself."

14. The learned counsel for the Applicant also placed reliance in (1999) 7 SCC 409, (Zunjarrao Bhikaji Nagarkar vs. Union of India & Ors.); wherein it was held as under :-

> "When penalty is not levied, the assessee certainly benefits. But it cannot be said that by no levying the penalty the officer has favoured the assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. The record in the present case does not show if the disciplinary authority had any information within its possession from where it could form an opinion that the appellant showed "favour" to the assessee by not imposing the penalty. He may have wrongly exercised his jurisdiction. But that wrong can be corrected in appeal. That cannot always form a basis for initiating disciplinary proceedings against an officer while he is acting as a quasi-judicial authority. It must be kept in mind that being a quasi-judicial authority, he is always subject to judicial supervision in appeal."

15. In (2007) 4 SCC 247, (Ramesh Chandra Singh vs. High Court of Allahabad & another), it was reported that "Disciplinary proceedings against a judicial officer – initiated on the basis of judicial order passed by him – power of High Court – there should be strong grounds to suspect the officer's bonafides and the order itself should be actuated by malice, bias or illegality C– while taking disciplinary action based on judicial orders, High Court must take extra care and caution – Practice of initiation of disciplinary proceedings against officers of subordinate judiciary merely because judgments/orders passed by them

are wrong, has been disapproved by Supreme Court on several occasions. Inspecting judge of High Court finding that there was no truth in the said allegation – He, however, concluding that the bail order was passed by appellant with an oblique motive (in a case of murder) on the basis of insufficient grounds and extraneous consideration – Held the appellant was competent and well within his right to grant bail in discharge of his judicial function. Initiation of disciplinary proceedings against the appellant solely on the basis of the complaint which was disbelieved, questioned by the Supreme Court."

16. on the basis of this reported case, the Advocate for the Applicant pleaded for quashing of the charge sheet against the Applicant. The whole thrust of his argument was that the order passed by Applicant in his quasi judicial capacity, in spite of infirmities, cannot be the basis of charge sheet/disciplinary proceeding; as the action of authorities (exercising quasi judicial power) have to be protected so that they can function fearlessly and pass orders without fear of penal action; as the said actions (of quasi judicial authority) are available to be examined statutorily by the higher judicial authorities. It has been argued that if such actions are penalized, than something more than mere allegations (as per para 26 of 1993(2) SCC 56, Union of India vs. K.K.Dhawan) has to be found against him. It has been pointed out that actually there were no materials against the Applicant on record and that by obtaining a statement from the A.O, after the disposal of the Appeal, a charge has been framed. The learned counsel for the Applicant has stated that the notice to the Assessment Officer was duly issued by the

Applicant but as a matter of fact the Assessing officer never appeared before him in spite of notice given to him. Copy of ITMS-51 was not found in the records of CIT, there is no materials to show that he has sent it to the Commissioner (Appeal) but CIT underlined ITMS-51 thrice in red ink pen without calling for any question as it was found missing from the records.

17. On the other hand Mr G.Baishya, learned Sr. Standing counsel appearing for the Respondents, cited the following decisions in support of the case of the Respondents.

18. In (1996) 3 SCC 157, (Secretary to Govt. Prohibition & Excise Department vs. L.Srinivasan), the Hon'ble Supreme Court held that "quashing of suspension and charges at this very stage where the Administrative Tribunal has committed grossest error in its exercise of power as if he is an appellate forum dehors the limitation of judicial review. This is one such instance where a member had exceeded his power of judicial review in quashing the suspension order and charges even at the threshold.

19. In another decision (1997) 7 SCC 101, Govt. of T.N. vs. K.N.Ramamurthy), the Hon'ble Supreme Court held "the Court can interfere only if inference of misconduct cannot be drawn from the charges and the supporting particulars, or if the charges are contrary to law." In the instant case there is no such ambiguity."

20. In (2000) 5 SCC 467, (Air India Ltd. vs. M. Yogeshwar Raj), the Hon'ble Supreme Court had held as under :-

"in this case punishment of dismissal from service without retirement benefits was awarded. High

> Court while passing interim order observing that prima facie the respondent belonged to SC/ST and accordingly, staying proceedings before the disciplinary authority. The disciplinary authority was yet to finally decide the issues involved in this case and to make up its mind about respondent's guilt. High Court should not have therefore pre-empted decision of the disciplinary authority on facts, nor should have the proceedings been stayed on a prima facie finding on the subject matter of inquiry when the disciplinary authority was yet to make up its mind. It was also not a case of delayed proceedings where the court ought to have stepped in – High Court order therefore set aside."

21. In 2000 SCC (L&S) 1100, (District Forest Officer vs. R.Rajamanickam and another), it was held that "the Tribunal was not justified under law to interfere with the correctness of the charges leveled against the delinquent officer."

22. In (2000) 1 SCC 416, (High Court of Judicature at Bobay through its Registrar vs. Shashikant S. Patil & another), it has been reported that "Judicial interference is permissible if there is violation of natural justice or statutory regulations. The decision of the disciplinary authority is also vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority on the very face of it is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or other similar grounds – It cannot however be overlooked that disciplinary authority is the sole judge of the facts if the enquiry has been properly conducted – If there is some legal evidence on which findings can be based then adequacy or even realiability of that evidence is not a matter to be canvassed before the High Court under Art. 226 of Constitution of India."

23. In 1995 Supp (1) SCC 180, (Union of India & another vs. Ashok Kacker), the Hon'ble Supreme Court held as under:-

> "the respondent has the full opportunity to reply to the charge sheet and to raise all the points available to him including those which are not urged on his behalf. This was not the stage at which the Tribunal ought to have entertained such an application for quashing the charge sheet and the appropriate course for the respondent to adopt is to file his reply to the charge sheet and invite the decision of the disciplinary authority thereof."

24. Again in (2006) 12 SCC 28, (Union of India and another vs. Kunisetty Satyanarayana), the Apex Court held that "it is well settled that ordinarily no writ lies against a charge sheet or show cause notice. A writ petition lies when some right of any party is infringed. A mere show cause notice or charge sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance."

25. The Respondents have also relied on the Apex Court Judgment in 2007 (207) E.L.T. 166 (S.C), Union of India vs. Duli Chand wherein the decision of (1999) 7 SCC 409, (Zunjarrao Bhikaji Nagarkar vs. Union of India & Ors.) was overruled. It may be stated here that the Duli Chand case was decided by a 3 Judge Bench. Relevant portion of the Duli Chand judgment is reproduced below :-

> "The issue in this appeal is whether disciplinary action could be taken against the respondent-employee on the ground that the employee had been found to be negligent while discharging quasi-judicial functions. x x x x x x x
> The punishment imposed was stoppage of two annual increments with cumulative effect. x x x x

The action of the disciplinary authority was challenged before the Central Administrative Tribunal on the ground that no disciplinary proceedings would lie against an officer discharging judicial/quasi-judicial functions unless there was an element of moral turpitude. The Central Administrative Tribunal upheld the finding of the gross negligence on the part of the respondent. But it was held, relying upon the decision of this Court in Zunjarrao Bhikaji Nagarkar v. Union of India (1999) 7 SCC 409) that disciplinary proceedings would not lie against the officer discharging quasi-judicial functions unless it were established that the officer concerned had obtained an undue advantage thereby or in connection therewith.

"The decision of the Tribunal was challenged by the appellants before the High Court. The High Court came to the conclusion that since no ulterior motive was alleged against the respondent, the Tribunal was correct in quashing the proceedings proceedings against the respondent.

x x x x x x x x x

The law on the subject was considered in extenso in the three Judge Bench decision of Union of India v. K.K.Dhawan (1993) 2 SCC 56) wherein it was noted that the view that no disciplinary action could be initiated against an officer in respect of judicial or quasi judicial functions was wrong. It was further said that the officer who exercises judicial or quasi judicial powers acting negligently or recklessly could be proceeded against by way of disciplinary action.

X x x x x x x x x

The decision in K.K.Dhawan case was considered by this Court and followed in Govt. of T.N. Ramamurthy (1997) 7 SCC 101). In that case the Tribunal had set aside the order imposing punishment on an officer who had been discharging judicial functions. The Court was of the view that the Tribunal's action was contrary to the several judgments of this Court and the settled law on the question.

In 1999 another Bench of two Judges in Zunjarrao Bhikaji Nagarkar considered and referred to these earlier decisions. However, the Court appears to have reverted back to the earlier view of the matter where disciplinary action could be taken against an officer discharging judicial functions only where there was an element of culpability involved. Since in that particular case there was no evidence

whatsoever that the employee had shown any favour to the assessee to whom refund had been made, it was held that the proceedings against him would not lie. In fact the Court set aside the disciplinary proceedings at the stage of the issuance of charge sheet to the charged officer.

In our opinion, Nagarkar case was contrary to the view expressed in K.K.Dhawan case. The decision in K.K.Dhawan being that of a Larger Bench would prevail. The decision in Nagarkar case therefore does not correctly represent the law. Inasmuch as the impugned orders of the Tribunal and the High Court were passed on the law enunciated in Nagarkar case this appeal must be allowed. The impugned decisions are accordingly set aside and the order of punishment upheld."

26. The Applicant of this case while deciding the appeal (case), as it appears, did not call for or examine the seized material in order to verify the facts of the case and passed order only after two sittings. The Applicant, it appears from the record, also deleted the additions (in income) without either cross checking the explanations himself and giving his specific findings thereon or by remanding the matter to the Assessing Officer (AO) for further verification. As observed by the Supreme Court in the case of Kapoorchand Shimal vs. CIT (131·ITR 451460 (SG) (which was followed in a number of judgments thereafter) the appellate authority, in such cases, must verify facts himself or restore the issue with the AO for further verification. AO had sought, specifically, personal hearing and CIT (Appeal) should have abided by the procedure which was not done. He did not call for the seized materials on the basis of which the addition were made and with reference to which the assesse gave his explanations. He neither verified the seized materials himself nor obtained the explanation from the AO. Sh. J.K.Goyal thus failed to observe the most elementary rules

of decision making by an appellate authority and, thus, apparently, favoured to the assessee and caused loss of revenue. In course of search, two audited sets of final accounts giving different figures belonging to the assessee for the same period were found. The assessee's explanation was that the Balance Sheet which gave higher figure was fictitious one and was prepared with a view to obtain Solvancy Certificates and higher credit limits, from banks etc. Apparently, the Chartered Accountant, who had signed the Balance Sheet was also examined by A.O. He said that the balance Sheet giving higher figure was a correct one in so far as it was prepared on the basis of data and documents provided for by the assessee himself. The AO also obtained a copy of the Balance Sheet giving higher figure from the Bank of India, Shahid Nagar Branch, Bhubaneswar. In assessment the AO relied on the balance sheet which gave higher figure, as also corroborated with the copy obtained from the Bank of India and made additions. Shri J.K.Goyal, the Applicant has given into the submission of the assessee and implicitly accepted his contention that the Balance Sheet giving higher figure was only prepared on the basis of estimation. Secondly, Shri Goyal in his own hand in red ink inserted a sentence stating "The A.O also did not obtain the copies of Balance Sheet furnished to the Bank." Ignoring the fact that copy of the balance sheet referred to by the AO was in place in the assessment record itself and the same bears stamp of Bank of India, Shahid Nagar Branch, Bhubaneswar. There was so many such discrepancies that Applicant has committed in passing the ordern in the Appeal of the assessee. The

Applicant placed total reliance on the assertion made by the assessee, totally ignoring the information contained in seized papers. The Applicant simply deleted the addition to the income tax of the assessee though the assessee had not rebutted the findings in the seized papers. The Applicant's action in simply deleting the said addition and discrepancies of over a crore of rupees, without considering the evidence available in seized record was totally questionable. Thus, it cannot be said that the action of the Appellant (the manner of deciding the appeal) cannot be subjected to a Departmental Enquiry merely because he is a 1st appellate (and as a quasi judicial) authority. In para 11.2 of his appellate order the Applicant simply accepted the assessee's version that the Balance Sheet duly signed by AO was self serving "balance sheet prepared with a view to obtain higher credit limit from the banks. This view is contradictory to the ratio of decision of Hon'ble Gauhati High Court rendered in the case of Dhansiram Agarwala vs. CIT (1993) 201 ITR 192) which has also been impliedly affirmed by the Apex Court as the SLP against the said judgment of the Hon'ble Gauhati High Court has been dismissed by the Supreme Court.

27. The question with regard to the orders passed by quasi judicial authority ought constitute misconduct justifying departmental action against the quasi judicial authority is no longer res integra. However, from the records produced and the arguments advanced by the Applicant as well as Respondents by their learned counsel, the action of the Applicant in the instant case cannot be covered within the

parameters decided by various decisions cited by the learned counsel for the Applicant.

Secondly, initiation of the departmental proceeding for serving a charge sheet is not an end of the matter as the Applicant will have liberty to make his points before the departmental authority.

Meanwhile, if the appeal of the department before the Appellate I.T.Tribunal is decided in favour of the assessee, then the Applicant will have the advantage of the decision by Appellate I.T.Tribunal to justify his decision and it will be difficult for the Respondents to procecute him further. However, if his stand is not supported by the orders of Appellate I.T. Tribunal, in that case Respondents should have liberty to pass appropriate orders in the matter.

In Black's Law Dictionary the quasi judicial term has been defined as "a term applied to the action, discretion etc. of public administrative officers or bodies, who are required to investigate facts or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action and to exercise discretion of a judicial nature." From the action of the Applicant in deciding the 1st appeal case as a Commissioner (Appeal) cannot be said that he has acted as was expected of him. The citations submitted by the learned counsel for the Applicant to get the proceedings dropped at this stage cannot be applied to the instant case. As a quasi judicial authority the Applicant was expected to take care of the interest of the revenue and seeks additional information with regard to the facts mentioned in the

assessment order where he felt the need for further verification of facts against the order of the assessing officer by seeking further information or remanding the case to him in case he did not agree to the conclusion arrived at by the Assessing Officer. The argument of the learned counsel that mistake committed by him will be corrected before the appellate forum but that does not absolve him of the charges or having acted in a manner which is irrational and unbecoming of a Government servant and he has certainly not performed his duties as was expected of a 1st Appellate and quasi judicial authority. The 1st Appellate authority in such cases verify the facts just like the A.O. or restore the issue with the AO for further verification that too when AO had sought personal hearing before IT (Appeal) as was decided by the Apex Court in Kapoorchand Shimal vs. CIT (131-ITR 451460 (SC).

28. The Applicant will have the chance to rebut the charges during the proposed departmental enquiry though he has already superannuated. In his own interest the Applicant should face the enquiry to show his bonafide. The charge sheet against him cannot be dropped at this stage. We feel that the wheel of justice must run its full circle and let the law govern the field. In case the stand of the Applicant gets support of I.T.Appellate Tribunal, then the Departmental Proceeding initiated by the Respondents (against the Applicant) will automatically stand dropped. Thus, the Departmental Proceeding against the Applicant need continue and final orders need only be passed after the disposal of the Appeal stated to be pending before the I.T.Appellate Tribunal.

29. Various judgments cited by the learned counsel for the Respondents makes it very clear that Tribunal has neither jurisdiction nor any reason to interfere or to go further into details at this preliminary stage of the Departmental Proceedings. Hon'ble Supreme Court has held that "Tribunal cannot act like an appellate authority as it does not have its jurisdiction to do so." We would not have also delved into the merits of the matter recording preliminary findings/prima facie view on some of the issues, which form the basis for institution of charge sheet against the Applicant; but for compliance with the order of Hon'ble High Court rendered in W.P.(C) No.5747/2003 of the Applicant. We go on record to say that the Disciplinary Authority/Enquiry Authority, without being influenced by order on those preliminary findings/prima facie view of some of the issues to be considered in the Disciplinary Proceedings, should examine the matter independently and pass final orders after the I.T.Appellate Tribunal disposes of the Appeal filed by the Department. Records of the Department should be send back to the appropriate authority promptly to be produced before I.T.Tribunal.

30. In the aforesaid premises the Original Application is dismissed being devoid of merit. There will be no order as to costs.

19.06.08 19/06/08

(KHUSHIRAM)
ADMINISTRATIVE MEMBER

(MANORANJAN MOHANTY)
VICE CHAIRMAN

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URGE

THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram & Arunachal Pradesh)

Writ Petition (C) NO. 5747 of 2003

Dr. J. K. Goyal, Chief Commissioner of Income Tax, Jalpaiguri, West Bengal.

..... ***Petitioner***

-Versus-

1. The Union of India, represented by the Secretary, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi.

2. The Chairman, Central Board of Direct Taxes, Ministry of Finance, North Block, New Delhi.

3. The Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi.

..... ***Respondents***

BEFORE
THE HON'BLE MR JUSTICE A.H. SAIKIA
THE HON'BLE MR JUSTICE B.D. AGARWAL

For the petitioner : Mr. P.K. Tiwari,
Mr. J. Purkayastha, Advocates.

For the respondents : Mr. G.P. Bhowmik, Advocate.

Date of hearing : 10.11.2006

Date of Judgment : 10.11.2006

SC(J)
NS
22.1.07

A.H Saikia, J.

The legality and validity of the order dated 30.05.2003 passed by the Central Administrative Tribunal, Guwahati Bench, (for short, 'the CAT') in Original Application (for short, 'O.A.') No.388/2002 has been assailed in this petition filed by the petitioner under Article 226 read with Article 227 of the Constitution of India.

2. Heard Mr. P.K. Tiwari, the learned counsel for the petitioner as well as Mr. G.P. Bhowmik, the learned counsel represented by the Union of India/respondents.

3. The impugned order has been challenged only on the sole count that though the petitioner approached the CAT questioning basically the validity and continuation of the impugned disciplinary proceeding initiated against him under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short, 'the Rules'), the CAT, instead of interfering with the disciplinary proceeding, directed the respondents to complete the disciplinary proceeding within a time frame of three months from the date of the receipt of the order in absence of availability of the relevant records whatsoever for the perusal of the CAT.

4. In view of the admitted position of non-production records, according to Mr. Tiwari, the CAT ought to have decided the matter on merits on the question of maintainability and also as regards continuation of the disciplinary proceedings instead of referring it to the authority concerned for completion of the disciplinary proceeding within the time schedule as noted above.

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5. We have meticulously perused the impugned judgment and order. In paragraph 6 of the impugned order, it was categorically observed as follows:

> *".....We also noted the vehement criticism of Mr. Tiwari as to the conduct of the respondents in not placing the records before the Bench at the time of hearing. We express our resentment on this matter. When the matter was slated for adjudication it was incumbent on the authority to place the full records of the department and render genuine assistance to the Court or Tribunal to dispense justice. However, considering all the factors mentioned above, we allow the department to complete the disciplinary proceeding. From the documents referred to the charge, the case is based on records, more particularly the records of the Appellate Authority.....".*

6. It transpires from the above view that the CAT was not able to proceed with the case on merit, admittedly, for want of the records, and as such when the petitioner challenged the continuation of the disciplinary proceeding thereof, in our considered view, the CAT ought not to have directed the authority concerned to proceed with the same ad it is, therefore, a fit case for remand.

7. At this stage, Mr. Bhowmik has contended that the entire records has presently been placed before the Income-tax Appellate Tribunal at Bhubaneswar for its perusal due to the pendency of the appeal and the cross-appeal preferred by the parties therein. It is fairly submitted by him that the same would be placed before the CAT as and when necessary and if directed by this Court on remittal of the matter to the CAT for disposal on merit.

8. Upon hearing the learned counsel for the parties and also taking on account the facts and circumstances of the case in its entirety, this Court is inclined, in the interest of justice, to remit the matter to

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the CAT for re-hearing and final disposal on merit by properly examining and appreciating the relevant records on being placed by the department/respondents. We order accordingly.

Since the parties are represented by their respective engaged counsel, they are directed to appear before Tribunal within two months from today. Meanwhile, the department/respondents are also directed to make arrangement for placement of the relevant records before the CAT without default.

9. Till such time that the CAT passes necessary orders on appearance of the parties as indicated above, the interim order passed by this Court on 29.07.2003 shall continue.

10. In view of the above, this writ petition stands disposed of.

Sd/- B.D. Agarwal.
JUDGE

Sd/- A.H. Saikia.
JUDGE

Memo No.HC.XXI. 2682-82 /R.M.Dtd. 22/1/07

Copy forwarded for information and necessary actionto :-

1. The Registrar, Central Administrative Tribunal, Guwahati.

The Judgment has been communicated to the concerned parties vide Memo No. 8116-8118 dtd. 2/12/06.

By order

Asstt.Registrar(Judl.)
Gauhati High Court,Guwahati.

22/1/07

Memo No...C.XXI._____/A.M.Dtd._____

Copy forwarded for information and necessary actionto :-

1. The Registrar, Central Administrative Tribunal, Guwahati.

The Judgment has been communicated in the concerned matter vide Memo No. 6116-6138 dtm. 2/12/06.

By order

Asstt.Registrar(Judl.)
Gauhati High Court,Guwahati.

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CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH

O.A. / ~~MA~~. No. 388 . . of 2002

DATE OF DECISION 30.3.2003.....

J.K. Goyal
. . . . . .APPLICANT(S).

Mr B.K. Sharma, Mr P.K. Tiwari and
Mr S. Sarma
. . . . . ADVOCATE FOR THE APPLICANT(S).

- VERSUS -

The Union of India and others
. . . . . .RESPONDENT(S).

Mr A.K. Chaudhuri, Addl. C.G.S.C.
. . . . . ADVOCATE FOR THE RESPONDENT(S).

THE HON'BLE MR JUSTICE D.N. CHOWHDURY, VICE-CHAIRMAN

THE HON'BLE MR S.K. HAJRA, ADMINISTRATIVE MEMBER

1. Whether Reporters of local papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of the judgment ?

4. Whether the judgment is to be circulated to the other Benches ?

Judgment delivered by Ho'ble Vice-Chairman

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH

Original Application No.388 of 2002

Date of decision: This the 30th day of May 2003

The Hon'ble Mr Justice D.N. Chowdhury, Vice-Chairman

The Hon'ble Mr S.K. Hajra, Administrative Member

J.K. Goyal,
Resident of Fancy Bazar,
Guwahati. .....Applicant

By Advocates Mr B.K. Sharma, Mr P.K. Tiwari and Mr S. Sarma.

- versus -

1. The Union of India, represented by the Secretary,
Department of Revenue,
Ministry of Finance,
Government of India,
New Delhi.
2. The Chairman,
Central Board of Direct Taxes,
Ministry of Finance,
New Delhi.
3. The Under Secretary to the
Government of India,
Ministry of Finance,
Department of Revenue,
Central Board of Direct Taxes,
New Delhi. .....Respondents

By Advocate Mr A.K. Chaudhuri, Addl. C.G.S.C.

.....

O R D E R

CHOWDHURY. J. (V.C.)

The issue is as to the legality, validity and continuation of the impugned disciplinary proceeding initiated against the applicant under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (1965 Rules for short) in the following circumstances:

The applicant while serving as Chief Commissioner, Income Tax, Guwahati, was served with a show cause memorandum calling upon him to explain in respect of his alleged conduct in discharging his duties as a CIT (Appeals). On the same date the applicant was placed under suspension in aid of Rule 10(2) of the 1965 Rules. The applicant, amongst others assailed the order of suspension dated 18.2.2002 before this Bench which is numbered and registered as O.A.No.76 of 2002. During the pendency of the aforementioned O.A. the impugned Memorandum dated 28.10.2002 was issued under the 1965 Rules in respect of the alleged misconduct mentioned in the articles of charge against the applicant which reads as follows:

> "That the saidSh J.K. Goyal while functioning as Commissioner of Income Tax (Appeal)-I Bhubaneswar, showed undue haste in passing appeal order in the case of block assessment of Sh Karuna Kar Mohanty and decided the appeal without exercising due diligence, so as to grant undue favours to the appellant to the detriment of the interest of Revenue. While doing so he
>
> (a) accepted the submissions/claims made by the appellant assessee without examining their veracity with the material facts on record, including search records and without making independent verifications or enquiries with the Assessing Officer.
>
> (b) failed to afford an opportunity to the Assessing Officer, against whose order the appeal was preferred, to be heard as prescribed under the Income Tax Act; and
>
> (c) showed lack of application of mind and predetermination of issues.
>
> By the aforesaid acts of omission and commission Sh J.K. Goyal failed to maintain absolute integrity and devotion to duty and exhibited conduct unbecoming of a Government servant. He thereby violated the Ruels 3(1)(i), 3(1)(ii) and 3(1)(iii) of the CCS (Conduct) Rules, 1964."

The Memorandum was accompanied with the statement of imputations, list of documents in support of the articles

of charge etc. The legitimacy of the action of the respondents is assailed in this O.A. on the ground that the charges levelled against the applicant did not constitute misconduct.

2. In the O.A. the applicant contended that the respondent authority without due application of mind initiated the purported disciplinary proceeding with a view of harass and victimise him with malafide intention. It was contended that the applicant all throughout was exercising quasi judicial power in exercise of the power of Appellate Authority conferred upon him by statute under the Income Tax Act, 1961. A quasi judicial authority, it was contended, is not immune from mistak and error of law or fact and such mistakes or errors are subject to scrutiny by the higher authority.

3. The respondents contested the case and submitted their written statement denying and disputing the claim of the applicant.

4. We have heard the learned counsel for the parties at length. Mr P.K. Tiwari, learned counsel for the applicant, submitted that all throughout the applicant was not getting fair treatment from the respondents. He referred to the earlier departmental proceeding initiated in 1990 which dragged on for years together affecting his service career and finally concluded only at the interference of the Tribunal. Referring to the allegatios contained in the charge memo and the statement of imputations, the learned counsel submitted that the materials did not disclose any misconduct. The charges as alleged does not reflect on his reputation, integrity or good faith or devotion to duty. There was no whisper that the applicant was actuated by any corrupt motives. At the

worst.....

worst it could only be said that the views taken by the applicant as an Appellate Authority was not acceptable to the higher authority and against which, in fact appeal preferred before the Tribunal. In support of his contention, the learned counsel referred to the decision of the Bench in O.A.No.1/2000 and O.A.No.2/2000 disposed of on 28.2.2001. The learned counsel also referred to the decisions rendered by the Supreme Court in Zunjarrao Bhikaji Nagarkar Vs. Union of India and others, reported in (1999) 7 SCC 409 and P.C. Joshi Vs. State of U.P. and others, reported in (2001) 6 SCC 491. Countering the submission of Mr P.K. Tiwari, Mr A.K. Chaudhuri, learned Addl. C.G.S.C., appearing on behalf of the respondents, also referred to the statutory provisions enjoined in the Income Tax Act, 1961 as well as the Income Tax Rules made thereafter. The learned Addl. C.G.S.C. submitted that there are materials to show that in conducting his statutory obligations the officer failed to observe the essential duties. In reply, Mr P.K. Tiwari referred to the conduct of the Assessing Officer who deliberately absented himself while the appeal was posted for hearing. The learned counsel for the applicant referred to the statement of facts contained in the show cause memorandum as well as the adjudication order and stated that these notices as required under Section 250 of the Act read with the Rules were served upon the Assessing Officer and who in turn sent his comments which were duly considered by the Appellate Authority.

5. We have given our anxious consideration in the matter. No doubt, the applicant was discharging quasi judicial power. A quasi judicial act is an act which is

of.....

of judicial nature performed by one who is not acting as a judge. A quasi judicial action is "a term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature". Independent functioning of quasi judicial action is not to be whittled down. There is a meaning behind to protect such exercise from fear or pressure, but it will be trite to say that in all cases in the area of exercise of quasi judicial power no misconduct can be inferred in the exercise of quasi judicial power. If there is obvious gross dereliction in discharge of the duties or if one fails to act honestly or in good faith, in that event there will be no bar from invoking disciplinary jurisdiction. It all depends on facts and situations. We are, however, purposfully not going into the merits of the proceeding at this stage in view of the fact that the disciplinary proceeding is in underway and as a matter of fact the Inquiry Officer was also appointed.

6. We have given our utmost consideration on the issues raised by the parties. Mr P.K. Tiwari is, no doubt right in his submission that in the absence of heedless, indiscreet, irresponsible and dishonest motive in exercise of quasi judicial power no misconduct can be construed. To decide the legal issues raised before us it requires evaluation of the facts, scrutiny of the materials relied upon in framing the charges, the alleged

statement.....

statement of the Assessing Officer dated 20.12.2001 relating to ITNS 51 and the records of the Appellate Authority which are not before us. We were told that the enquiry proceeding is in fact underway and the Inquiry Officer was appointed long back. We, therefore, would like to accede to the stand taken by the Addl. C.G.S.C. We also noted the vehement criticism of Mr Tiwari as to the conduct of the respondents in not placing the records before the Bench at the time of hearing. We express our resentment on this matter. When the matter was slated for adjudication it was incumbent on the authority to place the full records of the department and render genuine assistance to the Court or Tribunal to dispense justice. However, considering all the factors mentiond above, we allow the department to complete the disciplinary proceeding. From the documents referred to the charge, the case is based on records, more particularly the records of the Appellate Authority. Four documents were cited. Mr Tiwari, referring to item 4 of the list of documents in support of the articles of charge contended that the statement dated 20.12.2001 purportedly made by the Assessing Officer in respect of ITNS 51 was not to be accepted since the same was taken as a device/an after-thought to fix the applicant after the event took place. We are not inclined to make any comments at this stage since we feel that the disciplinary proceeding needs to be allowed to be concluded within a time frame. It would be open to the applicant to raise all the issues those were raised here including as to the conduct and credibility of the version of the Assessing Officer.

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7. Considering the facts and circumstances, we feel that ends of justice would be met if a direction is issued to the respondents to complete the disciplinary proceeding with utmost expedition. Considering the fact situation and the nature of the enquiry we direct the authority to conclude the enquiry within three months from the date of receipt of the order. The parties are directed to take necessary steps for concluding the enquiry within the time frame.

8. With the above observation the application thus stands disposed of. There shall, however, be no order as to costs.

(S. K. HAJRA)
ADMINISTRATIVE MEMBER

(D. N. CHOWDHURY)
VICE-CHAIRMAN

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL::GUWAHATI BENCH

(An application under Section 19 of the Administrative Tribunals Act, 1985)

Title of the Case : O.A. No. 388 of 2002

J.K. Goyal ... Applicant

- Versus -

Union of India & Ors. ... Respondents

I N D E X

For use in Tribunal's Office :

Date of filing :

Registration No.

REGISTRAR

Filed by the Applicant through his Advocates
Jaideep Purkayastha
10/12/2002

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH

O.A. No. 388 of 2002

BETWEEN

J.K. Goyal,
resident of Fancy Bazar,
Guwahati-1.

... Applicant

AND

1. The Union of India, represented by the Secretary, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi.

2. The Chairman, Central Board of Direct Taxes, Ministry of Finance, North Block, New Delhi.

3. The Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi.

... Respondents

DETAILS OF APPLICATION

1. PARTICULARS OF THE ORDER AGAINST WHICH THE APPLICATION IS MADE :

The present application is directed against the memorandum of charge vide F.No.C-14011/5/2002-V&L dated 28.10.2002 issued in the name of the President by the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes. In the present application, the Applicant is seeking quashing of the article of charge against him.

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2. JURISDICTION OF THE TRIBUNAL :

The Applicant declares that the subject matter of the application is within the jurisdiction of this Hon'ble Tribunal.

3. LIMITATION :

The Applicant further declares that the application is filed within the limitation period prescribed under Section 21 of the Administrative Tribunals Act, 1985.

4. FACTS OF THE CASE :

4.1 That the Applicant in the present case is seeking quashing of the memorandum of charge issued against him. The impugned memorandum of charge has been issued on the ground of certain alleged act of omission or commission on the part of the Applicant while functioning as Commissioner, Income-tax (Appeals) at Bhubaneswar. It has been alleged that the Applicant when he was posted as the Commissioner, Income Tax (Appeal-I), Bhubaneswar having Appellate jurisdiction over the assessments completed by the Deputy Commissioner, Income Tax (Investigation) Circle-I, Bhubaneswar, had the occasion to decide the appeal in the case of block assessment of one Karunakar Mohanty assessed by the then Deputy Commissioner of Income Tax (Investigation) and the Applicant in the aforesaid capacity passed the order in unseemly hurry without properly appreciating the evidence contained in seized

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papers and without affording any opportunity to the Assessing Officer of being heard. Apart from the fact that the allegations made against the Applicant are baseless, it is to be noted that while discharging his duty as Commissioner of Income Tax (Appeals), the Applicant exercised statutory powers in quasi judicial capacity. His function was to decide a lis between the Department and the assessee in a free and fair manner and against the order passed by him in that capacity, there is a provision for appeal under Section 253 of the Income Tax Act. In the present case, the impugned memorandum of charge has been issued without any just and sufficient reason. The same has also been issued in malafide exercise of power and prima facie it does not disclose recklessness or misconduct of the Applicant in discharge of his duties. In the present case, there is nothing to show that the Applicant had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty. There is also nothing to show that the Applicant had acted in order to unduly favour a party or that his action was actuated by corrupt motive. Suffice it to say that the impugned memorandum of charge is contrary to the established principles of service jurisprudence. Hence the present Original Application.

4.2 That the Applicant is a direct recruit of the Indian Revenue Service belonging to 1969 batch. He joined Indian Revenue Service on 24.7.69.

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4.3 That for proper appreciation of the facts, it would be apposite to advert to the sequence of events of more than a decade of systematic victimisation and harassment of the Applicant by the official Respondents. It is the case of the Applicant that the impugned memorandum of charge is a part of victimisation and harassment of the Applicant which is going on since last more than a decade. Hence before adverting to the facts constituting the impugned memorandum of charge, certain facts pertaining to past events are being referred to.

BACKGROUND OF THE CASE

4.4 That while the Applicant was posted as Deputy Commissioner of Income Tax, Range-I, Raipur (M.P.), a memo dated 19.4.90 was issued alleging a number of acts of misconduct committed by the Applicant. The Applicant submitted his reply on 31.5.90 as well as on 1.9.90. However, a charge memo dated 16.7.91 under Rule 14 of the CCS (CCA) Rules, 1965 was issued containing five articles of charges. Since out of these five articles of charges, the Applicant was exonerated of four charges, therefore, it would be sufficient to refer to fifth charge which was held to be only very marginally proved against the Applicant by the Enquiry Officer. This fifth charge was of making some excessive phone calls from the official telephone.

4.5 That the Applicant submitted his written statement of defence by his communication dated 30.9.91 wherein

he denied each charge contained therein and explained in details as to how the charge under memo dated 16.7.91 was baseless. In his written statement of defence, the Applicant stated in detail as to how the framing of charges is the outcome of grudge held against the Applicant by one Mr. H.O.K. Srivastava who at the relevant time was the Commissioner of Income Tax and under whom the Applicant was posted. According to Applicant, the relationship between him and Mr. H.O.K. Srivastava soured when the DPC held in April 1988 for recommending promotion to the grade of Commissioner of Income Tax superseded the Applicant. Being aggrieved, the Applicant approached the Jabalpur Bench of the Central Administrative Tribunal which in its order dated 17.5.89 held that the performance of the said Mr. H.O.K. Srivastava as reflected in the Annual Confidential Reports was inferior to that of the Applicant and the panel prepared by the April, 1988 DPC wherein the name of the said Shri H.O.K. Srivastava was included was quashed being arbitrary and illegal. It was due to this that the said Shri H.O.K. Srivastava nursed a grudge against the Applicant. It was in this background that the memorandum of charge dated 16.7.91 was issued against the Applicant.

4.6 That the Respondents took considerable time to consider the statement of defence submitted by the Applicant in answer to the charge memo. It was vide order dated 23.6.93 i.e. almost two years after the

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Applicant was charge sheeted, the Respondents finally appointed an Enquiry Officer.

4.7 That the Enquiry Officer started preliminary hearing of the case from 16.8.93 onwards. However, even the hearing of the case could not be conducted smoothly due to non-supply of relevant documents to the Applicant by the Presenting Officer. In this connection, even the direction of the Enquiry Officer were not heeded to by the Respondents. It was under these circumstances that the enquiry against the Applicant could not be conducted speedily.

4.8 That when all this was happening, the aforesaid Mr. H.O.K. Srivastava withheld the clearance of TA Bills of the Applicant. Being aggrieved, the Applicant had to approach the Allahabad Bench of the Central Administrative Tribunal in O.A. No. 848/93 which by its order dated 27.11.97 not only directed the payment of the amount of TA Bills to the Applicant within a period of three months, but also awarded the cost of Rs.5,000/- in his favour.

4.9 That the Enquiry Officer on conclusion of the enquiry submitted the report on 17.5.95 and the same was made available to the Applicant after sixteen months on 17.9.96 vide letter dated 28.8.96. In the enquiry report, the Applicant was exonerated of four charges out of the five charges and the fifth charge was held to be "very marginally proved".

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4.10 That after receiving the copy of the enquiry report, the Applicant gave his reply vide representation dated 22/30.10.96 wherein the Applicant brought out discrepancies, inconsistencies, contradictions and defects in the findings of the Enquiry Officer.

4.11 That thereafter, the Applicant did not receive any further communication from the Respondents, though a number of reminders were sent to the Respondents urging them to finalise the disciplinary proceeding so as to put an end to the agony and unnecessary harassment of the Applicant, but the same was of no avail.

4.12 That meanwhile, the Applicant became due for consideration for further promotion as Chief Commissioner of Income Tax. A DPC for the same took place on 5.2.2001 and in regard to the Applicant, the recommendations of the DPC were put in a sealed cover on account of the pendency of the aforesaid disciplinary proceeding. Being aggrieved, the Applicant filed O.A. No. 590/2001 before the Principal Bench of the Tribunal.

4.13 That the Principal Bench of this Hon'ble Tribunal disposed of the Original Application vide order dated 29.3.2001 with a direction to the disciplinary authority to pass final order in the disciplinary proceeding expeditiously and within a period of two months from the date of service of the order.

4.14 That as the Respondents failed to pass final order in the disciplinary proceeding within the stipulated period of two months as directed in the order of the Hon'ble Tribunal dated 29.3.2001, the Applicant filed a Civil Contempt Petition being C.P. No. 336/2001. The Respondents meanwhile filed an application for extension of time which was listed as M.A. No. 1457/2001. Both the Contempt Petition filed by the Applicant and the M.A. filed by the Respondents were heard by the Hon'ble Tribunal on 6.8.2001 and by the order of the same date, the Hon'ble Tribunal directed the Respondents to open up the sealed cover in respect of the Applicant's promotion and in the event of his being found eligible to grant him a provisional promotion subject to the final orders to be passed in the disciplinary proceeding. The Respondents were directed to do the same within a period of two months from the date of service of the order. For finalisation of the disciplinary proceeding, the Respondents were granted extension of time of six months as prayed.

4.15 That inspite of the stipulation in the order of the Hon'ble Tribunal dated 6.8.2001 regarding the opening of the sealed cover and granting promotion to the Applicant, the Respondents did not do anything in the matter. Consequently, the Applicant filed C.P. No. 633/2001 before the Principal Bench of the Hon'ble Tribunal on 18.10.2001.

4.16 That meanwhile the Applicant filed another Original Application being O.A. No. 2966/2001 before

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the Principal Bench praying for a direction to the Respondents to promote the Applicant to the grade of Chief Commissioner of Income Tax in accordance with the recommendation of the DPC which took place on 5.2.2001. By way of interim relief, the Applicant prayed that the Respondents be restrained from promoting any officer junior to the Applicant to the grade of Chief Commissioner of Income Tax till the Respondents comply with the directions of the Hon'ble Tribunal contained in its order dated 6.8.2001 passed in CP No. 336/2001 in O.A. No. 590/2001.

4.17 That on 30.10.2001, the Hon'ble Tribunal passed the interim order in O.A. No. 2966/2001 restraining the Respondents from promoting any officer junior to the Applicant to the grade of Chief Commissioner of Income Tax till the Respondents comply with the directions of the Hon'ble Tribunal contained in order dated 6.8.2001 passed in C.P. No. 336/2001 in O.A. No. 590/2001.

4.18 That even at this stage, the Respondents instead of acting in compliance of the order of the Hon'ble Tribunal moved the Misc. Application being M.A. No. 2569/2001 in O.A. No. 2966/2001 for vacation of the order dated 30.10.2001 stating inter alia that on account of the said order, the Respondents were not able to fill up vacant post in the grade of Chief Commissioner of Income Tax which is bound to hamper revenue collection. However, the aforesaid statement of the Respondents were thoroughly false as there was

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no impediment in the way of the Respondents to promote other officers on and after 28.12.2001 and before 7.11.2001 when the order dated 30.11.2001 was served. The Respondents issued order of promotion of a number of officers as Chief Commissioner of Income Tax only on 10.1.2002. The Misc. Application No. 2569/2001 was, therefore, meant only to stop the promotion of the Applicant for malafide reasons.

4.19 That the M.A. No. 2569/2001 in O.A. No. 2966/2001 was heard on 23.11.2001 and the same was rejected and the interim order dated 30.10.2001 was made absolute.

4.20 That meanwhile the Respondents filed their reply to C.P. No. 633/2001 and the case was heard on 10.12.2001 and the following order was passed :

"We have perused the reply filed in response to the Contempt Petition. The same has been affirmed by one Shri Sandip Garg, Under Secretary (V&I), Central Board of Direct Taxes, Deptt. of Revenue, New Delhi. Since this is a Contempt Petition, we would have expected the Respondents themselves to have submitted the reply. Be that as it may, we find from the reply that the sealed cover of the Applicant has been opened on 13.11.2001 in terms of the order passed on 6.8.2001. The same was opened after the period provided in the order has already elapsed. The reply further provides that the recommendations of the DPC on opening of the sealed cover have been sent for approval of the ACC and approval of the ACC is awaited. According to Shri

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Uppal, the learned counsel appearing for the contemners, the approval of the ACC will be received within a period of three weeks. We do not find any justification why the approval of the ACC should take such a long duration especially when the same has been approved by the Finance Minister and sent on 23.11.2001. In the circumstances, we direct that in case the approval of the ACC is not received and not implemented within the aforesaid period of three weeks, the contemners will appear before us in person on the adjourned date."

4.21 That inspite of the aforesaid order, the Respondents continued to dither and did not give effect to the various orders of the Hon'ble Tribunal. Instead the Respondents filed a Civil Writ Petition before the Hon'ble Delhi High Court being C.W.P. No. 7483/2001 praying for setting aside the order dated 23.11.2001 passed in O.A. No. 2966/2001. In the aforesaid case, the Division Bench of the Hon'ble Delhi High Court passed the following order :

"Respondent's promotion to the post of Chief Commissioner of Income Tax has remained stalled for a decade or more on a charge of making some excessive phone calls from his official telephone. A charge memo was served on him on 16.7.91 which was followed by an enquiry finalised sometime in 1995. He was not given the inquiry report for which he made repeated representations but in vain.

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Meanwhile Petitioner convened DPC for making promotion to the post and adopted sealed cover procedure qua Respondent. Apprehending that his juniors would be promoted to the post, Respondent filed O.A. No. 590/01 for quashment of pending disciplinary proceedings. Tribunal allowed this O.A. by order dated 29.3.2001 granting Petitioner two months to complete these proceedings. He then filed CCP 336/01 alleging non-compliance of this order and tribunal by order dated 6.8.01 directed Petitioner to open the sealed cover and to grant provisional promotion to Respondent within two months and to complete disciplinary proceedings within six months meanwhile. Petitioner allegedly failed to comply with this order also and initiated steps for making promotion to the post. Respondent challenged this in O.A. 2966/01 and obtained interim order dated 30.10.2001 restraining Petitioner from making any promotion to the post till its order dated 6.8.2001 was complied with Petitioner applied for modification of this order which was rejected and this order made absolute. Hence this petition.

The sequence of events disclose a sorry state of affairs. WE would have dealt with this petition on merit but we are informed that Petitioner was in the process of implementing Tribunal order dated 6.8.2001 by passing appropriate order shortly. Considering that this could end litigation between parties for good and to lend urgency to the matter, we direct the Petitioner

to pass the requisite order pursuant to tribunal order dated 6.8.2001 within two weeks from receipt of this order. Mr. Rajinder Nischal is required to seek compliance of this order from the concerned Authority....."

4.22 That it was under these circumstances, the Respondents were compelled to issue an order dated 28.12.2001 promoting the Applicant to officiate as Chief Commissioner of Income Tax on provisional basis subject to final order to be passed in pending disciplinary proceeding against him after obtaining approval of the Appointments Committee of Cabinet who also dictated the Respondents to fix responsibility for delay in finalisation of disciplinary case. Instead of fixing such responsibility, the Respondents decided to fix up the Applicant in a number of ways.

4.23 That as the Respondents did not finalise the disciplinary proceeding against the Applicant, they filed M.A. No. 177/2002 before the Principal Bench of this Hon'ble Tribunal seeking three months further time for finalisation of disciplinary proceeding. The Principal Seat of this Hon'ble Tribunal in its final order deprecated the delay caused by the Respondents in completing the disciplinary proceeding against the Applicant and gave Respondents six weeks time by way of last opportunity to complete the disciplinary proceeding against the Applicant from 8.1.2002 failing

which the disciplinary proceeding against the Applicant was to abate. This time expired on 18.2.2002.

4.24 That meanwhile, the Applicant submitted a representation dated 4.1.2002 to the Central Vigilance Commissioner wherein he narrated in detail the inordinate delay and various acts of omission and commission on the part of the Respondents in conducting disciplinary proceeding against the Applicant. In his representation, the Applicant stated as to how the fifth charge that has been held to be very marginally proved against the Applicant is frivolous and vexatious and as to how a number of officers for far more excessive billing of the STD telephone have been left unscathed.

4.25 That since the Respondents could not complete the disciplinary proceeding against the Applicant within the six weeks time granted to them by the Principal Bench of this Hon'ble Tribunal, therefore, vide order dated 20.2.2002, the Government of India in exercise of power under Rule 15 of CCS (CCA) Rules, 1965 dropped the disciplinary proceeding initiated vide memorandum dated 16.7.91 without prejudice to any administrative action for recovery of the excess telephone call charges from the Applicant.

FACTS OF THE PRESENT CASE

4.26 That it was in this backdrop that the Applicant was served with a show cause memorandum dated 18.2.2002 which was accompanied by the order of suspension of

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the same date. In the show cause memorandum, the allegation was made against the Applicant that during the period April 2001 to December 2001 when he was posted as Commissioner of Income Tax (Appeals-I), Bhubaneswar having appellate jurisdiction over the assessment completed by the Deputy Commissioner of Income Tax (Investigation) Circle-I and had the occasion to decide the appeal in the case of block assessment of one Karunakar Mohanty assessed by the then Deputy Commissioner of Income Tax, he passed the appellate order in unseemly hurry without properly appreciating the evidence contained in the seized paper and without affording any opportunity to the Assessing Officer of being heard. The Applicant was given 15 days time to submit his explanation against the show cause notice.

Copy of the show cause memorandum dated 18.2.2002 is annexed as ANNEXURE-A/1.

4.27 That after issuing the show cause memorandum dated 18.2.2002, the official Respondents ought to have waited till the stipulated time of at least 15 days so as to enable the Applicant to submit his explanation. However, instead of doing so, on the same date, the order placing the Applicant under suspension was also passed. It is therefore, apparent that in the present case, official Respondents acted with preconceived mind and their act of issuing show cause memorandum to the Applicant was an empty formality.

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Copy of the order of suspension dated 18.2.2002 is annexed as ANNEXURE-A/2.

4.28 That the contents of the show cause memorandum dated 18.2.2002 bear testimony to the fact that the Respondents have acted arbitrarily in total non-application of mind. The allegations made in the show cause notice are frivolous and baseless. The show cause memorandum runs on a theme that though the Applicant as Commissioner of Income Tax (Appeals) was exercising quasi judicial functions, but he ought not to have treated the department and the assessee on an equal footing and that he ought to have given a preferential treatment to the department. The Respondents possibly believed that the job of the Applicant as a quasi judicial authority while determining a lis between the department and the assessee is to lean in favour of the department and any action on his part of deciding a lis in favour of assessee is an act of misconduct.

4.29 That the order of suspension that 18.2.2002 was assailed by the Applicant before this Hon'ble Tribunal in O.A. No. 76/2002 and this Hon'ble Tribunal vide its order dated 10.4.2002 stayed the operation of the order of suspension dated 18.2.2002 until further orders. It was however made clear by the Hon'ble Tribunal that it will be open for the Respondents to approach the Hon'ble Tribunal for alteration and/or modification of the interim order, if they are so advised. As per the order of this Hon'ble Tribunal, the case was listed for orders on 11.5.2002 for fixing the date of hearing.

Copy of the order dated 10.4.2002 passed by this Hon'ble Tribunal in O.A. No. 76/2002 is annexed as ANNEXURE-A/3.

4.30 That notwithstanding the interim order of this Hon'ble Tribunal dated 10.4.2002, the present Applicant was not allowed to discharge his duties as Chief Commissioner of Income Tax and the interim order of the Hon'ble Tribunal was not given effect to by the Respondents. Being faced with this situation, the present Applicant filed a contempt petition No. 21/2002 before this Hon'ble Tribunal under Section 17 of the Administrative Tribunals Act, 1985 read with Rule 24 of the Central Administration Tribunal (Procedure) Rules, 1987.

4.31. That this Hon'ble Tribunal on 29.5.2002 issued notice in contempt petition No. 21/2002. However, immediately after receipt of notice in contempt petition No. 21/2002, the Respondents passed order No. 72 of 2002 dated 4.6.2002 transferring one D. Chakraborty, from the post of Chief Commissioner of Income Tax-IV, Kolkata to the post of Chief Commissioner of Income Tax, Guwahati i.e. the post of the present Applicant. Strangely, in the order No. 72 of 2002 dated 4.6.2002, the post of the Chief Commissioner of Income Tax, Guwahati was shown as a vacant post.

4.32. That the order dated 4.6.2002 resulted in the Applicant filing the M.P. No. 79/2002 in C.P. No.

21/2002 before this Hon'ble Tribunal. The Applicant also filed a separate O.A. No. 181/2002 on 6.6.2002 assailing the legality of the order dated 4.6.2002 pursuant to which on the post of the Applicant at Guwahati, Mr. D. Chakraborty was sought to be transferred. This Hon'ble Tribunal vide its order dated 7.6.2002 admitted the O.A. No. 181/2002 and stayed the order dated 4.6.2002.

4.33. That thereafter on 14.6.2002, the Respondents filed W.P.(C) No. 3947/2002 before the Hon'ble Gauhati High Court assailing the legality of the interim order of this Hon'ble Tribunal dated 10.4.2002 passed in O.A. No. 76/2002 wherein this Hon'ble Tribunal had stayed the operation of the impugned order of suspension dated 18.2.2002. The Hon'ble Gauhati High Court vide its order dated 21.6.2002 admitted the writ petition and stayed the operation of the order of the Hon'ble Tribunal dated 10.4.2002 passed in O.A. No. 76/2002.

4.34. That in view of the interim order of the Hon'ble High Court dated 21.6.2002, this Hon'ble Tribunal vide its order dated 28.6.2002 closed the contempt petition No. 21/2002 and M.P. No. 79/2002 filed in the contempt petition. Further the O.A. No. 181/2002 was also dismissed by an order dated 6.8.2002 in view of stay order granted by the Hon'ble high Court.

4.35. That after the interim order of the Hon'ble High Court dated 21.6.2002 passed in W.P.(C) No. 3947/2002, the present Applicant was made to vacate his

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official accommodation at Uzan Bazar and presently he is living in a room in a hotel. His residential telephone was also removed as if he had been dismissed from service.

4.36. That the present Applicant being aggrieved by the interim order of the Hon'ble High Court dated 21.6.2002 passed in W.P.(C) No. 3947/2002 preferred a Misc. Case No. 1043/2002 in the aforesaid writ petition for vacation/modification of the interim order of stay dated 21.6.2002.

4.37. That the Hon'ble High Court vide its order dated 27.8.2002 disposed of the Misc. Case No. 1043/2002 and vacated the interim order dated 21.6.2002 pursuant to which the interim order of this Hon'ble Tribunal dated 10.4.2002 passed in O.A. No. 76/2002 was stayed.

4.38. That as a result of the order of the Hon'ble High Court dated 27.8.2002, the earlier interim order passed by this Hon'ble Tribunal on 10.4.2002 became effective and operative and consequently, the impugned order of suspension of the Applicant is no longer operative.

4.39. That the order of the Hon'ble Gauhati High Court dated 27.8.2002 resulted in total change of circumstances under which this Hon'ble Tribunal dismissed the O.A. No. 181/2002 vide its order dated 6.8.2002. In view of the changed situation, the

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reasons which impelled the Hon'ble Tribunal to dismiss the O.A. No. 181/2002 became non-existent. Therefore, it became necessary for the present Applicant to prefer the application for review of the order dated 6.8.2002 passed in O.A. No. 181/2002.

4.40. That the present Applicant accordingly preferred review application No. 5/2002 in O.A. No. 181/2002 under Section 22(3)(f) of the Administrative Tribunals Act, 1985.

4.41 That though the Applicant sent not less than eight reminders, the last one being the reminder dated 16.10.2002 for giving the opportunity to peruse and/or inspect the relevant documents so as to enable him to submit an effective representation against show cause dated 18.2.2002, however, despite the promise, neither the copies of those relevant documents were made available to the Applicant nor he was given an opportunity of inspecting the relevant files containing those documents. It is pertinent to mention that the Respondent No.4 vide letter dated 21.3.2002 had informed the Applicant that all the records for which a request was made by the Applicant are available with the Director of Income-tax (Vigilance) East Zone, Kolkata. The Applicant was therefore, directed to approach the Director of Income-tax, East Zone, Ayakar Bhawan, 8th Floor, P-7, Chowranghee Square, Kolkata-700069 for inspecting the relevant documents in his office. It is stated that on 1.4.2002, the Applicant received the copy of the letter dated 21.3.2002 and

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immediately on 2.4.2002, he wrote to the Director of Income-tax (Vigilance), East Zone, Ayakar Bhawan, Kolkata for necessary inspection of relevant records and documents. The letter dated 2.4.2002 was followed by the reminder dated 20.5.2002, but there was no response. The Applicant also wrote to the Under Secretary (Vigilance) Central Board of Direct Taxes on 19.6.2002 in regard to the same matter, but from there also, there was no response. The Applicant, therefore, even after sending eight reminders failed to get the desired response for inspecting the relevant files so as to enable him to prepare and submit an effective representation against the show cause dated 18.2.2002.

Copies of letters and reminders showing the approach made by the Applicant for inspection of relevant records and documents for filing the effective representation are annexed herewith and marked as ANNEXURE-A/4 colly.

4.42 That the Respondents instead of responding to the pleas of the Applicant that he be made available, the relevant documents so as to enable him to file an effective representation against the show cause notice, belatedly served upon him the impugned memorandum of charge dated 28.10.2002. It is noteworthy that the memorandum of charge dated 28.10.2002 repeats the same allegations which were made in the show cause notice. The first stage approval of the Central Vigilance Commissioner for issuing the said memorandum was

obtained by misleading the Commission that the Applicant had not deliberately replied to the show case notice whereas it is the Respondents who intentionally failed to provide inspection of relevant files to the Applicant.

Copy of the memorandum of charge dated 28.10.2002 is annexed as ANNEXURE-A/5.

4.43 That on receipt of the aforesaid memorandum of charge dated 28.10.2002, the Applicant submitted a representation dated 6.11.2002 highlighting his grievances and urged for the withdrawal of the same.

Copy of the representation dated 6.11.2002 is annexed as ANNEXURE-A/6.

4.44 That the memorandum of charge dated 28.10.2002 was followed by the order dated 18.11.2002 passed in the name of the President of India under the signature of the Under Secretary to the Government of India, Ministry of Fiance and Company Affairs, Department of Revenue. Pursuant to this order, in so called compliance of the order of this Hon'ble Tribunal dated 10.4.2002, the operation of the order of suspension dated 18.2.2002 was suspended with effect from 10.4.2002 till further orders.

Copy of the order dated 18.11.2002 is annexed as ANNEXURE-A/7.

4.45 That vide another order No. 181 of 2002 issued on the same date 18.11.2002, the Applicant is posted as

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Chief Commissioner of Income-tax (Officer-on-Special Duty), Guwahati with effect from 10.4.2002 until further orders. It is stated that the aforesaid order has not been officially served upon the Applicant and the same was unofficially sent to the Applicant by his friends. It is not known as to why the Respondents have chosen to keep the order dated 18.11.2002 in the file without official serving the same on the Applicant. Since this order dated 18.11.2002 has not come into effect as yet, the Applicant would be challenging the same in a separate proceeding before this Hon'ble Tribunal.

4.46 That like the show cause notice dated 18.2.2002, in the memorandum of charge also, the Respondents have basically made four allegations against the Applicant viz. (i) passing the appellate order in unseemly hurry without exercising due diligence so as to grant undue favour to the party, (ii) non-appreciation of evidence contained in the seized papers, (iii) opportunity of hearing being not given to the Assessing Officer while passing the appellate order, and (iv) submission of the assessee were accepted without verification.

4.47 That the official Respondents have tried to make an issue of the fact that the appeal in question was against one of the biggest assessment orders in Orissa charge and the fact that the same was decided in a matter of two hearings and that the final order was passed within 32 days of the filing of the appeal, shows undue haste on the part of the Applicant. It is

stated that the officials of the Indian Revenue Service are trained to decide the appeals without being bothered about the nature of assessment order. They are trained to behave in such a manner because it is believed that if the officers of Indian Revenue Service start giving importance to the size and nature of the assessment order, then they would not be able to discharge their duties impartially and fearlessly. In this connection, the past record of the Applicant is also noteworthy. The Applicant as Asstt. Commissioner Appellate during the period November 1979 to July 1983 disposed of approximately 10,000 appeals with an average of more than 2,500 appeals per year. This is an all time record in India. Even as Commissioner of Income Tax (Appeals), the Applicant disposed of approximately 100 appeals per month against the target of 60 appeals per month. Applicant has a reputation of quick disposal of appeals and all other matters. Even the department emphasises the importance of quick disposal of the appeals and the officers capable of quick disposal are rated highly. On account of unduly long time taken by certain Appellate Officers in deciding appeals, the Income Tax Act provided for a stipulation to decide appeals within the period of one year from the date of filing. This time limit is further requested to be reduced by the Central Board of Direct Taxes in respect of appeals involving high demand. Hence it is unfortunate that in the case of the Applicant, department has chosen to make an issue

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of what it calls undue haste on the part of the Applicant as Commissioner of Income Tax (Appeals). In this connection, reference is made to the letter of the Chairman, Central Board of Direct Taxes dated 20.9.2000 and to the instructions No. 1973 of the Government of India dated 28.9.99 wherein speedy disposal of appeal by Commissioner of Income Tax (Appeals) have been emphasised. Moreover, it is not unusual for an appellate authority to dispose of such cases in a period of one month particularly when appeals are accompanied by prayer for stay of demand. There are many instances wherein orders of such nature have been passed by the authorities holding the same position as that of the Applicant disposing of such block assessment appeals in around one month period.

Copies of the letter dated 20.9.2000 and of instruction dated 28.9.99 are annexed as ANNEXURE-A/8 colly.

Applicant craves leave of this Hon'ble Tribunal to produce copies of some of the orders wherein the Block Assessment Appeals were disposed of in around one month period, at the time of hearing of this case.

4.48 That there is not an iota of evidence to even suggest that the Applicant while discharging his quasi-judicial power of Commissioner of Income-tax (Appeals), Bhubaneswar had passed the appellate order dated 13.8.2002 in I.T. Appeal No. 196/ORS/2001-2002 to grant undue favour to the private party therein. The

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appellate order of the Applicant is self-explanatory and it shows due application of mind of the Applicant and his consideration of all relevant documents and records while passing the same order. The appellate order of the Applicant has been annexed in his rejoinder to O.A. No. 76/2002 and the Applicant craves leave of the Hon'ble Tribunal to rely on the same at the time of hearing of this case. That also clearly exhibits that the Applicant had given opportunity of hearing to the Assessing Officer, considered the report sent as well as the records as made available by him (the Assessing Officer).

4.49 That the allegation against the Applicant of granting undue favour to the private party by exercising his quasi-judicial powers of C.I.T. Income Tax (Appeal) in passing the appellate order is vague, general and sweeping. Initiation of disciplinary proceeding against the Applicant cannot take place on vague, general and sweeping allegation. Suspicion has no role to play in such matter. There must exists reasonable basis for the Disciplinary Authority to proceed against the delinquent officer. Merely because appellate order of the Applicant as CIT, Income Tax (Appeal) went partly against the department could not be ground enough to draw an inference against the Applicant that he granted undue favour to the assessee. There has to be some basis for the Disciplinary Authority to reach such a conclusion even prima facie. The record in the present case does not show that the

Disciplinary Authority had any information within its possession from where it could form an opinion that the Applicant showed favour to the assessee by passing an order. The Applicant might have wrongly exercised his jurisdiction, but that wrong can be corrected in appeal. That cannot always form a basis for initiating disciplinary proceedings against an officer while he is acting as a quasi-judicial authority. Being a quasi-judicial authority, the Applicant is always subjected to judicial supervision and appeal. In this connection, it is pertinent to mention that against the order passed by the Applicant as C.I.T. (Appeals), Bhubaneswar, cross appeals have been filed both by the department as well as by the assessee and the same are pending disposal before the Income-tax Appellate Tribunal.

4.50 That the allegations made against the Applicant that he accepted the submissions/claims made by the assessee without examining their veracity with the materials facts on records, including case records and without making independent verification or enquiries with the Assessing Officer, are equally vague, general and sweeping. The order of the Applicant dated 13.8.2001 passed in I.T. Appeal No. 196/ORS/2001-02 run into 78 pages. The order is self-explanatory and unequivocally demonstrate the fairness of the action of the Applicant like providing more than one opportunity to the Assessing officer for presenting his case and consideration of his submissions. In the present case,

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the competent authority acted exclusively on the basis of the allegation of the Assessing officer who himself was an interested party in the case and against whom there were serious allegations of corruption/ harassment. Even assuming without admitting that this allegation is true, then also the same cannot form the basis of initiation of disciplinary proceeding. In a quasi-judicial adjudication, omission to consider the relevant materials or negligence in doing so, has to be a culpable negligence. It is not negligence perceived as carelessness, inadvertence or omission. Misconduct does not come within the purview of error in judgment, carelessness or negligence in performance of duty. However, the appellate order of the Applicant is self-explanatory and it prima facie demonstrate exercise of due care and diligence by the Applicant in passing the appellate order while exercising his quasi-judicial powers.

4.51 That the impugned memorandum of charge makes an issue of the Applicant not hearing the Assessing Officer while deciding a lis between the Department and the assessee. It is pertinent to mention that the two different notices dated 16.7.2001 and 17.7.2001 were sent to Assessing Officer. The assessing Officer in response sent his report/written submission on 19.7.2001 which was received in the office of the Commissioner of Income-tax (Appeals) on 20.7.2001. The written submission/report of the Assessing Officer was duly considered by the Applicant while exercising the

powers of Commissioner of Income-tax (Appeals). The first hearing took place on 24.7.2001 and the second hearing took place on 25.7.2001. The Assessing Officer had full knowledge of the dates of hearing as the same were intimated to him. For the reasons best known to the Assessing Officer including his habit, he chose not to appear before the Applicant on the days of hearing. It is also not worthy that while sending his report/written submission, the Assessing Officer did not express any desire to be heard in person. In this connection, it is to be noted that most of the cases of such nature are decided without the original records and copy of the notice also is not normally sent to the Assessing Officer. It is noteworthy that providing an opportunity of hearing to the Assessing Officer is more an exception than a rule and this fact is well known to the Income Tax officials. If the Assessing Officer did not appear despite having knowledge of the dates of hearing, then he is to be blamed for this. It is emphasised that most of the cases are decided at the level of Commissioner of Income-tax (Appeals) without the original records or on the basis of whatever part/split records are made available by the Assessing officer. This fact is also well known in the Income tax Department. The Commissioner of Income-tax (Appeals) is expected to decide the lis on the basis of the records and materials available before him. Hence, there was nothing unusual in the conduct of the Applicant as Commissioner of Income-tax (Appeals).

4.52 That the Applicant while functioning as Commissioner of Income Tax (Appeals), Bhubaneswar vide his various communications dated 3.8.2001, 6.8.2001, 31.10.2001, 9.11.2001 and 28.9.2001 focussed on the fact of non-appearance of the concerned Assessing Officer during hearing of the appeals. The Applicant also drew the attention of the officials towards the fact that the Assessing Officers do not make available the case records in the course of hearing of the appeals. In his D.O. letter dated 6.8.2001 addressed to Shri S.P. Swain, Commissioner of Income Tax, Bhubaneswar, the Applicant specially stated that while functioning as Addl. Commissioner of Income Tax (Hqrs.) of the office of the Chief Commissioner of Income Tax, Bhubaneswar, the aforesaid Shri Swain had addressed a letter to the Commissioner of Income Tax (Appeals) that ITNS-51 was not being sent to the Assessing Officer so also memos of appeals and that the appeals were being decided without calling for the case records. While referring to the aforesaid, the Applicant pointed out that on receipt of the letter of Shri Swain, he kept a close watch over such matters and found that the Assessing Officer despite clear opportunity do not send case records and also do not return the ITNS-51. It was also pointed out by the Applicant that the Assessing Officer choose not to remain present during the course of hearing of the appeal. It was also pointed by the Applicant that in a number of cases, when the notices

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for hearing are sent to the Assessing Officers, they do not even return the notices in time after having got them duly served or otherwise. In his letter of 31.10.2001 addressed to the Joint Commissioner of Income Tax, Range-I, Bhubaneswar, the Applicant gave details of the appeals on the date of hearing of which not a single record was received in the office, nor the Assessing Officers were prepared to render necessary assistance on the ground that the notices for hearing from the office of the Joint Commissioner of Income Tax were received in their office only a day before. Similarly in his letter dated 9.11.2001 addressed to the Joint Commissioner of Income Tax, Range-I, Bhubaneswar, the Applicant informed that the Assessing Officer did not appear in the hearing of any of the appeals during the aforesaid period. The Applicant desired to know the reasons for the same vide his aforesaid letter. The letter of the Applicant dated 28.11.2001 is in regard to the same matter and highlights the fact that non-appearance of the Assessing Officer in the course of hearing of the appeals is a Rule rather than an exception. It is noteworthy that all the communications mentioned above were sent by the Applicant in his capacity of Commissioner of Income Tax (Appeals), Bhubaneswar. The aforesaid communications bear testimony to the fact that the Applicant while discharging his duties of Commissioner of Income Tax (Appeals) faced difficulties and hardships because of lack of proper assistance from the Assessing Officers. It is to the credit of the

Applicant that despite these difficulties, he did his utmost in ensuring the quick disposal of the appeals.

Copies of the communications dated 3.8.2001, 6.8.2001, 31.10.2002, 9.11.2001 and 28.11.2001 are annexed as ANNEXURE-A/9 colly.

4.53 That moreover notwithstanding the fact that the Applicant was facing difficulties in ensuring quick disposal of the appeals because of lack of cooperation from the Assessing Officers, the Government of India, office of the Commissioner of Income Tax vide D.O. letter dated 12/13.6.2001, D.O. letter dated 6.8.2001 and memorandum dated 3.8.2001 exerted the pressure on the Applicant for quick disposal of the high demand appeals. In the aforesaid D.O. letters, the Applicant was directed to dispose of specified number of high demand appeals within the stipulated period. It is, therefore, seen that the Applicant was expected to ensure quick disposal of high demand appeals. It is, therefore, unfortunate that without any just and sufficient reasons, the Respondents in the present case are putting the blame on the Applicant for quick disposal of the high demand appeal in question. The Respondents are avoiding disposal of such appeals by the Income-tax Appellate Tribunal.

Copies of the D.O. letters dated 12/13.6.2001, 6.8.2001 and memorandum dated 3.8.2001 are annexed as ANNEXURE-A/10 colly.

4.54 That similarly the allegation of showing lack of application of mind and predetermination of issues are equally vague and the same cannot form any basis for initiation of disciplinary proceeding. Moreover, such an allegation relates to the error in exercise of power against which the remedy lies in the form of an appeal. As stated earlier, cross-appeals filed by the Department and the assessee are pending against the appellate order of the Applicant passed as Commissioner of Income-tax (Appeals), Bhubaneswar.

4.55 That in the show cause memorandum, an effort has been made to make an issue of so called disappearance of ITNS-51. It is stated that ITNS-51 is a non-statutory form which is sent to the Assessing Officer on receipt of the appeal to indicate certain factors like whether the appeal preferred is within the period of limitation, whether the undisputed taxes have been paid by the assessee or not and whether the Assessing officer would like to appear in person to assist the Commissioner of Income-tax (Appeals). It is not the job of the Applicant as Commissioner of Income-tax (Appeals) to find out as to why the ITNS-51 is not on the record. The objective behind the ITNS-51 is to give opportunity and intimation to the Assessing Officer about the hearing of the appeal. In any case, the Assessing Officer was provided sufficient opportunity to assist the Commissioner of Income-tax (Appeals) and he was given due notice of the date of hearing. The Assessing Officer also sent his written

submission and for his own reasons, he chose not to appear before the Appellate Authority. As Commissioner of Income-tax (Appeals), it was well nigh impossible for the Applicant to carry out the documentation in the file and to ensure that all the documents in the file are kept properly. Be that as it may, no motive can be imputed to the Applicant. It is also difficult to understand as to how the interest of the department has been prejudiced by the so called disappearance of the ITNS-51 from the appellate file. In the show cause memorandum, much has been made out of the factum of Applicant allegedly underlining thrice by red-ink pen the words "copies of ITNS-51". From this effort has been made to show that ITNS-51 was very much in the appellate file. It must not be forgotten that the factum of underlining the aforesaid expression with red-ink pen can also be indicative of the fact that the ITNS-51 was not present in the file and as such, the same was marked with red-ink pen by the Applicant. The official Respondents have chosen to drawn presumptions and inferences to buttress their arguments about the presence of ITNS-51 in the appellate file.

4.56 That in the statement of allegations, the effort has been made to make an issue of the fact that the appellate order was dated 6.8.2001 and the date was subsequently changed in hand to 13.8.2001. It is stated that the dictation might have been given on 6.8.2001 and the correction of the draft and finalisation of the order which ran into 78 pages, migh

have taken a few more days. The final order was passed on 13.8.2001. Hence nothing can be made out of changing of date of the appellate order from 6.8.2001 to 13.8.2001. The appellate order which ran into 78 pages could not have been pronounced without the necessary corrections. It is unfortunate that the official Respondents are blowing the petty matters out of proportion to suit their design.

4.57 That the statement of allegations also states about personal receipt of the order by the Assessee as per the marginal acknowledgment dated 14.8.2001 on the body of the order sheet of the CIT (Appeals) file. It is stated that after the pronouncement of the order file no longer remains with the Appellate Authority who becomes functus officio and the same is sent to the office. As to how the assessee collects the copy from the department is a matter between the department/office and the assessee. It is not the job of the CIT (Appeals) to retain the file after the pronouncement of the order.

4.58 That the statement of allegation deals copiously with the so called irregularities committed by the Applicant in deciding the matter pertaining to block assessment. What has been stated to be irregularities are the matters dealing with the merits of the order passed by the Applicant as Commissioner of Income-tax (Appeals). It is stated that if every error of law and/or fact were to constitute a charge of misconduct,

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it would impinge upon an independent function of quasi judicial officers like the Applicant. Since in sum and substance, misconduct is sought to be inferred by the official Respondents for having committed an error of law and/or of fact, the charge sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. As stated earlier, the appellate order passed by the Applicant as Commissioner of Income-tax(Appeals) has been challenged in cross-appeals filed by both the assessee and the Department and the same is pending disposal before the Income Tax Appellate Tribunal. Hence, the copious arguments advanced by the Respondents in the statement of allegation against the so called irregularities committed by the Applicant while passing the appellate order as Commissioner of Income-tax(Appeals) which relate to merits of the appellate order, cannot form a basis for initiating disciplinary proceeding against the Applicant.

4.59 That the present case is a fit case wherein this Hon'ble Tribunal may be pleased to stay the operation and effect of the impugned memorandum of charge dated 28.10.2002. The Applicant has made out a prima facie of illegality and arbitrariness on the part of the official Respondents. The balance of convenience is in favour of the Applicant and he would suffer irreparable loss and injury if the interim order as prayed for is not passed by this Hon'ble Tribunal.

4.60 That the Applicant files this application bonafide for the ends of justice.

5. GROUNDS FOR RELIEF WITH LEGAL PROVISIONS :

5.1 Because initiation of disciplinary proceeding against an officer cannot take place on information which is vague or indefinite. Suspicion has no role to play. There must exist reasonable basis for the Disciplinary Authority to proceed against the delinquent officer. Merely because the Applicant partly allowed the appeal of the assessee exercising his quasi judicial power of Commissioner of Income-tax (Appeals), could not be enough to proceed against him.

5.2 Because when appeal of the assessee was partly allowed, but it cannot be said that by partly allowing the appeal in favour of the assessee, the officer has favoured assessee or showed undue favour to him. There has to be some basis for the Disciplinary Authority to reach such a conclusion even prima facie. Records in the present case do no show that the Disciplinary Authority had any information within its possession from where it could form an opinion that the Applicant showed "favour" to the assessee by partly allowing his appeal. The Applicant while exercising his powers of Commissioner of Income-tax (Appeals) might have exercised his jurisdiction wrongly, but that wrong could be corrected in appeal. That cannot always form a basis for initiating disciplinary proceeding against an officer while he is acting as a quasi judicial

authority inasmuch as being a quasi judicial authority he is always subject to judicial supervision in appeal. Moreover in the instant case, cross appeals against the appellate order of the Applicant are pending disposal before the Income Tax Appellate Tribunal.

5.3 Because to maintain a charge sheet against quasi judicial authority something more has to be alleged than a mere mistake of law or of procedural irregularity or non-compliance of the principles of natural justice e.g. in the nature of some extraneous consideration influencing quasi judicial order. Since nothing of this sort is alleged herein which is based on some evidence, the impugned charge sheet is rendered illegal.

5.4 Because the memorandum of charge read with imputation of misconduct/statement of allegation only alleged that the Applicant was in error by partly allowing the appeal of the assessee and that the appeal of the assessee warranted dismissal, but there is no allegation of any corrupt motive or any familiarity with the party.

5.5 Because the charge sheet can only be issued if there is prima facie material. In the present case there is no material let alone prima facie material, rendering the charge sheet ab-initio void.

5.6 Because a perusal of the statement of allegation annexed alongwith the charge sheet demonstrate that the case of the Respondents is that by having committed

an error of law coupled with procedural irregularity which was favourable to the party, the Applicant has shown favour. On the face of it, such conduct cannot constitute favour as required to sustain a charge of a misconduct. In other words factum of Applicant committing an error of law or procedural irregularity while exercising statutory quasi judicial powers of Commissioner of Income-tax (Appeals) does not amount to showing of favour which is sine qua non for the maintainability of the charge sheet.

5.7 Because a wrong interpretation of law (assuming there is one), or omission to act in conformity with certain procedural requirement or non-compliance with the principles of natural justice cannot be a ground for misconduct. In the present case, there is nothing to show even prima facie that the action of the Applicant was deliberate and actuated by malafide. It is submitted that negligence in quasi judicial adjudication is not carelessness, inadvertence or omission, but a culpable negligence. In the present case, there is no prima facie evidence to show that the Applicant was guilty of culpable negligence while exercising his quasi judicial powers of Commissioner of Income-tax (Appeals).

5.8 Because a memorandum of charge read with imputation of misconduct coupled with the documents or records mentioned therein do not even prima facie disclose a material to show recklessness or misconduct

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by the Applicant in discharge of his duty. There is no prima facie evidence to show that the Applicant acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty or that he has acted in a manner which is unbecoming of a Government servant or that he omitted to act as per the prescribed conditions which are essential for the exercise of the statutory powers. There is also nothing to show even prima facie that the Applicant acted in order to unduly favour a party and that his actions were actuated by corrupt motive.

5.9 Because the impugned memorandum of charge has been issued in malafide exercise of power primarily for the purpose of harassing and victimising the Applicant. Events in the past suggest that the Respondents are inimical to the Applicant. Since they bear a grudge against the Applicant that is why the impugned charge sheet has been issued.

6. DETAILS OF REMEDIES EXHAUSTED :

The Applicant declares that in the facts and circumstances of the case, no adequate appropriate remedy is available to him.

7. MATTERS NOT PREVIOUSLY FILED OR PENDING BEFORE ANY OTHER COURT :

The Applicant further declares that he has not filed any application, writ petition or suit regarding the matter in respect of which this application has been made before any Court, Authority or any other Bench of the Hon'ble Tribunal nor any such application, writ petition or suit is pending before any of them.

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8. RELIEFS SOUGHT FOR :

8.1 Quash and set aside the memorandum F.No.C-14011/5/2002-V&L dated 28.10.2002 issued the Under Secretary, to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes.

8.2 Pass such other order/orders as may be deemed fit and proper by this Hon'ble Tribunal in the facts and circumstances of the case.

8.3 Cost of this application.

9. INTERIM ORDER PRAYED FOR :

Pending disposal of the application be further pleased to stay the operation and effect of the impugned memorandum of charge dated 28.10.2002 issued the Under Secretary, to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes.

10. .....

The application is filed through Advocate.

11. PARTICULARS OF THE I.P.O. :

i) I.P.O. No. : 7G 606596 (Rs 50.00/-)

ii) Date : 9/12/2002

iii) Payable at : Guwahati.

12. LIST OF ENCLOSURES :

As stated in the Index.

Verification....

VERIFICATION

I, Dr. J.K. Goyal, aged about 58 years, son of Shri M.L. Goyal, resident of Fancy Bazar, Guwahati-1, do hereby solemnly affirm and verify that the statements made in paragraphs 4.1 to 4.19, 4.22 to 4.25, 4.28 to 4.40, 4.45 to 4.47, 4.49 to 4.52 are true to my knowledge ; those made in paragraphs 4,20, 4.21, 4.26, 4.27, 4.41 to 4.44, 4.48, 4.53 to 4.59 are true to my information derived from records and the rests are my humble submissions before the Hon'ble Tribunal.

And I sign this verification on this the 10th day of December 2002 at Guwahati.

J. K. Goyal.

ANNEXURE-A/1

F.No. C-14011/5/2002-V&L
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes.

New Delhi: dated the 18th February 20

SHOW CAUSE MEMORANDUM

Whereas during the period April 2001 to December 2001 Sri J K Goyal was posted as the CIT(Appeals)-I Bhubaneshwar, having appellate jurisdiction over the assessments completed by the DCIT (Inv) Circle-1, Bhubaneshwar and had the occasion to decide the appeal in the case of block assessment of Shri Karuna Kar Mohanty, assessed by the then DCIT (Inv) Circle-1, Bhubaneshwar.

2. Whereas in that case, as against Nil undisclosed income for the block period, assessment was made on a total income of Rs.9,92,59,143/- and the assessment order was served on assessee on 29.6.2001.

3. Whereas in that case the appeal memo in Form No.35 was filed on 12.7.2001 and was given appeal No.196/ORS/2001-2002. And on 16.7.2001 along with the appeal memo, assessee's application for stay of the demand raised in the block assessment was also forwarded to the AO for his report and Vide notice u/s. 250 dated 17.7.2001, the case was fixed for hearing on 24.7.2001. Copy of the notice shows that a copy was endorsed to the Assessing Officer for confirmation and necessary action.

4. Whereas the then DCIT, Investigation Circle-1 Bhubaneshwar (the AO) vide his letter No.DCIT/Inv./Circle-1/2001-02/91 dated 19th July, 2001, sent his report to Sri J K Goyal as the CIT(A), which was received on 20.7.2001 and is on the record of the CIT(A)'s file.

5. Whereas in that report, the Assessing Officer submitted that ample opportunity was given to the assessee and despite these op; rtunities, assessee failed to explain properly the transactions mentioned in the block assessment order, on the basis of which additions were made. Further, the assessee was also confronted with the results of inquiries made by him. The AO at the end submitted that contentions made by the assessee in the grounds of appeal and in the stay application are not factually correct or legally sound and therefore, requested that the grounds of appeal and stay application may be rejected.

6. Whereas at the end of his letter, the AO stated that the copy of ITNS-51 and Block Assessment records both were enclosed with this letter which was duly received in the office of Sri J K Goyal,CIT(A), on 20.7.2001, the said ITNS-51 is not found on the record of the CIT(A).

7. Whereas the then AO confirmed in writing that only one copy of the ITNS-51 was received, which was sent back to Sri J K Goyal without retaining any office copy with him and that he had sought personal appearance and also had requested that in case the CIT (Appeals) needed any clarification, further report should be called for from him.

8. Whereas the last sentence of the AO's letter dated 19.7.2001 in the record of the CIT(A)'s file has been underlined in red ink by the CIT(A)'s own hand and the words "copies of ITNS-51" have been underlined thrice by red ink-pen, which the CIT(A) has used for marking the rest of the letter and other documents, which, in the absence of any further correspondence on this issue, clearly suggests that the said ITNS-51 was received and seen by Sri J K Goyal as the CIT(A).

Attested

P. K Tiwari
Advocate

9. Whereas, as per the notings in the ordersheet of the CIT(A)'s file on 24.7.2001, Sri J K Goyal as the CIT(Appeals) heard the case without calling the Assessing Officer, who was thus not given an opportunity to rebut the contention of the assessee. Neither the seized material was called for examination by Sri J K Goyal as CIT(A) nor the AO was asked to give his comments on the written submission made by the assessee before Sri Goyal.

10. Whereas the CIT(A)'s order sheet reads that on 24.7.2001 the assessee was present and was partly heard and on 25.7.2001, the order sheet entry reads "the assessee is present with Sh. B.N. Mahapatra, Advocate, A/R". Next entry on the order sheet dated 13.8.2001 states in Hindi that the order is passed, which amply and clearly suggests that neither the AO was asked to be present nor was he afforded an opportunity to go through the submissions and evidences produced by the assessee before the CIT(A) and to present, before him, the Department's point of view.

11. Whereas the copy of the order was received personally by Shri K.K. Mohanty, assessee, as per the marginal acknowledgement dated 14.8.2001 on the body of the order sheet of the CIT(A)'s file, which is quite unusual because normally the appellate orders are despatched by post rather than handed over personally to the assessee.

12. Whereas apart from the fact that appeal against one of the biggest assessment orders in Orissa Charge was decided in a matter of two hearings, showing undue haste as the final order was passed within 32 days of the filing of the appeal, even the order sheet entry dated 25.7.2001 does not indicate that the case was fully heard. It is also pertinent to note that Shri K.K. Mohanty filed written submissions of 19 pages apparently on 24.7.2001, as the written submissions are signed by the appellant Shri K.K. Mohanty on 24.7.2001. These written submissions along with the Annexures were never sent to the AO for his comments or even for verification as to whether the Annexures filed were not new evidence or whether the text tallied with what was submitted with the AO.

13. Whereas the above sequence of events clearly shows total lack of application of mind and predetermination of issues by Sri J K Goyal as the CIT(A), as the assessment order spread over 29 pages, grounds of appeal comprising 96 grounds spread over 23 pages and written submissions spread over 19 pages filed on 24.7.2001, were all decided in two hearings on 24th and 25th July, 2001. It is also pertinent to note that the appellate order is dated 6th August, 2001 and this date was subsequently changed in hand to 13th August, 2001. Thus, as on 6th August, 2001, Sri Goyal as CIT(A) had already decided the issues against the Department and yet did not give an opportunity to the AO till 13th August, 2001, when the order was finally signed. It is also pertinent to note that at no stage before passing of the order did CIT(Appeals) call for the seized material and examine it or cause it to be examined.

14. Whereas even on merits, Sri J K Goyal committed gross irregularities in deciding the following issues :

14.1 The AO had found large discrepancies in the quantum of contract work reported by the assessee and the figures obtained by him from the Govt. Agencies, which awarded the contract, and which were duly confronted with the assessee in the course of assessment proceedings. The aggregate of the discrepancies was over a crore of Rupees. Though Sri Goyal as the CIT(A) has reproduced the details from the assessment order, in para-13 of his order, he accepted the assessee's version in a summary manner stating in Para - 13.1 " **The above explanation is plausible and has not been gone through or cross checked by the AO before taking an adverse view on the basis of show cause notice dated 30.5.2001. In the circumstances, the additions made on account of such Table-1 by the Ld. AO are hereby deleted."**

If the only ground on which the deletion has been made by Shri J K Goyal, as the CIT(A), is that the explanation of the assessee was not cross checked by the AO, Sri Goyal, as the CIT(A), is all the more guilty of deleting the additions without either cross checking the explanations himself, and giving any specific findings on each item on merits or by remanding the matter to the AO. As observed by the Supreme Court in the case of **Kapoorchand Shrimal Vs CIT (131 ITR 451, 460 (SC), which was followed in a**

Attested

P. K. Tiwari
Advocate

number of judgements thereafter, the first appellate authority in such cases must verify the facts himself or restore the issue with the AO for further verification. These duties cast on the CIT(A) assume greater significance in the instant case because the AO had specifically sought personal hearing. No such procedure was followed by Sri J K Goyal in deciding the above referred appeal.

14.2 Similarly in para - 13.3 onwards Sri J K Goyal, as the CIT(A), has blindly accepted the version of the assessee without seeking AO's version. Further, the fact that he, as the CIT(A), did not even prefer to call for the seized materials on the basis of which additions were made and with reference to which the assessee gave his explanations, (thus without himself verifying the seized materials) and also without obtaining the explanation from the AO, shows that Sri Goyal as the CIT(A) failed to observe the most elementary rules of decision making by an appellate authority and thus bestowed favour to the assessee and caused loss to the Revenue.

14.3 In the course of search, two audited sets of final accounts giving different figures relating to the assessee's business for the same period, i.e. F Y 96-97 and F Y 97-98, were found. The assessee's explanation was that the Balance Sheets which gave the higher figure were fictitious and were prepared with a view to obtain Solvency Certificates and higher credit limits from banks, etc. Apparently, the Chartered Accountant, who had signed the Balance Sheet was also examined. He said that the Balance Sheet giving higher figure was a correct one in so far as it was prepared on the basis of data and documents provided by the assessee himself. The AO also obtained copies of both the Balance Sheets, giving higher figures, from the Bank of India, Sahid Nagar Branch, Bhubaneshwar. These copies bear the official stamps of Bank of India. The AO relied on the balance sheets which gave the higher figure, as also corroborated with the copies obtained from the Bank of India, and made additions. In para-3 of the appellate order, Sri J K Goyal, as the CIT(A), has given the submission of the assessee and implicitly accepted his contention that the Balance Sheet giving higher figure was only prepared on the basis of estimation. Secondly, as the CIT(A), Sri Goyal in his own hand, in red ink, has inserted a sentence stating "The AO also did not obtain the copies of Balance Sheet furnished to the Bank", ignoring the fact that copies of the balance sheets referred to by the AO were in place in the assessment record itself and the same bear the stamp of Bank of India, Sahid Nagar Branch, Bhubaneswar, as the AO obtained the same from that bank through Inspector of Income Tax.

14.4 In para-11 Sri Goyal, as the CIT(A), after referring to the affidavits of the assessee filed on 7.6.2001 and also to FIR dated 2.7.99 filed with the Police, observed that **" It is a settled law that the contents of an affidavit cannot be rejected outright unless the deponent has been examined and it is brought on record during the course of examination that such contents are wrong, in which case the deponent can also be proceeded with for *perjury*. No such thing was done. Even the Ld. CA, Shri B.N. Subudhi, who was examined by the AO(such examination was not available in the case record) was not subjected to explain as to how two sets of financial affairs were signed by him for the same period in respect of the same appellant."** However, it is also a settled law that on all issues considered by the AO, jurisdiction of the CIT(A) is co-terminus with that of the AO. If the AO, who was a junior officer and clearly was under lot of pressure of work, could not afford such cross examination, Sri Goyal, as the CIT(A), was duty bound himself to do so or cause it to be done by the AO. No such procedure was followed by him while deciding the above referred appeal.

14.5 The aforesaid observation is in fact contrary to the factual position obtaining from records. In fact, the A.O. did put the following questions to Sh. Subudhi, CA and his answers were as follows(*as excerpted from his statement on oath recorded by the AO on 01-12-2000) :*

"Q.8 : Please refer to your answer to question No.7 above. Please specify what are the informations/materials supplied by Sri Karunakar Mohanty for preparation of proforma balance sheet and audited balance sheet as on 31.3.97 and 31.3.98 and as stated above while preparing the proforma balance sheet as on 31.3.98. have you verified the true and

Attested

P. K Tiwari

correct information as supplied by Sri Karunakar Mohanty to you while the audited balance sheet for year ending 31.3.97 substantially differed in quantum of assets/liabilities as mentioned in proforma balance sheet for 31.3.97.

Ans: The proforma balance sheet for 31.3.97 was prepared as per the list of assets/liabilities furnished by Sri Karunakar Mohanty at the time of preparation of the proforma balance sheet. But the audited balance sheet was prepared as per the records furnished to us.

As the assessee had promised to furnish the records in support of total assets/ liabilities at the time of audit, relying on the clients undertaking, the proforma balance sheet was prepared for 31.3.98.

.....

Q.10 : As a cerified auditor of ICAI, did you verify the assets and liabilities mentioned by Karunakar Mohanty for preparation of proforma balance of 31.3.97 and 31.3.98?

Ans. The proforma balance sheet is subject to audit and certification later, when the audited balance sheet is prepared. We have only prepared proforma balance sheet for 31.3.97 and 31.3.98 and signed the same as it was prepared by us based on the information provided by Shri K.K. Mohanty at that time. The details were not verified at the time of preparation of proforma balance sheet as same was not provided by Shri K.K. Mohanty at that time and to be furnished later at the time of audit.

Q.11 : Please produce those informations which were furnished to you for preparation of proforma balance sheet as on 31.3.97 and 31.3.98?

Ans. : I am unable to produce the same now and I will produce the same by 15th Dec.'2000.

(The above information was never supplied)

Q.12 : As a certified auditor, did you ask Sri Karunakar Mohanty regarding substantial difference of assets/liabilities as mentioned by you in the proforma balance sheet as on 31.3.97 and 31.3.98 vis-a-vis those of audited balance sheet as on 31.3.97 and 31.3.98? If so, what are the explanations given by Sri Karunakar Mohanty to you?

Ans. : We did ask him about the difference in the assets and liabilities in both the balance sheets.

As I remember, he had explained that due to some documentation problem, he could not produce the records in support of all the assets and liabilities. I don't remember any specific detail now

.....

Q.14 : Please refer to your answer to question No.13. Do you confirm actual gross understatement of value of assets possessed by Karunakar Mohanty but not shown to you in terms of supportive details in proforma balance sheets vis-a-vis audited balance sheets as on 31.3.97 and 31.3.98?

Ans. Yes, I do confirm that when I prepared and signed the proforma balance sheet as on 31.3.97 and 31.3.98, I thought it to be true and correct on the basis of informations supplied by Sri Karunakar Mohanty to me. However, on preparation of audited balance sheet on 31.3.97, I pointed out to Sri Karuna Kar Mohanty regarding the gross understatement of the values of assets as informed by said Sri Mohanty, while preparing the proforma balance sheet on 31.3.97 and Sri Mohanty despite our repeated request, did not supply those supportive details regarding the value of assets as per the proforma balance sheet as on 31.3.97. "

The above examination clearly reveals that assessee was duty bound to explain the variation in the two balance sheets which he never did in the course of assessment or the appellate proceedings. And yet, the CIT (A) without any basis deleted the addition by simply discrediting the balance sheets filed with the Bank.

Attested

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P. K Tiwari

Adv. [illegible]

14.6 It is also noted that Sri J K Goyal, as the CIT(A), has himself observed that the examination of the CA was not available in the case record nor any copy of it found placed in the appellate records and yet he gave a finding that relevant question was not put to Shri Subudhi, C A. Thus, Sri Goyal's bias and mala fide becomes clear in his relying on a self serving report filed by the assessee with the police and also on the fact that the assessee was not cross - examined by the AO. He totally ignored the examination of the C A which brought out the culpability of the assessee. As CIT(A), in para 11.2 of his order, Sri Goyal simply accepted the assessee's version that the proforma Balance Sheet duly signed by the CA was a self - serving balance sheet prepared with a view to obtain higher credit limit from the banks. Even this view is contradictory to the ratio of the decision of the Gauhati High Court in the case of **Dhansiram Agarwalla Vs. CIT(1993) 201 ITR 192), which has also been impliedly affirmed by the Honourable Supreme Court as the SLP against the said Judgement of the Hon'ble Gauhati High Court has been dismissed by the Supreme Court.**

15. Whereas there are other similar irregularities in the appellate order where the version of the assessee has been blindly accepted without cross verification from the seized materials and without obtaining a report of the AO on the written submission filed by the assessee on 24.7.2001, which have been enumerated as under :

15.1 The AO made additions of Rs. 19,67,693/- and Rs.7,48,055/- representing undisclosed investment in purchase of granulator and a mix plant respectively. The AO relied on seized paper which suggested that these machineries were purchased from one Utkal Stone Crusher and Everest Engineering Company. The assessee furnished an affidavit that these items had not been purchased by the assessee and the additions made on these accounts were deleted by Sri J K Goyal as the CIT(A). In this case, as is evident from many other incidents cited above, it was one person's version against another and in such a situation, the only course open before Sri Goyal as the CIT(A) was to collect necessary information from the alleged sellers of these machineries to find out whether those were actually purchased by the assessee or were only in the nature of proposals. Instead of arriving at the true nature of transaction as the first appellate authority, Sri Goyal again placed total reliance on the assertion made by the assessee, totally ignoring the information contained in seized papers.

15.2 In seized papers marked as KCP-6, page-1 and KCP-24, page-6, there was reference to investments of Rs.2,70,000 and Rs.2,31,000/-, total amounting to Rs.5,01,000/-, for financial year 1997-98 and the AO proposed, in a show cause notice issued and served to the assessee, to add this amount as undisclosed investments. The assessee, in his reply, mentioned that unless the original papers or photocopies were made available to him it would not be possible to offer any explanation on this issue. In short, there has been no rebuttal by the assessee of the stand taken by the AO ; the assessee only expressed his inability to offer any explanation in absence of photocopies being made available. The assessee had already taken photocopies of necessary seized papers earlier and since this process was completed long back, the AO did not allow photocopies of these documents to be given separately to the assessee. During appellate proceedings, this matter was reiterated by the assessee and Sri J K Goyal, as the CIT(A), deleted the addition without considering the evidence in the seized papers. As mentioned earlier, the assessee has not rebutted the findings in the seized papers and, therefore, Sri Goyal's action, as CIT(A), in simply deleting the said addition without considering the evidence available in seized record, was totally unwarranted.

15.3 In an order determining undisclosed income at Rs.9,92,59,143/- Sri J K Goyal, as CIT(A), has deleted the entire additions except two items (Rs.3,50,000+Rs.4,18,000) totalling Rs.7,68,000/-. While confirming these additions, he has mentioned that four bank slips were seized from the residence of the appellant and, as per presumption laid down u/s.132(4A), the burden lay on the appellant to claim that he had nothing to do with the same. It is not understood as to why the same reasoning and test have not been applied by Sri Goyal, as the CIT(A), to the other issues involving much larger revenue stakes, such as

Attested

P. K. Tiwari
Advocate

seized material reflecting discrepancies on account of unaccounted expenditure amounting to Rs.22,06,000/-, unaccounted sale of cement and steel amounting to Rs.12,36,180/- and inflation of expenditure to the tune of Rs.80,09,159/- seized either from the assessee's own premises or from the premises of the accountant who maintained assessee's books of accounts.

From the above, it appears that Sri J K Goyal, while functioning as CIT (Appeals) - I, Bhubaneshwar, passed the above referred appellate order in unseemly hurry without properly appreciating the evidences contained in seized papers and without affording any opportunity to the AO to be heard as prescribed under the Act. J K Goyal is hereby given an opportunity to say what he may have to say, to explain his above mentioned actions. His explanation, if any, should be made in writing and submitted so as to reach the undersigned not later than 15 days from the date of receipt of this memorandum by Shri J K Goyal.

(Sandip Garg)
Under Secretary to the Govt. of India
O/C.

Shri J.K. Goyal,
Chief Commissioner of Income Tax,
Guwahati.
(Through DIT(Vigilance), Kolkata)

Copy to :

1. DIT(Vigilance), Kolkata alongwith the copy meant for Shri J.K. Goyal, CCIT, Guwahati.
2. V&L Section, CBDT, New Delhi.
3. US(AD-VI)/US(AD-VI-A)/DT(Per.), CBDT, North Block.
4. Secretary, CVC, New Delhi.
5. office copy.

Issued 19/1/02

(Sandip Garg)
Under Secretary(V&L)
O/C

Attested
P. K Tiwari
Advocate

ANNEXURE-A/2

F.No.C-14011/5/2002-V&L
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

257, North Block, New Delhi
Dated 18th February 2002

Order Under Rule 10(2) of the CCS(CCA) Rules, 1965

WHEREAS a disciplinary proceeding against Shri J.K.Goyal, Chief Commissioner of Income Tax, Guwahati is contemplated.

Now, therefore, the President in exercise of the powers conferred by subrule (1) of Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, hereby places the said Shri J.K.Goyal under suspension with immediate effect.

It is further ordered that during the period that this order shall remain in force the headquarters of Shri J.K.Goyal, Chief Commissioner of Income Tax should be Guwahati and the said Shri J.K.Goyal shall not leave the headquarters without obtaining the previous permission of the undersigned.

(By order and in the name of the President of India)

(Sandip Garg)
Under Secretary to the Government of India

Shri J.K.Goyal,
CCIT, Guwahati (under suspension)

(Through DIT (Vig.), Kolkata)

Copy to:-

1. The Director General of Income Tax (Vig.), New Delhi
2. The Director of Income Tax (Vig.), Kolkata
3. Deputy Secretary Ad.VI, CBDT, New Delhi

(Sandip Garg)
Under Secretary to the Government of India

Attested

P. K. Tiwari
Advocate

ANNEXURE - A/3

IN THE ADMINISTRATIVE TRIBUNAL, GUWAHATI BENCH, GUWAHATI.

Original No.76/2002

Applicant : JK Goyal

Respondents: Union of India and others.

Advocate for Applicant: Mr BK Sharma, PK Tiwari, S Sarma, UK Nair.

Date : **ORDER**

10.4.2002 Heard Mr BK Sharma, learned Sr counsel for the applicant and also Mr AK Choudhury, learned Addl CGSC, appearing on behalf of the respondents on the interim matter.

By order dated 18.2.2002 the applicant was placed under suspension in aid of power conferred by sub rule 1 of Rule 10 of the Central Civil Services (Classification, Control, and Appeal) Rules, 1965. The said communication was preceded by show cause Memo dated 18.2.2002 indicating that the suspension order was directly related to the disposal of an appeal by the applicant relating to block assessment of one Shri Karunakar Mohanty, earlier assessed by the then DCIT(Inv) circle-I, Bhubaneswar.

It was alleged that the applicant passed the appellate order in unseemly hurry, without properly appreciating the evidence contained in seized papers and without affording any opportunity to the AO to be heard as prescribed under the Act. On the own showing of the respondents the applicant alleged that the suspension order is directly attributable to its exercise of quasi judicial power conferred by its statute. It is also stated that against the very order passed by the applicant, both the revenue as well as the assesse had preferred appeals before the Income Tax Appellate Tribunal under Section 253 of the Income Tax Act. I have also perused the reasons assigned in the show cause asking explanation from the official as to the grounds for holding the appellate authority guilty of unseemly hurry without

Attested

P. K Tiwari

properly appreciating the evidence and without affording the AO to be heard. It at best only shows that the officer passed a wrong order and erred in appreciation of facts and the law. It may be noted that the alleged ground of imputation pertains to exercise of quasi judicial power conferred on the Appellate Authority under Section 251 of the Income Tax Act. There is an obvious distinction between judicial-quasi judicial function quo administrative function. An Administrative decision is made according to the administration policy. In the former act, the authority attempt to find out the right result according to legal principles and norms. The expression quasi judicial is a sobriquet or a label for the exercise of power to administration. Such power is to be exercised in legal and judicial way - where he has the jurisdiction to err. These are only tentative view expressed while examining the interim prayer.

Instead of passing any interim order, though I would have preferred for disposal of the OA on merit, but that is not immediately possible since the other member consisting of this Bench is not inclined to take up the matter. The hearing of the application is likely to take some more time, therefore, the interim application is taken up.

The alleged imputation are based on assessment records which are presently pending before the Income Tax Appellate Tribunal. There is thus no scope for the applicant to deflect on interpolate the evidence and all the materials on which the alleged misconduct is based.

Considering all aspects of the matter, the factors like the balance of convenience, irreparable loss and public interest, I, therefore, pass the interim order suspending the operation of the order No.F.No.C-14011/5/2002-V&L dated 18.2.2002 until further orders. It will, however, always be open to the respondents to come for alteration and or modification of the interim order, if they are so advised.

List the case for order on 11.5.2002 for fixing a date of hearing.

Sd/- **VICE CHAIRMAN**

Attested

P. K Tiwari

99

ANNEXURE-A/4 Colly

Dr. J. K. Goyal, IRS
B.E., LL.M., Ph.D., M.B.A.
Chief Commissioner of Income Tax

Dt. 02.04.2002.

To,

The Director of Income-tax (Vig.),
East Zone,
Aayakar Bhawan, 8th Floor,
P - 7, Chowringhee Square,
Kolkata - 700 069.

Sir,

This has a reference to Under Secretary (V & L)'s letter dated 21.03.2002, received by me on 01.04.2002, in response to my letter dated 01.03.2002 in connection with the Show Cause Memorandum dated 18.02.2002.

2. You might have received the necessary instructions in the matter. Kindly make available to me authenticated copies of the documents requested in my letter dated 01.03.2002 and to accede to other requests contained in the same.

Thanking you

Yours faithfully,

(Dr. J. K. GOYAL)
C. C. I. T.,
Guwahati (u.s.).

Copy to the Under Secretary (V & L), Ministry of Finance, Department of Revenue, New Delhi. The time-limit of 15 days ~~can~~ be reckoned with only from the date of completion of my request contained in letter dated 01.03.2002.

(J. K. GOYAL)

Attested

P. K Tiwari
Advocate

100

From:

Dr. J. K. Goyal, IRS,
Chief Commissioner of Income-tax,
Guwahati.

May 20, 2002.

To,

The Director of Income-tax (Vig.),
East Zone,
Aayakar Bhawan, 8th Floor,
P - 7, Chowringhee Square,
Kolkata - 700 069.

Sir,

Kindly refer to my letter dated 02-04-2002 addressed to you (Copy endorsed for ready reference). I have not heard anything in the matter so far.

2. Kindly expedite copies of relevant documents as also of the A.O.'s affidavit, C.V.C.'s advice, etc., for further action at this end.

Thanking you.

Yours faithfully,

(J. K. GOYAL)
Chief Commissioner of Income-tax,
Guwahati.

Copy to the Under Secretary (V & L), Central Board of Direct Taxes, 257, North Block, New Delhi, for necessary action in the matter.

(J. K. GOYAL)

भारतीय डाक
INDIA POST
GUWAHATI GENERAL POST OFFICE (781001)
RLA/ 54075
Counter No:1,OP-Code:01L19
To:DIR.OF INCOME TAX,
KOLKATA
Wt:13grams,
Amt:21.00 , 20/05/2002 , 15:15:03
Have a nice day

भारतीय डाक
INDIA POST
GUWAHATI GENERAL POST OFFICE (781001)
RLA 54075
Counter No:1,OP-Code:01L19
To:SECY/MINISTRY OF FINANCE
N.DELHI-1
Wt:13grams,
Amt:21.00 , 20/05/2002 , 15:15:24
Have a nice day

Attested
P. K. Tiwari
Advocate

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From: Dr. J.K. Goyal, IRS,
Chief Commissioner of Income-tax,
Guwahati.

June 19, 2002.

To

The Under Secretary(V&L),
Central Board of Direct Taxes,
257, North Block,
NEW DELHI.

Sir,

Kindly refer to the show cause letter from F.No.C-14011/5/2002-V&L, dated 18-02-2002 and my request dated 01-03-2002 wherein certain documents were requested for to which your reply through letter dated 21-03-2002 was that the same were available with the DI, Vigilance(East), Calcutta, who was requested vide my letter dated 02-04-2002 (copy endorsed to you also) to make available the same. As this was not done, a reminder was again sent to the DI on 20-05-2002 but so far I have not been supplied the copies of relevant documents requested for. I am enclosing herewith copy of my letter dated 20-05-2002 for ready reference.

It is requested that necessary action may please be taken at an early date.

Yours faithfully,

Enclo.: As stated.

(J.K. GOYAL),
Chief Commissioner of Income-tax,
Guwahati.

बीमा नहीं INSURED
लगाये गये डाक टिकटों का मूल्य रु. पै.
Amount of Stamps affixed Rs. 22 P.
एक रजिस्ट्री ... प्राप्त किया
Received a Registered ... Under Sec CBDT
पानेवाले का नाम
Addressed to
क्रमांक 5394
No.
तारीख मोहर
Date Stamp
डाकघर के अधिकारी के हस्ताक्षर
Signature of Receiving Officer

Attested

R. K. Tiwari
Advocate

ANNEXURE-A/5

F.No C-14011/5/2002-V&L
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES

NEW DELHI dated the 28th October, 2002.

MEMORANDUM

The President proposes to hold an inquiry against Shri J K Goyal, Chief Commissioner of Income Tax (under suspension), under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. The substance of the imputations of misconduct or misbehaviour in respect of which the inquiry is proposed to be held is set out in the enclosed statement of articles of charge (Annexure I). A statement of the imputations of misconduct or misbehaviour in support of each article of charge is enclosed (Annexure II). A list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained are also enclosed (Annexure III and IV).

2. Shri J K Goyal is directed to submit within 20 days of the receipt of this Memorandum a written statement of his defence and also to state whether he desires to be heard in person.

3. He is informed that an inquiry will be held only in respect of those articles of charge as are not admitted. He should, therefore, specifically admit or deny each article of charge.

4. Shri Goyal is further informed that if he does not submit his written statement of defence on or before the date specified in para. 2 above, or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of Rule 14 of the CCS (CCA) Rules, 1965, or the orders/directions issued in pursuance of the said rule, the inquiring authority may hold the inquiry against him *ex parte*.

5. Attention of Shri Goyal is invited to Rule 20 of the Central Civil Services (Conduct) Rules, 1964, under which no Government servant shall bring or attempt to bring any political or outside influence to bear upon any superior authority to further his interest in respect of matters pertaining to his service under the Government. If any representation is received on his behalf from another person in respect of any matter dealt with in these proceedings it will be presumed that Shri Goyal is aware of such a representation and that it has been made at his instance and action will be taken against him for violation of Rule 20 of the CCS (Conduct) Rules, 1964.

6. The receipt of the Memorandum may be acknowledged.

(V K SINGH)
Under Secretary to the Govt. of India

To:
Shri J K Goyal,
Chief. Commissioner of Income Tax (under suspension)
(The CCIT Guwahati)

Attested

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Copy to:

1. CCIT, Guwahati alongwith the copy meant for Shri J.K.Goyal, CCIT(under suspension).
2. US(AD-VI)/AD-VI-A/DT(Per), North Block, New Delhi.
3. DGIT(Vigilance), New Delhi.
4. Secretary, CVC, New Delhi.
5. Office copy.

(V.K. Singh)
Under Secretary to the Government of India.

Attested

R. K. Tiwari
Advocate

ANNEXURE- I

104

STATEMENT OF ARTICLE OF CHARGE AGAINST SH J K GOYAL, THE THEN COMMISSIONER OF INCOME TAX (APPEAL) – I, BHUBANESWAR

Article I

That the said Sh J K Goyal while functioning as Commissioner of Income Tax (Appeal)-I Bhubaneswar, showed ~~undue~~ haste in passing appeal order in the case of block assessment of Sh Karuna Kar Mohanty and decided the appeal ~~without exercising due diligence~~ so as to grant ~~undue favours~~ to the appellant to the detriment of the interest of Revenue. While doing so he

(a) accepted the submissions/claims made by the appellant assessee without examining their veracity with the material facts on record, including search records and without making independent verifications or enquiries with the Assessing Officer;

(b) failed to afford an opportunity to the Assessing Officer, against whose order the appeal was preferred, to be heard as prescribed under the Income Tax Act; and

(c) showed lack of application of mind and predetermination of issues.

By the aforesaid acts of omission and commission Sh J K Goyal failed to maintain absolute integrity and devotion to duty and exhibited conduct unbecoming of a Government servant. He thereby violated the Rules 3(1)(i), 3(1)(ii) and 3(1) (iii) of the CCS (Conduct) Rules, 1964.

S 251

Attested

R. K. Tiwari
Advocate

ANNEXURE-II

105

STATEMENT OF IMPUTATION OF MISCONDUCT OR MISBEHAVIOUR IN SUPPORT OF THE ARTICLE OF CHARGE FRAMED AGAINST SH J K GOYAL, THE THEN COMMISSIONER OF INCOME TAX (APPEALS)-I, BHUBANESWAR

Article I

During the period April 2001 to December 2001 Sh J K Goyal was posted as CIT(Appeals) - I Bhubaneswar, having appellate jurisdiction over the assessments completed by the DCIT(Inv) Circle - 1 , Bhubaneswar and had the occasion to decide the appeal in the case of block assessment of Shri Karuna Kar Mohanty, assessed by the then DCIT(Inv) Circle -1, Bhubaneswar.

2. In that case, as against Nil undisclosed income for the block period, assessment was made on a total income of Rs.9,92,59,143/-.and the assessment order was served on the assessee on 29.6.2001. The appeal memo in Form No. 35 was filed on 12.7.2001, which was given appeal No. 196/QRS/2001-2002. On 16.7.2001, along with the appeal memo, assessee's application for stay of the demand raised in the block assessment was also forwarded to the AO for his report. Vide notice u/s.250 dated 17.7.2001, the appeal was fixed for hearing on 24.7.2001. Copy of the notice shows that a copy was endorsed to the Assessing Officer (AO) for confirmation and necessary action.

3. The then DCIT, Investigation Circle - 1 Bhubaneswar (the AO), vide his letter No. DCIT/Inv./ Circle-1/2001-02/91 dated 19th July, 2001, sent his report to Sh J K Goyal CIT(A), which was received on 20.7.2001 and is on the record of CIT(A)'s file. In that report, the Assessing Officer submitted that ample opportunity was given to the assessee and that despite these opportunities, assessee failed to explain properly the transactions mentioned in the block assessment order, on the basis of which additions were made. Further, that the assessee was also confronted with the results of enquiries made by the AO. It was also submitted by the Assessing Officer that contentions made by the assessee appellant in the grounds of appeal and in the stay application were not factually correct or legally sound and it was requested, therefore, that the grounds of appeal and stay application may be rejected.

4. At the end of his letter, the Assessing Officer stated that the copy of ITNS - 51 and Block Assessment records both were enclosed with this letter which was duly received in the office of CIT(A) on 20.7.2001. The said ITNS- 51 is not found in the record of the CIT(A). The then AO,Shri S. R. Senapati, has confirmed in writing that only one copy of the ITNS-51 was received, which was sent back to Sh J K Goyal without retaining any office copy with him and that he had sought personal appearance and also had requested that in case the CIT(Appeals) needed any clarification, further report should be called for from him.

The last sentence of the A.O's letter dated 19.7.2001, in the record of the CIT(A)'s file, has been underlined in red ink by the CIT(A) Sh J K Goyal's own hand and the words *"copies of ITNS-51"* have been underlined thrice by red ink-pen, which the CIT(A) has used for marking rest of the letter and other documents, This, in the absence of any further correspondence on this issue, clearly suggests that the said ITNS- 51 was received and seen by Sh J K Goyal as the C. (A).

5. As per the notings in the ordersheet of the CIT(A)'s file, on 24.7.2001, Sh J K Goyal heard the case without calling the Assessing Officer. The order sheet reads that on 24.7.2001 the assessee was present and was partly heard and on 25.7.2001, the order sheet entry reads *"the assessee is present with Shri B. N. Mahapatra, Advocate, AIR"*. Next entry on the order sheet dated 13.8.2001 states in Hindi that the order is passed.

Attested

P. K. Tiwari
Advocate

Left at 19.7.01

6. This amply and clearly shows that neither was the AO asked to be present nor was he afforded an opportunity to go through the submissions and evidences produced by the assessee before the CIT(A) and to present before him, the Department's point of view. Sh Goyal also did not call for or examine the seized material in order to verify the facts of the case.

7. One of the biggest assessment orders in Orissa Charge was decided in a matter of two hearings, showing undue haste as the final order was passed within a month of the filing of the appeal, even the order sheet entry dated 25.7.2001 does not indicate that the case was fully heard. It is also pertinent to note that Shri K.K. Mohanty filed written submissions of 19 pages apparently on 24.7.2001 as the written submissions are signed by the appellant Shri K.K. Mohanty on 24.7.2001. These written submissions along with the Annexures were never sent to the A. O for his comments or even for verification as to whether the Annexures filed were not new evidence or whether the text tallied with what was submitted with the AO. The assessment order spread-over 29 pages, grounds of appeal comprising 96 grounds spread-over 23 pages and written submissions spread-over 19 pages filed on 24.7.2001, were all decided in two hearings on 24th and 25th July, 2001. It is also pertinent to note that the appellate order is dated 6th August, 2001 and this date was subsequently changed in hand to 13th August, 2001. Thus, as on 6th August, 2001, Sh J K Goyal had already decided the issues against the Department and yet did not give an opportunity to the AO till 13th August, 2001 when the order was finally signed.

7.1 The copy of the order was received personally by Shri K.K. Mohanty, assessee, as per the marginal acknowledgment dated 14.8.2001 on the body of the order sheet of the CIT(A)'s file, which is unusual, because normally the appellate orders are despatched by post rather than handed over personally to the assessee

7.2 The above sequence of events shows that Sh. J K Goyal decided the appeal in undue haste, without giving opportunity to the A O to represent the Department's case. It also shows total lack of application of mind and predetermination of issues by Sh. Goyal while deciding the appeal. This, along with the fact that the appeal order handed over personally to the assessee/appellant, indicates that Sh. Goyal's actions were guided by ulterior motives.

Even on merits, Sh J K Goyal committed gross irregularities in deciding the following issues:

8. The AO found large discrepancies in the quantum of contract work reported by the assessee and the figures obtained by him from the Govt. Agencies, which had awarded the contract, and duly confronted the assessee with those figures in the course of assessment proceedings. The aggregate of the discrepancies was over a crore of Rupees. Though Sh J K Goyal has reproduced the details from the assessment order, in para-13 of the appellate order, he accepted the assesssee's version in a summary manner stating, in Para - 13.1 *"The above explanation is plausible and has not been gone through or cross checked by the AO before taking an adverse view on the basis of show cause notice dated 30.5.2001. In the circumstances, the additions made on account of such Table-1 by the Ld. A.O. are hereby deleted".*

However, Sh J K Goyal is as much guilty of deleting the additions without either cross checking the explanations himself and giving his specific findings thereon or by remanding the matter to the AO. As observed by the Supreme Court in the case of *Kapoorchand Shrimal Vs CIT (131 ITR 451, 460 (SC))* which was followed in a number of judgements thereafter, the first appellate authority in such cases must verify the facts himself or restore the issue with the AO for further verification. These duties cast on the CIT(A) assume greater significance in the instant case because the AO had specifically sought personal hearing. No such procedure was followed by Sh J K Goyal in deciding the above referred appeal.

Attested

P. K Tiwari
Advocate

9. Similarly in para - 13.3 onwards, of his order, Sh J K Goyal accepted the version of the assessee without seekin AO's version. Further, Sh J K Goyal did not even call for the seized materials on the basis of which additions were made and with reference to which the assessee gave his explanations. He neither verified the seized materials himself nor obtained the explanation fro the AO. Sh J K Goyal thus failed to observe the most elementary rules of decision making by an appellate authority and thus bestowed favour to the assessee and caused loss to revenue.

10. In course of search, two audited sets of final accounts giving different figures belonging to the assessee for the same period were found. The assessee's explanation was that the Balance Sheet which gave higher figure was fictitious one and was prepared with a view to obtain Solvency Certificates and higher credit limits , from banks etc. Apparently, the Chartered Accountant, who has signed the Balance Sheet was also examined. He said that the Balance Sheet giving higher figure was a correct one in so far as it was prepared on the basis of data and documents provided for by the assessee himself. The AO also obtained a copy of the Balance Sheet giving higher figure from the Bank of India, Shahid Nagar Branch, Bhubaneswar. In assessment the AO relied on the balance sheet which gave higher figure, as also corroborated with the copy obtained from the Bank of India and made additions.

In para - 3 of the appellate order, Sh J K Goyal has given the submission of the assessee and implicitly accepted his contention that the Balance Sheet giving higher figure was only prepared on the basis of estimation. Secondly, Sh J K Goyal in his own hand in red ink inserted a sentence stating "*The A.O also did not obtain the copies of Balance Sheet furnished to the Bank*" ignoring the fact that copy of the balance sheet referred to by the AO was in place in the assessment record itself and the same bears stamp of Bank of India, Shahid Nagar Branch, Bhubaneswar, as the AO obtained the same from that bank through Inspector of Income Tax. In para- 1.1 Sh J K Goyal after referring to the affidavits of the assessee filed on 7.6.2001 and also to FIR dated 2.7.99 filed with the Police observed that "*It is a settled law that the contents of an affidavit cannot be rejected outright unless the deponent has been examined and it is brought on record during the course of examination that such contents are wrong in which case the deponent can also be proceeded with for per jury. No such thing was done. Even the Ld. CA., Shri B.N. Subudhi, who was examined by the A.O.(such examination was not available in the case record) was not subjected to explain as to how two sets of financial affairs were signed by him for the same period in respect of the same appellant*".

It is a settled law that on all issues considered by the AO., jurisdiction of the CIT(A) is co-terminus with that of the A.O. If the AO, who was a junior officer and clearly was under lot of pressure of work, could not afford such cross examination, Sh J K Goyal as CIT(A) was duty bound himself to do so or cause it to be done by the A.O. No such procedure was followed by Sh J K Goyal while deciding the above referred appeal.

Further, Sh J K Goyal also concluded, without assigning any reason or basis, as to what the C.A was asked to explain, because he himself had observed that the examination of the C.A was not available in the case record nor any copy of it found placed in the appellate records. In para 11.2 of his order, Sh J K Goyal simply accepted the assessee's version that the Balance Sheet duly signed by the C.A was a self serving balance sheet prepared with a view to obtain higher credit limit from the banks. Even this view is contradictory to the ratio of the decision of the Gauhati High Court in the case of *Dhanisiram Agarwalla Vs. CIT((1993) 201 ITR 192)*, which has also been impliedly affirmed by the Honorable Supreme Court as the SLP against the said Judgement of the Hon'ble Gauhati High Court has been dismissed by the Supreme Court.

Thus Sh Goyal failed in his duty as an appellate authority to carry out the examination of the witness/evidence to arrive at the correct facts. He acted contrary to law in accepting the assessee appellant's version that the balance sheet showing higher

Attested

P. K Tiwari
Advocate

figure was a fictitious, self-serving one. This shows malafide on the part of Sh. Goyal and his bias towards the appellant.

Other similar irregularities in the appellate order, where the version of the assessee has been accepted without cross verification from the seized materials and without obtaining a report of the A. O. on the written submission filed by the assessee on 24.7.2001, are enumerated as under:

11 The AO made additions of Rs. 19,67,693/- and Rs. 7,48,055/- representing undisclosed investment in purchase of granulator and a mix plant respectively. The A.O relied on seized paper which suggested that these machineries were purchased from one Utkal Stone Crusher and Everest Engineering Company. The assessee furnished an affidavit that these items have not been purchased by the assessee and the additions made on these accounts were deleted. In this case, as is evident from many other instances cited above, it was one person's version against another and in such a situation, the only course open before Sh J K Goyal was to collect necessary information from the alleged sellers of these machineries to find out whether those were actually purchased by the assessee or were only in the nature of proposals. Instead of arriving at the true nature of transaction as the first appellate authority, Sh J K Goyal again placed total reliance on the assertion made by the assessee, totally ignoring the information contained in seized papers.

12 In the seized papers marked as KCP-6, page-1 and KCP-24, page-6, there was reference to investments of Rs. 2,70,000 and Rs.2,31,000/-, total amounting to Rs.5,01,000/-, for financial year 1997-98 and the AO proposed in a show cause notice issued and served to the assesseee to add this amount as undisclosed investments. The assessee in his reply mentioned that unless the original papers or photocopies were made available to him it would not be possible to offer any explanation on this issue. In short, there was no rebuttal by the assessee of the stand taken by the A.O; the assessee only expressed his inability to offer any explanation in absence of photocopies being made available. The assessee had already taken photocopies of necessary seized papers earlier and since this process was completed long back, the A.O did not allow photocopies of these documents to be again given separately to the assessee. During appellate proceedings, this matter was reiterated by the assessee and Sh J K Goyal simply deleted the addition. Since the assessee had not rebutted the findings in the seized papers, Sh J K Goyal's action in simply deleting the said addition, without considering the evidence available in seized record, was totally unwarranted.

13 In an order determining undisclosed income at Rs. 9,92,59,143/- Sh J K Goyal deleted the entire additions except two items (Rs.3,50,000 + Rs. 4,18,000) totalling Rs. 7,68,000/-. While confirming these additions Sh J K Goyal mentioned that four bank slips were seized from the residence of the appellant and as per presumption laid down u/s.132(4A), the burden lay on the appellant to claim that he had nothing to do with the same. However, Sh Goyal declined to apply the same reasoning and test to the other issues involving much larger revenue stakes, such as seized material reflecting discrepancies on account of unaccounted expenditure amounting to Rs.22,06,000/-, unaccounted sale of cement and steel amounting to Rs.12,36,180/- and inflation of expenditure to the tune of Rs.80,09,159/- seized either from the assessee's own premises or from the premises of his accountant who maintained the assessee's books of accounts. This shows the total lack of application of mind by Sh. Goyal as also his mala fide intent in deciding the really vital issues in favour of the assessee applicant.

14 From the facts discussed above, it is shown that Sh. J K Goyal, for apparently mala fide reasons, passed the appeal order in the case of Sh. Karuna Kar Mohanty in unseemly haste, without verifying the material facts from the available record or from independent inquiry and without giving opportunity to be heard to the AO. He showed lack of application of mind and predetermination of issues, even ignoring the law laid down by the Courts and decided the appeal so as to grant undue favours to the assessee. Sh. Goyal thus failed to maintain absolute integrity and devotion to duty and displayed conduct unbecoming of a government servant.

Attested

P. K Tiwari
Advocate

ANNEXURE-III

LIST OF DOCUMENTS IN SUPPORT OF THE ARTICLES OF CHARGE FRAMED AGAINST SHRI J K GOYAL, THE THEN CIT(APPEAL)-I, BHUBANESWAR

Following records in the case of Sh Karuna Kar Mohanty

1. Appellate Folders and Records
2. Assessment Folders and Records
3. Search and Seizure Records
4. Statement dated 26.12.2001of the Assessing Officer Sh. S R Senapati, relating to ITNS 51

Attested

P. K. Tiwari
Advocate

ANNEXURE-IV

LIST OF WITNESSES IN SUPPORT OF THE ARTICLES OF CHARGE FRAMED AGAINST SHRI J K GOYAL, THE THEN CIT(APPEAL)-I, BHUBANESWAR

NIL

Attested

R

Dwarl
Advocate

ANNEXURE-A/6

From
J. K. Goyal
CCIT

Guwahati
06/11/02

To,
The Under Secretary (V & L)
Ministry of Finance, CBDT
North Block, New Delhi

Sub : Objection against issuance of chargesheet
Ref : Memorandum of chargesheet issued under
F. No. C-14011/5/2002-V & L dtd. 28/10/2002

Sir,

I am deeply hurt by the manner and method in which I have been put to perpetual humiliation over the years latest being by way of issuance of the memorandum of chargesheet under reference.

2. As you are aware, I was dragged on through a departmental proceeding for the period of long ten years during which time I was also denied my promotion. Eventually at the intervention of the court I could get my promotion to the present grade/rank and the departmental proceedings were dropped. However, again to my misfortune, the same very circle with vested interests which was instrumental towards blocking my promotion over the years got issued an order of suspension dtd. 18/02/2002. Along with the said order of suspension, a show cause notice was also enclosed stating the ground of my suspension.

3. Being aggrieved against the said order of suspension, I approached the Hon'ble CAT Guwahati Bench by filing O.A. No. 76/2002. The Hon'ble Tribunal by its order dtd. 10/04/2002 was pleased to stay the order of my suspension. However, without implementing the said order of the Hon'ble Tribunal, the Department preferred a writ petition being WP (C) No. 3947/2002 before the Hon'ble Guwahati High Court. Although initially the Hon'ble Court by its order dtd. 21/06/2002 was pleased to stay the order of the Hon'ble Tribunal, however, by its subsequent order dtd. 27/08/2002, has been pleased to vacate the said stay order and thus the Hon'ble Tribunal's stay order has been restored.

4. Inspite of the above, I am still not being allowed to function in my post and am still being treated as to be under suspension in clear violation of judicial orders. My repeated requests asking for related documents in respect of the show cause notice have also not been responded to. It appears that necessary clearance of the competent authority towards issuance of the chargesheet has been obtained by suppressing all these vital factors. Even in the memorandum of chargesheet, I have been described and shown to be under suspension in clear violation of the orders of the Hon'ble Courts.

cont. (2)

Attested

P. K. Tiwari
Advocate

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5. The allegations made in the chargesheet are the same very allegations made in the show cause towards issuance of the order of suspension which is now subjudice before the Court of law. Any decision thereof will have a direct bearing on the chargesheet, which the Department is fully aware of. In such a situation the chargesheet under reference could not have been issued so as to usurp the power and jurisdiction of the Hon'ble Court. This speaks of volumes of malafide and colourable exercise of power.

6. In view of the above factual as well as legal position pertaining to the matter, you are hereby humbly requested to withdraw the chargesheet and/or otherwise forebear from proceeding in the matter till such time a final decision is arrived at in the aforesaid proceedings pending in the Court of law.

7. An early reply in the matter entitling me to take further course of action, if need be, will be highly appreciated.

Thanking you

Yours faithfully,

(J. K. Goyal)

Attested

P K Tiwari
Advocate

ANNEXURE-A/7

CONFIDENTIAL

F.No.C-14011/5/2002-V&L
Government of India
Ministry of Finance & Company Affairs
Department of Revenue
Central Board of Direct Taxes

.....

New Delhi, the 18th November, 2002

ORDER

Whereas disciplinary proceedings were contemplated against Shri J.K. Goyal, Chief Commissioner of Income Tax, Guwahati;

And Whereas Shri J.K. Goyal was placed under suspension with immediate effect vide order of even number dated the 18th February, 2002 under Rule 10 (2) of the CCS (CCA) Rules, 1965.

And Whereas Shri J.K. Goyal filed an OA No. 76/2002 before Hon'ble Central Administrative Tribunal, Guwahati Bench against the order dated the 18th February, 2002. The Hon'ble CAT vide interim order dated 10.04.2002 suspended the operation of the order F.No.C-14011/5/2002-V&L dated 18.02.2002.

And Whereas Hon'ble Guwahati High Court vide order dated 21.06.2002 in WPC No.3947/2002 (UOI & ors Vs. Shri J.K. Goyal) stayed the operation of the order dated 10.04.2002 passed by the Hon'ble CAT, Guwahati Bench in OA No.76/2002.

And Whereas subsequently, Hon'ble Guwahati High Court vide order dated 27.08.2002 vacated its order dated 21.06.2002 staying the operation of the order passed by the Hon'ble CAT on 10.04.2002 in OA No.76 of 2002.

Now, therefore, in compliance with the order dated 10.04.2002 of CAT, Guwahati Bench, the President is pleased to suspend the operation of the suspension order dated 18.02.2002 with effect from the 10th April, 2002 i.e. the date of the CAT order and till further orders subject to the outcome of WPC No. 3947/2002 pending before the Guwahati High Court and/or any SLP that may be filed before the Hon'ble Supreme Court of India.

(by order and in the name of the President of India)

(Dr. V.K. SINGH)
Under Secretary to the Government of India

Shri J.K. Goyal,
CCIT (under suspension)

(Through O/o CCIT, Guwahati)

Copy to: -

1. The Chief Commissioner of Income Tax, Guwahaiti.
2. The Director General of Income Tax (Vig.), New Delhi.
3. The Director of Income Tax (Vig.), Kolkata.
4. The Under Secretary Ad-VI, CBDT, New Delhi.
5. Ad-VIA/DT (Per).
6. Litigation file
7. Office Copy.
8. Guard file.

Attested
P. K. Tiwari
Advocate

(Dr. V.K. SINGH)
Under Secretary to the Government of India

Annexure-A/8. Colly

-67-

A. Balasubramanian
CHAIRMAN

केन्द्रीय प्रत्यक्ष कर बोर्ड
राजस्व विभाग, वित्त मंत्रालय
भारत सरकार
Central Board of Direct Taxes
Department of Revenue, Ministry of Finance
Government of India
North Block
नई दिल्ली New Delhi-110 001
Tel. : 301 2648

My Dear D.N.S. Sinha,

20th September, 2000.

I am writing this letter to bring to your notice the very low level of disposal of appeals during the month of July, 2000 by the CsIT(Appeals). It is seen from the All India Summary Statistics that 201 CsIT(Appeals) all over India have disposed of 6836 appeals in July, 2000. It is also noted that till 31.7.2000 the progressive disposal is only 22,833, giving an average of 114 appeals. In other words in four months the average disposal is 114. The monthly average is less than 30. This is against the average disposal per month expected at 60.

You will agree that the performance by the CsIT(A) could not be said to be encouraging. It is more so in the present context when we are undertaking a restructuring of the Department giving out the promises of increasing the productivity of performance at all levels. Our proclaimed professional approach to matters of administration may come under question.

Only in few charges the average disposals have been at the expected level of 60 per month. In all the other charges the poor performance has to be attributed to the lack of supervision by the CCsIT. I would expect the CCs immediately to review the performance of each of the CIT(A) every month and ensure that the CsIT((A) dispose of sufficient number of appeals depending on the nature of the appeals. It would be the responsibility of the CC to ensure that the disposal of appeals is kept up to the minimum expectations. CCsIT will bear in mind that these appeals pending include the transfer of appeals from the Dy. Commissioners, which are of minor nature.

CCsIT may also remove the apprehension in the minds of some CIT(A)s that the promotions prospects may be affected in terms of the number of CsIT(A)s' posts. This could hardly be a consideration. Further, having regard to the pendency of appeals as on 1.4.2000 amounting to 1,89,603, on an average each CIT (A) has got nearly 950 appeals which is more than the disposal of 15 months. The idea of mentioning this is to disabuse the thinking in the minds of some of the CIT(A)s in this direction.

I would expect you to devote considerable time of yours in supervising the disposal of appeals by CsIT(A) and adding few lines in this regard in your monthly DO letter to your zonal Member/Chairman.

Yours sincerely,

(A. BALASUBRAMANIAN)

Shri D.N.S.Sinha,
Chief Commissioner of Income-tax,
Bhubaneshwar.

Attested

[illegible] Tiwari
Advocate

Instruction No. 1973 115

F.No.261/1/99-ITJ
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
*****

New Delhi, dated 28.09.1999

To

All Chief Commissioners of Income-tax,
All Directors General of Income-tax.

Sub:- Disposal of appeals by Commissioners of Income-tax (Appeals) – Regarding.

Sir,

The norms for disposal of appeals by Commissioners of Income-tax (Appeals) were last dealt with in Board's Instruction No. 1895 dated 11.8.92. During the current financial year, disposal of appeals does not form part of the Central Action Plan. It does not follow that there should be no monitoring at all the quantum of disposals by the Commissioners of Income Tax (Appeals). The Chief Commissioners of Income Tax/Directors General of Income Tax should ensure that Commissioners of Income Tax (Appeals) dispose of 60 appeals per month on an average in their charges. To achieve this rate of disposal, the Chief Commissioners/Directors General of the region would be free to fix individual targets for Commissioners of Income-tax (Appeals) having regard to the nature of cases with that particular Commissioner of Income-tax (Appeals).

2. The Chief Commissioner of Income-tax/Directors General of Income Tax may also redistribute the work amongst various Commissioner of Income-tax (Appeals) in such a way that the pendency is evenly distributed.

3. The report as required in Instruction 1906 dated 18.5.93 may still be sent to Director (RSP&PR) in the same format.

4. This issues in supersession of all existing Instructions issued on the subject so far.

Yours faithfully,

(Sandip Pradhan)
Under Secretary to the Govt. of India
Tel.3016364

E.mail Address: CBDTJUDL@FINANCE.DELHI.NIC.IN

Attested

P. K. Tiwari
Advocate

Copy to :-

1. The Chairman, Members and all other officers in CBDT of the rank of Under Secretary and above.
2. The Director of Income-tax (RSP&PR), Mayur Bhavan, New Delhi for printing in the quarterly tax bulletin and for circulation as per his usual mailing list.
3. The Comptroller & Auditor General of India (40 copies).
4. The Director of Income-tax (Vigilance), Mayur Bhavan, New Delhi.
5. Joint Secretary & Legal Adviser, Ministry of Law, Justice & Co. Affairs, New Delhi.

(Sandip Pradhan)
Under Secretary to the Govt. of India

No. CC/ITJ/5/5/RSP/2020.

Attested
R. K Tiwari
Advocate

Annexure - A/9 colly

- 70 -

Telephone : 583645
582328
Fax : 583645

आयकर आयुक्त अपिलीय, भुवनेश्वर, ओडिशा
COMMISSIONER OF INCOME TAX (APPEALS)
BHUBANESWAR, ORISSA

DR. J. K. GOYAL

डी. ओ. सं०.
D.O. No. CIT(A)-I/Misc./2001-02/ 36
दिनाङ्क
Dated, the 03rd August, 2001.

Dear Shri

Sub : D.O. for the month of July, 2001 - regarding.

A batch containing 29 appellate orders has already been sent to the C.I.T., Bhubaneswar.

2. Segregation of pending appeals, as desired in your Office letter No.CCIT/Adm(GI)-IV/06/2001-2002.4181-83 dated 05.07.2001 has already been completed which was communicated also through this office letter dated 12.07.2001. The same is awaiting your Honour's kind instructions.

3. The compliance in respect of appearance by the A.O.s and also making available the case records has once again been noticed to be extremely poor. For the hearings which commenced from 31.07.2001 the detailed lists were sent by the assistant of this office to the concerned A.O.s on 16.07.2001 with copies endorsed to the concerned C.I.T.s and Addl. Cs.I.T. but none of the A.Os till date appeared nor any case file was made available (copies enclosed for your ready reference).

Contd..2

Attested
R
R. K. Tiwari
Advocate

4. I am also serious about Board's concern over disposal of pending high demand appeals by 31.12.2001 and efforts are afoot in this direction. However, it is brought to your kind notice that the Assistant as well as Stenographer of this office stand promoted as Inspectors and, therefore, if substitutes are not provided, the disposal rate would suffer.

Yours

(Dr. J. K. Goyal)

Shri V.D. Trivedi, IRS
Chief Commissioner of Income-tax,
Orissa,
Bhubaneswar.

Attested

P. K. Tiwari
Advocate

Telephone : 583645
582328
Fax : 583645

आयकर आयुक्त अपिलीय, भुवनेश्वर, ओडिसा
COMMISSIONER OF INCOME TAX (APPEALS)
BHUBANESWAR, ORISSA

DR. J. K. GOYAL

डी. ओ. सं.
D.O. No. CIT(A)-I/Misc./2001-02/ 489
दिनाङ्क
Dated, the 06th August, 2001.

My dear

You might recall that while functioning as Addl. C.I.T. (Hqrs.) of the Office of the Chief C.I.T., Bhubaneswar you had addressed a letter to the C.I.T.s(A) that ITNS - 51 was not being sent to the A.O.s so also memos of appeals and the appeals were being decided without calling for the case records. After receipt of that letter I have kept a close watch over such matters and I regret to write that the A.O.s, despite clear opportunity, do not send case records, do not return the ITNS - 51, do not choose to remain present during the course of hearing of appeal and what is more, in a number of cases when the notices for hearing are sent to them they do not even choose to return them in time after having got them duly served or otherwise. Such difficulties are on increase after re-organisation of the jurisdiction of the A.O.s and that is the precise reason that the appellate orders for the month of July, 2001 were not received by any responsible person in respect of I.T.O., Bhubaneswar Ward, D.C.I.T.s, Inv. Circle & Circle-III and Addl. C.I.T., Bhubaneswar Range. These orders are enclosed herewith for necessary action at your end.

2. You may like to discuss the matter with your A.O.s.

Yours

(Dr. J. K. Goyal)

Shri S.P. Swain, IRS
Commissioner of Income-tax,
Bhubaneswar.

Contd..2

Encl. As above

Attested
P. K. Tiwary
Advocate

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[2]

Memo No.CIT(A)-1/Misc./2001-02/ 490
Dated, Bhubaneswar the 06th August, 2001.

Copy to the Chief Commissioner of Income-tax, Orissa, Bhubaneswar for information.

(Dr. J. K. Goyal)

Attested

P. K. Tiwari
Advocate

(2)

GOVERNMENT OF INDIA
OFFICE OF THE COMMISSIONER OF INCOME-TAX (APPEALS)-I
BHUBANESWAR - 751 004

F.No.CIT(A)-I/Misc./2001-02/ 8924
Dated, Bhubaneswar the 31st October, 2001.

To

The Jt. Commissioner of Income-tax
Range-I,
Bhubaneswar.

Sub : Hearing of appeals - sending of case records - Reg.

The following appeals were posted for hearing on 30.10.2001.

Sl.	ITA No.	Name of the appellant	A/y.
01.	68/Co./2001-02	Orissa State Warehousing Corpn.	1997-98
02.	136/Co./2001-02	M/s.Powmex Steels Ltd.	1995-96
03.	135/Co./2001-02	- do -	1996-97
04.	134/Co./2001-02	- do -	1991-92
05.	137/Co./2001-02	- do -	1992-93
06.	50/Co./2001-02	Orissa Forest Development Corpn.	1992-93
07.	53/Co./2001-02	- do -	1992-93
08.	51/Co./2001-02	- do -	1993-94
09.	54/Co./2001-02	- do -	1993-94
10.	57/Co./2001-02	- do -	1994-95
11.	55/Co./2001-02	- do -	1994-95
12.	56/Co./2001-02	- do -	1995-96

Not a single record was received in this office on the date of hearing nor the A.O's were prepared to render necessary assistance on the ground that the notices for hearing from your office were received in their office only a day before.

The A.O. also could not render any assistance during the course of hearing of the appeal in the case of Smt. Basanti Mohanty which was adjourned to 30.10.2001 from 15.10.2001 after part hearing and the reason given was that the A.O. was under the impression that the hearing was adjourned to 31.10.2001, although on 15.10.2001 the A.O. had signed the order sheet entry evidencing the adjourned date as 30.10.2001.

In the list of seventy appeals sent to you on 03.10.2001 with a request to communicate this office whether the jurisdiction over those files rests with you but despite my personal reminder to you, the report in only 29 cases was sent by you whereas there is no report in the rest.

You may like to look into the matter.

Attested

P. K Tiwari
Advocate

(Dr. J. K. Goyal)
Commissioner of Income-tax (Appeals)-I,
Bhubaneswar.

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[2]

Memo No.CIT(A)-I/Misc./2001-02/ 825
Dated, Bhubaneswar the 31st October, 2001.

Copy to the Chief Commissioner of Income-tax, Orissa, Bhubaneswar for kind information.

(Dr. J. K. Goyal)
Commissioner of Income-tax (Appeals)-I,
Bhubaneswar.

Attested
P. K. Tiwari
Advocate

123

GOVERNMENT OF INDIA
OFFICE OF THE COMMISSIONER OF INCOME-TAX (APPEALS)-I
BHUBANESWAR - 751 004

F.No.CIT(A)-I/Misc./2001-02/ 852
Dated, Bhubaneswar the 09th November, 2001.

To

The Joint Commissioner of Income-tax,
Range-1,
Bhubaneswar.

Sub : Non appearance of the A.O.s - reg.

During this week the A.O. mainly the Asst. Commissioner of Income-tax, Circle-1(i) did not appear in any of the appeals fixed before me for hearing. You may like to inform me the reasons for the same.

(Dr. J. K. Goyal)
Commissioner of Income-tax (Appeals)-I,
Bhubaneswar.

Attested
P. K Tiwari
Advocate

GOVERNMENT OF INDIA
OFFICE OF THE COMMISSIONER OF INCOME-TAX (APPEALS)-I
BHUBANESWAR - 751 004

124

F.No.CIT(A)-I/Misc.2001-02/ 890
Dated, Bhubaneswar the 28th November, 2001.

To

The Jt. Commissioner of Income-tax,
Range - 1,
Bhubaneswar.

Sub : Hearing of appeal - sending of records/ appearance by A.O.s - Matter regarding.

Please refer to your letters No.3573 and 3575 dated 13/15.11.2001 on the above subject.

It was desired by the C.I.T., Bhubaneswar that the notices be routed through the J.C.I.T. in the absence of jurisdiction specific files of different A.O.s and that is why the notices are being sent to you. No A.O. appeared personally during the course of hearing of any of the appeals during this month nor has there been any information from any of the A.O.s to that effect.

(Dr. J. K. Goyal)
Commissioner of Income-tax (Appeals)-I,
Bhubaneswar.

Memo No.CIT(A)-I/Misc.2001-02/ 891
Dated, Bhubaneswar the 28th November, 2001.

Copy to the Commissioner of Income-tax, Bhubaneswar for information.

(Dr. J. K. Goyal)
Commissioner of Income-tax (Appeals)-I,
Bhubaneswar.

Attested
P. K. Tiwari
Advocate

Annexure - A/10 colly

भारत सरकार
आयकर आयुक्त कार्यालय
भुबनेश्वर

सत्यमेव जयते

B. B. SAHU, IRS

Telephone : 586921
586923 (D)
Res. :
Fax : (0674) 586920

GOVERNMENT OF INDIA
OFFICE OF THE COMMISSIONER OF INCOME-TAX
BHUBANESWAR

Dear Goyal Sahab,

D.O.No.B&S.I-5/2001-2002/1261
Dated, Bhubaneswar the 12th June, 2001.
13/6

Sub:-Disposal of High Demand Appeals on priority basis -request regarding-

While passing comments on dossier cases exceeding Rs. One crore and above the Chief Commissioner of Income-tax, Orissa, Bhubaneswar has directed me to request you to take up the appeal cases as per the enclosed list for hearing on priority basis.

14/06

With regards.

Yours sincerely,

(B.K.Sahu)

Dr.J.K.Goyal, IRS
Commissioner of Income-tax(Appeals)-I
Bhubaneswar.

Attested
P. K. Tiwari
Advocate

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GOVERNMENT OF INDIA
OFFICE OF THE CHIEF COMMISSIONER OF INCOME-TAX, ORISSA,
BHUBANESWAR.

No. CCIT/ORISSA/SBR-33/2001-02/ 6807-09
Dated, Bhubaneswar the 06th August, 2001.

To

1. The Commissioner of Income-tax (Appeals)-I, Bhubaneswar.
2. The Commissioner of Income-tax (Appeals)-II, Bhubaneswar.
3. The Commissioner of Income-tax (Appeals), Cuttack.

Sub: Disposal of High Demand & other appeals etc. - Request regarding.

I have been directed to enclose herewith (i) list of cases over and of one crore and (ii) others for disposal by 30.09.2001 and 30.11.2001 respectively.

Please send a disposal list of High Demand Appeals by 15th of the succeeding month.

Yours faithfully,

(P.N. Sethi)
Dy. Commissioner of Income-tax (Tech.),
for Chief Commissioner of Income-tax, Orissa,
Bhubaneswar.

Encl: As above.

Attested
P. K. Tiwari
Advocate

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GOVERNMENT OF INDIA,
OFFICE OF THE COMMISSIONER OF INCOME-TAX,
AAYAKAR BHAWAN, RAJASWA VIHAR,BHUBANESWAR

No.CIT/BBSR/2001-2002/ 2267
Dated, the 3rd August,2001.

To

1. The Commissioner of Income-tax(Appeals)-I, Bhubaneswar.

2. The Commissioner of Income-tax(Appeals)-II, Bhubaneswar.

Sir,

Sub : Disposal of high demand appeals.

I am directed to enclose herewith a list of appeals involving demand of Rs.1 crore and above and to request you that those may be disposed of by 30th September,2001.

Yours faithfully,

(S. P. Swain)
Commissioner of Income-tax,
Bhubaneswar.

Encl : as stated.

Memo No.CIT/BBSR/2001-2002/
Dated, the 3rd August,2001.

Copy to :

(1) The Joint Commissioner of Income-tax, Range-I, Bhubaneswar and (2) The Joint Commissioner of Income-tax, Range-II, Bhubaneswar. They are directed to ask the Assessing Officers to represent the case before CIT(A) and in some cases they themselves may also represent the matter before the CIT(A).

Sd/-
(S. P. Swain)
Commissioner of Income-tax,
Bhubaneswar.

Attested
P. K. Tiwari
Advocate

Appeal -I,

- 81 -

Central Administrative Tribunal
30 JAN 2003
Guwahati Bench

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

GUWAHATI BENCH ::: GUWAHATI

Union of India & Ors. - Respondents
Through - Anup Kumar Chandhuri
30/1/03
28
Addl. Central Govt. Standing Counsel

In the matter of -

O.A.No. 388/2002

Dr. J.K. Goyal
..... Applicant.

- Vs -

Union of India & Ors.
..... Respondents.

AND

In the matter of -

Written Statement for and on behalf of the Respondents No. 1, 2 and 3.

I, Kumud Ranjan Das, Addl. Commissioner of Income-tax(Vig.), Guwahati, do hereby solemnly affirm and say as follows:-

01. That I am the Addl. Commissioner of Income-tax(Vig.), Guwahati and as such fully acquainted with the facts and circumstances of the case. I have gone through a copy of the application and have understood the contents thereof. Save and except whatever is specifically admitted in Written Statement the other contentions and statements may be deemed to have been denied. I am competent and authorised to file this Written Statement on behalf of the Respondents No. 1,2 and 3.

02. That with regard to the statement made in paragraph 1 of the application the respondents beg to state that it relates to the particulars of the memorandum of charge against which the application is made. This is merely a charge sheet and not a penalty which can be imposed only after the completion of oral inquiry and after the disciplinary authority reaches a conclusion on the basis of findings of such inquiry. Such inquiry is yet to commence in this case. Hence there is no cause of action at this stage and the OA deserves to be quashed for this reason alone.

03. The statements made in the paragraph **2** of the application being a matter of fact no comment is offered by the respondents.

04. That the respondents have no comment to the statement made in paragraph **3** of the application.

05. That with regard to statement made in paragraph 4.1 of the application, the respondents beg to deny that the memorandum dated 28.10.2002 was issued in mala fide exercise of powers. On the contrary, there is sufficient evidence to prima-facie show that the applicant himself is guilty of mala fide exercise of powers vested in him in the capacity of CIT(Appeals). The facts mentioned at length in Annexure-II to the memorandum dated 28.10.2002 do not merely indicate recklessness on the part of the applicant that also indicate that the applicant's action in passing the appellate order in case of Shri K.K.Mohanty was guided by ulterior and malicious motive to impart undue favours on the assessee.

06. That the statement made in paragraph **4.2** of the application being matter of fact no comment is offered by the respondents.

07. That with regard to paragraph **4.3** of the application the respondents beg to state that the sequence of events referred here are irrelevant. It is denied that there was "more than a decade of harassment by the official respondents". The memorandum dated 28.10.2002 has been solely with reference to the acts of omission and commission mentioned therein and in the Annexures thereto.

08. That with regard to the statements made in paragraph **4.4 to 4.11** of the application, the respondents beg to state that these refer to the charge memo dated 16.07.1991 and subsequent inquiry etc. The matter under consideration has no relevance to the past events stated by the applicant to have occurred when he was the Deputy Commissioner of Income-tax, Range-1, Raipur, Madhya Pradesh. The present charge sheet relates to the acts of omission and commission by the Officer as Commissioner of Income-tax(Appeals)-I, Bhubaneswar.

09. That with regard to the statements made in paragraph **4.12 to 4.25** of the application, the respondents beg to state that these refer to the matter relating to DPC for considering the Commissioner of Income-tax for promotion to the grade of Chief Commissioner of Income-tax(CCIT for short) and subsequent filing of OA, CP, MA etc. by the applicant. This is again with reference to the proceedings arising out of inquiry with reference to charge memo dated 15.07.1991. This is absolutely immaterial and irrelevant to the issue under consideration. Furthermore, the disciplinary proceeding initiated with reference to the memo dated 16.07.1991 was eventually dropped by the Govt. Of India vide order dated 20.02.2002.

That the applicant was one of the officers under consideration zone considered by the DPC held on 05-02-2001 for selecting panel for promotion to the grade of CCIT. The finding of the said DPC were kept in sealed cover in respect to the applicant who was not clear from vigilance angle due to Disciplinary Proceeding pending against him.

That on the direction of the Hon'ble Tribunal the sealed cover of the applicant was opened and findings of the DPC were placed before the Finance Minister for approval. After the approval of the Finance Minister the same was sent to the Department of Personnel and Training (DOP & T for short) for the approval of the ACC. On receipt of approval from the ACC, the applicant was promoted as CCIT on provisional basis vide order dated 28-12-2001 because the disciplinary proceeding was pending at that time.

10. That with regard to the statements made in paragraph **4.26** of the application, the respondents beg to state that these refer to the contents of the show-cause memorandum dated 18.02.2002. This being matter of fact no comment is offered by the respondents.

11. That with regard to the statements made in paragraph **4.27 to 4.40** of the application, the respondents beg to state that these refer to the issue of suspension order under rule 10(1) of the CCS(CCA) Rules, 1965 issued on 18.02.2002, the transfer and posting of Shri D. Chakrabarti, CCIT as CCIT, Guwahati and the various OAs, CPs and MAs filed by the applicant in this regard, a writ petition filed by the Department before the Hon'ble Gauhati High Court, Guwahati and the various orders passed by the Honb'le Tribunal, Guwahati Bench and the Hon'ble Gauhati High Court. These are subject matters of separate proceedings for which comments have been offered by the Director General of Income-tax(Vig.), New Delhi from time to time and as such no further comment is offered here.

The applicant has completely misunderstood the situation that arose immediately after his suspension and its aftermath continuance. As a matter of fact, the order of suspension was immediately followed by another order by which Shri E.J. Mawlong, CCIT, Shillong had assumed the Additional Charge of the CCIT, Guwahati prior to 10-04-2002 - the date on which the Hon'ble Tribunal passed the impugned order in OA 76/2002 simply suspending the order of suspension. In the said impugned order of the Hon'ble Tribunal it was no where mentioned that the applicant should be allowed to join as the CCIT, Guwahati. The post of CCIT, Guwahati was never left vacant after suspension of the applicant on 18.02.2002. After retirement of Shri E.J.Mawlong , CCIT, Guwahati on superannuation the charge of this post was taken over by Shri D.Chakraborti as CCIT, Guwahati by an order of the Board. Thus the applicant did not have the charge of CCIT, Guwahati at any point of time subsequent to his suspension and therefore, the presumption that the applicant continued to be the CCIT, Guwahati consequent upon the said interim order of the Hon'ble Tribunal dated 10.04.2002 in OA 76/2002, is not correct.

The incumbency chart of the CCIT,Guwahati is enclosed as **Annexure-A**

That subsequently when the order of suspension dated 18-02-2002(F. No. C-14011/5/2002-V&L) was suspended the applicant was posted as CCIT(OSD), Guwahati with effect from 10-04-2002 vide order No. 181, dated. 18-11-2002.

12. That with regard to the statements made in paragraph **4.41** of the application, the respondents beg to state that contention of the applicant is not correct. Vide Board's letter dated 21.03.2002 (which was served on the applicant on 01.04.2002),the applicant was informed that all the relevant records were available with the DIT(Vigilance),East Zone. The applicant was also requested to approach the DIT for inspecting the records and was also asked to furnished his explanation within 15 days of the receipt of the letter.

However the respondents would like to clarify that as per extent rules and directives, the applicant was not normally entitled to the inspection of records at the stage of preliminary inquiry. Here the respondents crave before this Hon'ble Tribunal to produce those relevent rules and directives if called for at the time of hearing.

Instead of inspecting the documents in the office of the DIT(Vigilance),East Zone and furnishing his explanation within the given time , the applicant had adopted delaying tactics by repeatedly asking for authenticated copies of the documents. It was under these circumstances that in absence of an explanation from the applicant., it was finally decided to issue a charge sheet to the applicant .

13. That with regard to the statements made in paragraph **4.42** of the application, the respondents beg to deny that the first stage advice of the Central Vigilance Commission was obtained by misleading the Commission or that the respondents intentionally failed to provide inspection of relevant files to the applicant. It is reiterated that it was the applicant who adopted a delaying tactics by entering into unnecessary correspondences instead of availing the opportunity so provided to the applicant as discussed in detail vide para 12 cf this writted statement as above.

14. That with regard to the statements made in paragraphs **4.43** and **4.44** of the application, the respondents beg to state that these being matter of records no comment is offered by the respondents.

15. That with regard to the statements made in paragraph **4.45** of the application, the respondents beg to state that as per record available in the R & I section of the Ministry of Finance and Company Affairs, Department of Revenue, New Delhi, the posting order No.181, dated 18-11-2002 was sent to the applicant through the CCIT, Guwahati on 22-11-2002.

16. That with regard to the statements made in paragraph **4.46** of the application being matter of record, hence no comment is offered by the respondents.

17. That with regard to the statements made in paragraph **4.47** of the application, the respondents beg to state that this refers to the issue of undue haste with which appeal order was passed. It has been contended that the appeal order was passed keeping in mind the letter of Chairman, CBDT, dated 20.09.2000 and CBDT Instruction No. 1973 dated 28.09.1999 that there should be speedy disposal of appeals. Speedy disposal of appeal has to be necessarily as per the provisions of law and after giving due opportunity to both the assessee and the Assessing Officer. The submission of the applicant that that IRS officers are trained to decide appeals without being bothered about the nature of assessment order is denied. Appellate function is a quasi judicial function and it has to be carried out in a fair manner after hearing both parties and deciding as per law. The nature of assessment order has a bearing on the disputed demand.

18. That with regard to the statements made in paragraph **4.48** of the application, the respondents beg to state that the facts and circumstances narrated at length in Annexure II to the Memorandum dated 28.11.2002 prima facie indicate that the acts of omission and commission by the applicant while deciding the appeal in question were guided by an ulterior motive to impart undue favours on the assessee. It is reiterated that the applicant failed to call the Assessing Officer at the time of hearing of appeal, despite the fact that the Assessing Officer had made a request for personal appearance.

19. That with regard to the statements made in paragraph **4.49** of the application, the respondents beg to deny that the allegation regarding that applicant granting undue favour to the assessee is vague, general or sweeping in nature. There is sufficient basis and adequate material to prima facie show that the applicant exercised his powers in an indiscreet, predetermined and prejudiced manner, with a motive to impart undue favour to the assessee. That this was done purportedly in exercise of quasi-judicial powers vested in the applicant or that the appellate order is the subject matter of cross appeal by the Department and by the assessee, does not have a bearing on the applicant's misconduct in deciding the appeal without giving a reasonable and proper opportunity to the Assessing Officer and without causing to examine the evidence on records.

20. That with regard to the statements made in paragraph **4.50** of the application, the respondents beg to deny that the allegations contained in the memorandum dated 28.10.2002 are vague, general or sweeping in nature. The above charges are based on material and evidence in possession of the disciplinary authority. That the applicant's claim that there are serious allegations of corruption/harassment against the Assessing Officer has no bearing on the present disciplinary proceedings where the applicant's own conduct is in question.

There is adequate material and evidence to show that the applicant had passed the appellate order in question without examining the correctness of claim/submissions made by the assessee, ignoring the evidence available on record including seized materials and without affording proper and reasonable opportunity of hearing to the Assessing Officer. This could not be termed merely as carelessness, inadvertence or omission but amounts to definite misconduct on the part of the applicant.

Without prejudice to the above, the correctness or otherwise of the allegations contained in the memorandum dated 28.10.2002 can be conclusively determined only after a full fledged oral inquiry which is yet to commence in this case. The applicant is trying to scuttle down the fool proof process of oral inquiry by praying for quashing the charge sheet at this stage.

21. That with regard to the statements made in paragraph **4.51** of the application, the respondents beg to state that this refers to the issue of opportunity given to the Assessing Officer while deciding the case under consideration. While it is a matter of record that an appeal memo together with the assessee's application for stay of demand were sent to the Assessing Officer for his report and a notice under section 250 dated 17.07.2001 was sent to the Assessing Officer and that the Assessing Officer sent his report dated 19.07.2001, it has been stated by the Assessing Officer under oath that he had sought personal appearance. There is nothing in the order sheet entries in the relevant record of the CIT(Appeals) to show that the applicant made any attempt to call the Assessing Officer at the time of hearing of the appeal or at any time thereafter. The statements relating to procedural aspect like most cases are decided without original records and copy of the notice and it is not normally sent to the Assessing Officer, that providing an opportunity to the Assessing Officer is mere an exception than a rule - are incorrect particularly keeping in view that there was a search case in which voluminous evidence adverse to the assessee was collected by the Department. The Act lays down the procedure to be followed by the CIT(Appeals) before disposing the appeal cases. Right to be heard has been expressly provided to the Assessing Officer by section 250(2) of the Income-tax Act, 1961, violation of the procedure would amount to gross irregularity. It is a matter of fact that the Assessing Officer was not given a chance to argue his case before the CIT(Appeals) as has been stated in the memorandum dated 28.10.2002.

22. That with regard to the statements made in paragraph **4.52** of the application, the respondents beg to state that this refers to the attempt of the applicant to draw attention of the CIT, Bhubaneswar that the Assessing Officer do not appear appeal hearing and do not render assistance to the CIT(Appeals). The letter referred to by the applicant are matter of records. It is, however, of significance that this was a search case involving huge revenue in which the Assessing Officer has sent a letter to the CIT(Appeals) seeking opportunity to represent before him the case of the Department.

23. That with regard to the statements made in paragraph **4.53** of the application, the respondents beg to state the same comment as in para 17 above.

24. That with regard to the statements made in paragraph **4.54** of the application, the respondents beg to state that this refers to the legality of initiating disciplinary proceedings against an officer who was exercising powers in quasi-judicial capacity. Contrary to the submission of the applicant as CIT(Appeals) he was subject to administrative control of the Government. While the order itself of the CIT(Appeals) can not be questioned, but the manner in which appeal proceedings are conducted, is a matter of administrative scrutiny which has been exercised judiciously. The appeal proceedings are require to be conducted as per the relevant provisions of the Income-tax Act, 1961 read with the Income-tax Rules, 1962 and serious violation of the procedural provisions is open to inquiry at any stage.

25. That with regard to the statements made in paragraph **4.55** of the application, the respondents beg to state that this refers to the issue of disappearance of ITNS-51 from the Appellate file. Although the form is a non statutory one, it gives affect to the mandatory provisions of section 250(1) of the Income tax Act,1961 that requires the CIT(Appeals) to give notice to the Assessing Officer about the hearing of the appeal.

Thus, ITNS-51 is an official document, the placement of which has to be correct and proper. As in charge of Appeal Office, CIT(Appeals) has to ensure that all documents are placed in the file and kept properly. Further, if, as stated by the applicant , the underlining with red ink pen was indicative of the fact that ITNS-51 was not present in the file, then the most logical course of action which ought to have been taken by the applicant was to make necessary inquiries with his staff and /or with the Assessing Officer and also to specifically ascertain from the Assessing Officer as to whether he desired a personal appearance in the matter.

26. That with regard to the statements made in paragraph **4.56** of the application, the respondents beg to state that it is a matter of fact that the appellate order was dated 06.08.2001 and this date was subsequently changed in hand to 13.08.2001. It is reiterated that, as stated in the memorandum dated 28.10.2002 , it is clearly indicative of the fact that the applicant had decided the issues on 06.08.2001 itself and still did not offer an opportunity to the Assessing Officer to offer his comments/ clarifications on the issues involved, inspite of the fact that the actual order was passed after about a week i.e. on 13.08.2001.

27. That with regard to the statements made in paragraph **4.57** of the application, the respondents beg to state that it is not the usual practice to have acknowledgement as to the receipt of the assessment order or appellate order by the assessee by getting his signature on the note sheet/order sheet of the assessing officer's/CIT(Appeals)'s file. The appellate order or the assessment order is delivered to assessee personally by the Department by having his signature on a separate acknowledgement slip. This is irrespective of the fact that the order is given by the staff or the officer.

The very fact that the order was delivered to the assessee on the next day of its passing by the applicant and getting his signatures on the order sheet indicates that the applicant has done it without the knowledge of staff also. Now he can not put the blame on others.

28. That with regard to the statements made in paragraph **4.58** of the application, the respondents beg to state that from the facts and circumstances described at length in Annexure-II to the memorandum dated 28.10.2002, there is enough evidence to prima facie indicates that the irregularities /omissions committed by the applicant in deciding the appeal in question are not mere errors of law/fact but constitute a calculated misconduct on the part of the applicant which was guided by ulterior and malicious motives to impart undue favour to the assessee.

29. That with regard to the statements made in paragraph **4.59** of the application, the respondents beg to state that this refers to stay of the operation and effect of memorandum dated 28.10.2002. There is no prima facie case of illegality and arbitrariness on the part of the official respondents as alleged by the applicant. This memorandum is merely a charge sheet and not a penalty which can be imparted only on completion of oral inquiry and after the disciplinary authority reaches a conclusion on the basis of findings of such inquiry. Such inquiry is yet to be commenced in this case. Hence there is no cause of action at this stage and the OA deserves to be quashed for this reason alone.

30. That with regard to the statements made in paragraph **4.60** of the application, the respondents beg to deny that the application is made bona fide for ends of justice. The applicant is seeking to delay the proceedings by avoiding submission of reply to memorandum dated 28-10-2002.

31. That with regard to the statements made in paragraph **5** of the application, the respondents beg to state that this refers to grounds of relief. All the contentions made in the OA are denied. Mere issuance of charge sheet does not amount to any penalty or punishment. Considering the grave irregularities committed by the applicant, there is prima facie case of misconduct against the applicant and the memorandum dated 28.10.2002 has been issued in accordance with rules and procedures. By seeking to get the charge sheet quashed at this stage, when a full fledged oral inquiry is yet to commence the applicant is trying to scuttle down the process of inquiry.

32. That with regard to the statements made in paragraph **6** of the application, the respondents beg to state that this refers to the details of remedies available to officer. His submission that he has exhausted all remedies is absolutely incorrect because a full fledged inquiry is yet to commence in this case and there is no cause of remedy at this stage.

33. That with regard to the statements made in paragraph **7** of the application, the respondents beg to state that this refers to matter not filed/ pending before any Court. This is a matter of fact. No comment is offered by the respondents.

34. That with regard to the statements made in paragraph **8** of the application, the respondents beg to state that this refers to the relief sought. The relief sought are not justified and hence may not be granted. Mere issuance of charge sheet does not amount to imposition of any penalty/punishment. So there is no cause of action at this stage.

35. That the applicant is not entitled to any relief sought for in the application and the same is liable to be dismissed with cost.

Verification.....

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V E R I F I C A T I O N

I, Kumud Ranjan Das, working as Additional Commissioner of Income-tax(Vigilance), Guwahati do hereby solemnly affirm and state as follows:-

1. That, I am competent to file this verification on behalf of the respondents as authorised and I swear the same. I am also fully acquainted with the facts and circumstances of the case.

2. That, the statement made in this verification and in paragraphs 1, 3, 4, 6, 29 + 30 of the accompanying written statement of defence are true to my knowledge, those made in paragraphs 2, 5, 7 – 28 + 31 are being matters of records of the case are true to my information derived therefrom which I believe to be true and the rest are my humble submissions before this Hon'ble Tribunal.

I sign this verification on this twenty-eighth day of January, 2003 at Guwahati.

Kumud Ranjan Das

DEPONENT

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ANNEXURE - A

INCUMBENCY CHART OF THE CHIEF COMMISSIONER OF INCOME TAX, GUWAHATI

Sl. No.	Name of the Chief Commissioner	Period	Remakrs
1	*Shri A. Mukhopadhyay*	*25-02-2000 to 16-04-2000*	*Additional charge*
2	*Shri M.S. Thanvi*	*17-04-2000 to 20-11-2000*	
3	*Shri Subrata Das*	*21-11-2000 to 04-05-2001*	
4	*Shri Amitava Gupta*	*04-05-2001 to 31-05-2001*	*Additional charge*
5	*Shri V. Tochhawng*	*01-06-2001 to 31-10-2001*	
6	*Shri E.J. Mawlong*	*31-10-2001 to 08-01-2002*	
7	*Shri J.K. Goyal*	*09-01-2002 to 20-02-2002*	
8	*Shri E.J. Mawlong*	*20-02-2002 to 28-02-2002*	*Additional charge*
9	*Shri D. Chakravarti*	*01-03-2002 onwards*	*Additional charge*
10	*Shri D. Chakravarti*	*04-06-2002 onwards*	*Regular charge vide Board's order No.72/2002, dtd. 04-04-2002, suspended vide Hon'ble CAT's interim order dtd. 07-06-2002 in OA No. 181/2002, till returnable date.*
11	*Shri P. N. Pathak*	19.07.2002 (A/N.)	*Assumed Additional charge.*
12	Shri D. Chakrabartu	12.08.2002 (F/N) to 30.10.2002	Regular Charge.
13	Shri. D. K. Das	30.10.2002 onwards	Assumed Additional Charge

Attested

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केन्द्रीय प्रशासनिक अधिकरण
Central Administrative Tribunal
17 FEB 2003
गुवाहाटी न्यायपीठ
Guwahati Bench

Filed by
The applicant Through
Chitra Das.
Advocate
17/2/03

CENTRAL ADMINISTRATIVE TRIBUNAL

GUWAHATI

OA No. 388/02.

Dr. J.K. Goyal.

------Applicant.

- Versus-

Union of India & Ors.

--------Respondents.

IN THE MATTER OF

An Affidavit highlighting Additional statement of Fact in connection with the above noted OA.

The humble application on behalf of the applicant above named.

MOST RESPECTFULLY SHEWETH:-

1. That the applicant above named praying for quashing of the proceeding initiated against him pursuant to the memorandum of charges vide F.No C-1 4011/5/2002-V&L dated 28.10.2002 preferred this OA. The said OA is now pending disposal before this Hon'ble Tribunal. The applicant above named immediately on receipt of the said memorandum dated 28.10.2002 preferred the above noted OA seeking an urgent and ultimate relief. The applicant above named during the pendency of the OA has filed his reply dated 10.2.2003 which is not on record before this Hon'ble Tribunal. It is therefore through this Additional Affidavit the applicant begs to place the said reply before this Hon'ble Tribunal with a prayer to treat the same to be a part of the OA.

A copy of the said reply dated 10.2.2003 is annexed herewith and marked as Annexure-AA-1.

2. That the applicant begs to state that the aforementioned Annexrue AA-1 reply dated 10.2.2003 has got a direct bearing in this OA and same will be helpful in deciding the matter on merit.

3. That this application has been filed bonafide and to secure ends of justice.

In the premises aforesaid it is most respectfully prayed that Your Lordships would graciously be pleased to treat the Annexure-AA-1 reply dated 10.2.2003 as a part of the above noted OA and be further pleased to pass any such order/orders as may be deemed fit and proper.

And for this Act of kindness the humble applicant as in duty bound shall ever pray.

AFFIDAVIT

I, Dr. J.K.Goyal, aged about 57 years, son of Shri M.L.Goyal, resident of Uzan Bazar, Guwahati -1, do hereby solemnly declare and state as follows:

1. That I am the petitioner in the accompanying petition and as such, well conversant with the facts and circumstances of the case. I am therefore competent to swear this affidavit.

3. That the statements made in this affidavit and in paragraph.....2&3..... of the accompanying application are true to my knowledge, those made in paragraph.....1.....are matters of records which I believe to be true and the rest are my humble submission before this Hon'ble Tribunal. I have not suppressed any material facts. The Annexure are true copies of their original.

And I sign this affidavit on this the 16 th day of Feb. 2003 at Guwahati.

Identified by me:

Usha Das
Advocate

J.K.Goyal
Deponent.

Solemnly affirm and state by the deponent who is identified by Miss U.Das Advocate.

Siddhartha Das.

From

Dr. J.K.Goyal,
Chief Commissioner of Income Tax,
GUWAHATI.

Date : 10.02.2003

To

Shri V. K.Singh
Under Secretary,
Govt. Of India, Ministry of Finance
Department of Revenue,
North Block,
New Delhi.

This has reference to Memorandum F.No. C-14011/5/2002-V&L dt. 28.10.2002. At the outset it may be mentioned that the said Memorandum is not tenable in the eye of law in as much as that the same has not been signed "for and on behalf of the President of India".

2. As you are aware, the Memorandum was preceded by a show cause notice dt. 18.02.2002 which was issued with a predetermined mind and was accompanied by order of suspension of the same date.

2.1. Soon on receipt of the show cause notice, I requested for inspection/copies of the documents through letter dt. 01.03.2002. Though I was intimated to have the same at Kolkata vide letter dt. 21.03.02 of your office, yet despite my letters dt. 02.04.02, 20.05.02, 19.06.02, 19.07.02, 19.08.02, 17.09.02 and 16.10.02 the inspection/copies were not given and on the other hand a formal charge sheet has been issued.

2.2. Though I was again intimated to have the copies/inspection at Kolkata through your office letter dt. 26.12.02, yet when I wrote to D.I.(Vig.), Kolkata on 07.01.03, he refused to accept the letter. (ANNEXURE-1 colly)

2.3. The above sequel of events clearly indicates that I am being harassed with a predetermined and biased mind.

3. You would be kindly aware that where an officer is placed under suspension, disciplinary proceedings should be completed against him within 6 months - chargesheet issued wihin 3 months and the same finalised within next 3 months.

Cab Sectt DOP 39/59/70 Estt(A) dt. 9.2.71
DOP O.M. 39/33/72 dated 16.12.1972.

but in my case the chargesheet itself was issued after more than 8 months of the order of suspension for extraneous reasons.

4. At this juncture, it is also not out of place to refer to the fact of systematic persecution of mine for the last 15 years, starting with my supersession in April, 1988 DPC for the posts of Commissioner of Income Tax which compelled me to file an OA in May, 1988 before CAT who was pleased to quash the DPC proceedings to the disadvantage of some of the officers

Attested
Advocate

who have subsequently held the post of CVO of the Department and who acted to the prejudice of my interests. Otherwise, nothing explains the Inquiry Report dt. 17.05.1995 in persuance of a memorandum relating to alleged excessive use of official telephone being finalised in 2002 after prolonged legal battle and repeated directives/orders of the Court(s). It is pertinent that no chargesheet was issued to any of the officers on such a frivolous charge. (ANNEXURE -2)

4.1 When the Government was compelled to give me a promotion as CCIT in pursuance of above, they were irked by the directions dt. 20.12.01 of the ACC 'to fix responsibility for delay in finalisation of disciplinary case'. (ANNEXURE -3) Instead of fixing such responsibility, they decided to fix me up and the job was entrusted to Shri S.D.Kapila who was appointed as CVO only w.e.f. 25.01.02 and could not look into the alleged lapse before this date, but he did so under extra constitutional powers in league with the A.O. against whom there were serious charges of corruption and who served him in all possible manners during his (SD Kapila's) visit to Bhubaneswar and also in league with the infamous CCIT Bhubaneswar who was subjected to CBI searches more than once, and also placed under suspension a number of times. He also used to demand money from the officers. He gave adverse CRs to all CsIT because they did not oblige him by meeting his illegal demands.

4.2. The order of suspension was got approved by S.D.Kapila by the F.M. by misrepresenting to him about CAT's order in earlier D.E. for which a decision had already been taken by that time to drop the enquiry on recommendations of the UPSC, DOP etc..

4.3. Again the CVC was influenced into giving first stage approval for issuance of a charge sheet by misrepresenting to them that I had not given reply to the show cause notice, whereas the fact is that inspection/copies of documents was not given despite 8 request letters detailed above.

4.4. The CVC in their circular No. 8(1)(h)/98(1) dt. 18.11.1998 have laid down an outer time limit of 6 months for completing the enquiry under Rule 14. But the department does seem to be in no mood to adhere to such a time limit, as is evident from the fact that the D.I(Vig.), Kolkata, in whose custody the records are stated to be availabe, has not even accepted the request letter of mine dated 7.1.2003.

4.5. I also really wonder as to what explains the Government's decision to place me under suspension or appoint me as CCIT (OSD) when none of the officers against whom the CVC recommended major penalties to be levied/prosecutions to be launched, was ever meted out such treatment. Officers against whom there were serious allegations were also appointed as Board Members (ANNEXURES - 4 & 5).

5. It has been alleged that while deciding the Appeal, I acted in haste, showed lack of diligence and undue favour to the assessee, accepted the submissions blindly, showed lack of application of mind and predetermination of issues and did not allow an opportunity to the AO.

5.1. Paras 2 & 3 of Annexure-2 to memorandum clearly demonstrate that atleast two oportunities were given to the AO in the form of notices dated 16.7.2001 and 17.7.2001 and that is why the AO sent a report dated 19.7.2001(Para 9 of appellate order).

Attested
Adv.

Once he was aware of the dates of hearing, the AO was duty bound to appear before me - his absence was deliberate for which he is trying to pass the blame on to me. He did not require any special invitaion for appearance once notices of hearing had been sent and were duly received by him. **It is a matter of record that this AO in particular has never appeared before me in any of the appeal hearings including in respect of other assessees of this group where block assessments were made by him, and which were decided much later in December, 2001.** Such a ground of lack of opportunity to the AO has not been even taken by the department in appeal before the ITAT for the obvious reason.

5.2. The appeal is stated to have been decided in haste - in other words, within about a month of filing thereof. I enclose herewith copies of the following appellate orders.

Name of Appellant	Date of filing Date of disposal	Date of hearing	Whether AO present.
Siang Tea & Industries Pvt. Ltd.	21.5.2001/ 21.6.2001	21.6.2001	No.
Powmex Steels Ltd.	6.8.1999	29.7.1999	No.
Downtown Hospital	12.3.2001/ 30.4.2001	26.4.2001	No.
Gorge Williamson Ltd.	9.4.2001/ 30.5.2001	29.5.2001	No.
Williamson Financial Services	15.5.2001/ 22.6.201	20.6.2001	No.

(ANNEXURE-6 colly)

There are thousands of such appellate orders all over the country passed by different CsIT(A), but I am being singled out

Once the submissions of the appellant and of the AO have been obtained, the decision could be taken by me any time. The Citizen's Charter states department's commitment to expeditiously decide the appeals for which purpose an amendment to section 250 of the IT Act has also been made - Sec 250 (6A).

5.3. The appellate order is subject to further scrutiny by the ITAT and higher forums. It has not become final yet. Being a quasi-judicial order, it cannot be held that the same has resulted into favour to the assessee or into loss to the Revenue.

5.4. The submissions of the assessee were borne out from records that were made available by the AO. They were duly supported by an affidavit also which was not even considered by the AO. The contentions have been independently appreciated in the light of the affidavit, submissions of the AO., assessment order and material on record. It is, therefore, wrong to allege that lack of deligence has been exhibited or lack of application of mind. If the issues were predetermined as alleged, after hearing the appeal on 25.7.2001, the appellate order could have been passed on 26.7.2001 itself.

Attested
Adv.

6. It may be stated that the factual and the legal position was explained to the Hon'ble Chairman, CBDT when he was here during 18-23 April, 2002, and he was fully convinced with my submissions.

7. In OA No. 76/2002, the order of suspension has been challenged whereas in OA No. 388/2002, the issuance of chargesheet. Both these OAs have been admitted u/s 19(3) of Central Adminitrative Tribunal Act, 1985. In reply to these OAs it has been stated in written statements filed by the department that the merits of appellate order are not in question in the chargesheet or otherwise. Therefore, reference to certain case laws in the chargesheet is irrelevant.

Be that as it may,

(a) there is a decision reported in 234 ITR 733 Gujrat to the effect that a notice u/s 143(2) must be issued for completing block assessment ; the AO in this case having not done so, should he not be charged ?

(b) dismissal of SLP without a speaking order does not lay down any law as the correctness of the decision against which SLP is sought does not stand decided.

AIR 1961 SC 1457
AIR 1996 SC 2124
AIR 2000 SC 85
156 ITR 495 Gujrat
222 ITR 523 Allahabad
224 ITR 77 Patna
144 ITR 851 Allahabad FB
162 ITR 888 SC

(c) explanation having been given for discrepancy in figures of stock, no addition can be made on that account.

172 ITR 173 Allahabad

The AO did not find on physical search the assets stated to have been reported to the bank in **proforma** balance sheet (and not in the actual balance sheet).

(d) affidavit cannot be rejected without cross examination unless the facts on records demonstrate unequivocably to the contrary (in this case the AO did not even discuss affidavit or its contents).

30 ITR 181 SC
87 ITR 349 SC
158 ITR 215 Calcutta
149 ITR 172 Kerala
145 ITR 457 Allahabad

Attested
Adv.

8.1. Further it is wrong to assume that a junior officer is expected to do less work. It is a matter of record that an AAC/ DC(A) was required to dispose off 180 appeals in a month whereas a CIT(A) only 30-50 appeals. As an AAC, I disposed off 10,000 appeals per year but as CIT(A) only about 1,000.

8.2. It may be pertinent to refer to quality of block assessment orders as brought out succinctly in the Kelkar Report on Direct Taxes.

> " ..... the assessment is one sided, high pitched, completed in a hurry when it is getting barred by limitation ignoring the contentions of the assessee.....in a search case, there is no real investigation. As a result, the assesment does not stand the test of judicial scrutiny in appeals. There is nominal revenue gain from the searched case....."(ANNEXURE -7)

It appears that the observations are made keeping in mind the assessment in question.

8.3. There have been repeated requests/directions from the higher authorities to dispose off high demand appeals particularly when they are accompanied by request for stay of demand as in this case. There were repeated pointers to the higher authorities to the effect that the AOs do not appear at the appeal hearings.

8.4. The appeal in question was not the only one decided in a short time by me. (ANNEXURE- 8)

8.5. The AO after the search on 29.6.99 had completed assessment for some of the block years viz., 97-98 and 98-99 on 7.3.2000 and 11.1.2001 respectively u/s 143(3) by applying rate of 8% as prescribed u/s 44AD. He could not be allowed be go back on the same and apply the rate of 20.7% which is nowhere disclosed/adopted in respect of Civil Contractors, as the appellant is. (paras 13.4 & 10.1 of appellate order)

8.6. Under section 250(1), the AO is a necessary party to the appeal. If he was not noticed, he should have applied to the CIT(A) for recalling the appellate order which was exparte vis-a-vis him.

8.7. The appellant has, before the AO and other authorities, been alleging bias and harassment on the part of the AO and had even applied for transfer of case (para 2 of appellate order).

8.8. The AO in respect of contract receipts has blown both hot and cold by adopting the figures as shown by the appellant or as informed to him by department. He could either accept the figures declared by appellant or by department (para 4 of the appellate order).

8.9. The AO while working out addition of Rs. 3,42,68,696/- went by the figures of new assets as quoted by some one. He did not inform the assessee about this enquiry, nor did he find such new assets with the appellant during the course of search (paras 3, 14 of the appellate order).

Attested
Adv

8.10. After the search was over on 29.6.99, the appellant lodged an FIR with the police on 2.7.1999 to the effect that the books of accounts were missing. They were not found during search also. As such no adverse inference could be drawn from the fact of missing of these books of accounts (para 11.1 of appellate order)

8.11. The proforma balance sheets figures were not recorded in the books of accounts the CA indicated that they were on estimates so also the assessee, and therefore, could not be relied upon.

8.12. When the AO could go through 96 grounds of appeal, records, assessment order in a period of two days, there is no reason that an officer of the rank of the CIT(A) could not decide the appeal within 32 days.

8.13. It was for the CIT(A) to decide as to whether any clarifications were required. The AO could not anticipate that the CIT(A) would do so.

8.14. The records made available by the AO to CIT(A) were duly and fully considered.

8.15. The appellate order, after it is signed on original copy by the CIT(A), is signed by PA on other copies and steps taken by office for delivery/service.

8.16. It is never mentioned in appeal proceedings that the appeal is "fully" heard. The AOs also do not mention that the hearings have taken place "fully".

9. It is a settled law that where a decision in appeal goes against the Government, the proper course is to go in for a review/appeal and in no circumstances can an appellate officer be subjected to disciplinary proceedings, otherwise that would demoralise the departmental officers in deciding appeals without fear or favour(176 ITR 375). Also "it is well said that a judge who has not committed an error is yet to be born" (AIR 1994 SC 1031).

10. It is requested that the above facts/legal position be placed before the Competent Authority so that the disciplinary proceedings are dropped expeditiously, the charge having been denied.

Enclo : As stated.

(Dr. J.K.Goyal)

176 ITR 375

Attested
Adv.

By Speed Post.
Confidential

ANNEXURE-1

Confidential

F.No. C-14011/5/2002-V&L

Government of India
Ministry of Finance, Deptt. of Revenue
Central Board of Direct Taxes
North Block

New Delhi, dated the 26th December, 2002

To

Shri J.K. Goyal
Chief Commissioner of Income Tax (OSD)
Guwahati.
(Through CCIT, Guwahati)

Sir,

Sub : Memorandum of charge sheet issued under F.No. C-14011/5/2002/ V&L dated 28.10.2002- Written Statement of Defence - regarding

Kindly refer to your letter dated 6.11.2002 on the above subject.

2. The charge sheet dated 28.10.2002 was duly served on you on 1.11.2002. You were required to submit your written statement of defence accepting or denying the article of charge within 20 days from 1.11.2002. No such acceptance or denial has been received from your end till date.

3. You are hereby allowed 7 days from the date of receipt of this letter to submit your written statement of defence on the lines mentioned above in para 2, failing which it may be construed that you have nothing to say on the issue. In that case an oral inquiry may be instituted against you in terms of Rule 14(5)(b) of CCS (CCA) Rules, 1965. In case you desire to have inspection of the listed documents or require copies thereof, you may approach the DIT (Vig.) East, Kolkata in whose custody the listed documents are presently lying.

Yours faithfully,

(V.K. Singh)
Under Secretary to the Govt. of India

Copy to:

1. The Director of Income-tax (Vig.) East, Kolkata with reference to his letter no.DIT(V)/E/VI/104/2002-03/693 dated 20.12.02. He is requested to allow inspection/furnish copies of listed documents in case the CO approaches him for this purpose.

2. The DGIT (Vig.), New Delhi for information.

3. CCIT, Guwahati.

(V.K. Singh)
Under Secretary to the Govt. of India

Attested
Advocate.

(53)

From,
Dr. J. K. Goyal
Chief Commissioner of Income Tax
Guwahati

07/01/2003.

To,
Dr. V. K. Singh,
Under Secretary to Ministry of Finance,
Central Board of Direct Taxes,
North Block, New Delhi.

Please refer to your letter F No. C-14011/5/2002-V&L dated. 26/12/2002

At the outset, I wish to record my objection to the "Confidential" communications being sent to me in an open envelope through the CCIT Guwahati as if I am subordinate to that office. It appears that the procedure for service of such communications is not being observed deliberately with a view only to denigrade my image in office.

I also seriously object to being addressed as CCIT (OSD) in the communication dated 26/12/2002-an act contumacious to the Honourable Central Administrative Tribunal, despite clear order of theirs dated 23/12/2002 which was communicated on 24/12/2002 by me as well as the office.

I am also surprised at the fact of the communication under reference having been issued when the matter is pending before the Court in total disregard of the process of law.

You are fully aware that the show cause notice dated 18/02/2002 was issued to me with a predetermined mind, which was accompanied by the order of suspension of the same date which is under challenge before the Court through OA No. 76/2002. In the said OA, the very basis of suspension is under objection. Again, the show cause notice has been converted into a formal charge sheet without even allowing to me the inspection/copies of relevant documents/records despite ten request letters between March and October 2002. The advice of the CVC has also been obtained by the Department by misrepresenting to them to the effect that I had deliberately not replied to the Show Cause notice whereas the fact is that despite promise, the inspection / copies of the relevant record was not provided to me for which reason the reply to the show cause notice could not be furnished.

In these circumstances, it deserves to be decided as to how far the issuance of the charge sheet is justified more particularly when the same very charge sheet is under challenge before the Honourable CAT in OA No. 388/2002 and, therefore, the matter is sub judice.

Attested
Advocate

Accordingly I wish to be informed whether the Department proposes to proceed with the charge sheet at this stage. Till such time a decision is arrived at on this representation, the charge sheet may be kept in abeyance. However, in case the Department wishes to proceed further in the matter bypassing the above relevant factors, then I must be provided with copies of all the relevant documents / records as requested by me from time to time together with those of reference to the CVC and their advice. This will be obviously subject to any order that may be passed in my above OA by CAT. Further this is without any prejudice to the decisions in the OAs. It may be reiterated that there is no question of admitting the charge.

An early reply is requested.

(Dr. J. K. Goyal.)

Copy to: D. I. (Vig.) East, Kolkata. for information & necessary action.

(Dr. J. K. Goyal.)

Attested
Advocate.

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DESTINATION | DATE

96797948

ORIGIN: GUWAHATI

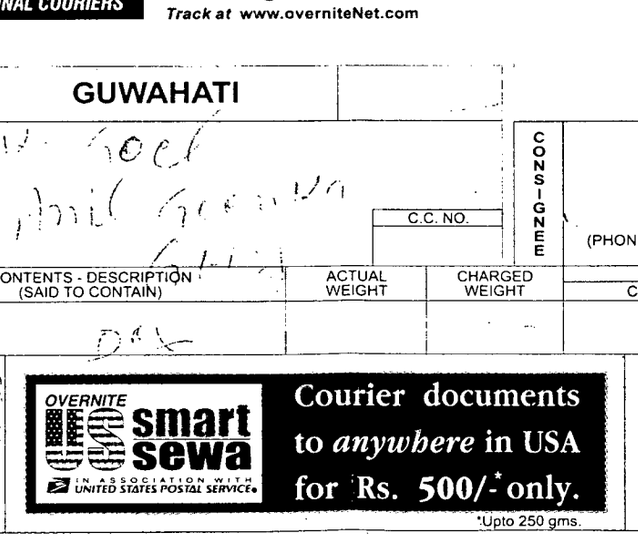
SHIPPER (PHONE / FAX) | C.C. NO. | CONSIGNEE (PHONE / FAX)

NO. OF PCS.	CONTENTS - DESCRIPTION (SAID TO CONTAIN)	ACTUAL WEIGHT	CHARGED WEIGHT	PAYMENT MODE CASH ①	PAYMENT MODE CREDIT ②	CHARGES	AMOUNT RUPEES
						Service Charge	
						Other Charges	
						TOTAL	
						Service Tax	
						GRAND TOTAL	

I hereby declare :
(1) That this consignment does not contain personal mail, currency notes, jewellery, contraband etc.
(2) That I have read the terms & conditions of carriage as given on reverse of the Shipper's Copy of Air Waybill and abide by the same.

SENDER'S NAME

SIGNATURE



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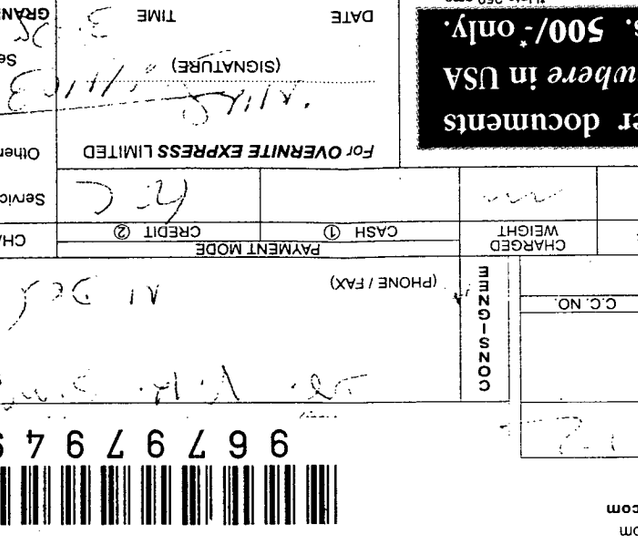
NO. OF PCS.	CONTENTS - DESCRIPTION (SAID TO CONTAIN)	ACTUAL WEIGHT	CHARGED WEIGHT	PAYMENT MODE CASH ①	PAYMENT MODE CREDIT ②	CHARGES	AMOUNT RUPEES
						Service Charge	
						Other Charges	
						TOTAL	
						Service Tax	
						GRAND TOTAL	

I hereby declare :
(1) That this consignment does not contain personal mail, currency notes, jewellery, contraband etc.
(2) That I have read the terms & conditions of carriage as given on reverse of the Shipper's Copy of Air Waybill and abide by the same.

SENDER'S NAME

SIGNATURE



For OVERNITE EXPRESS LIMITED

(SIGNATURE)

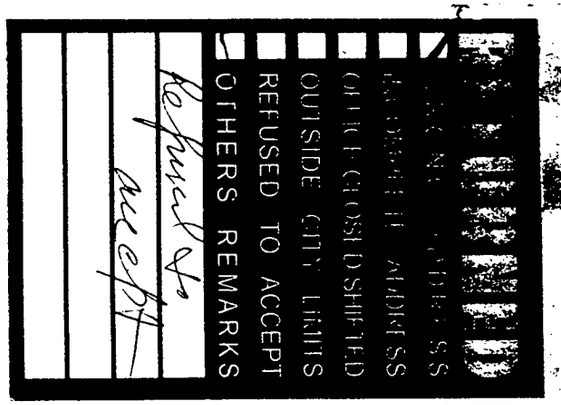
DATE | TIME

SHIPPER'S COPY

THANKS FOR USING OVERNITE EXPRESS

Attested
Advocate.

Things Covered



9674797 48

To,

Director of Income tax (Vigilance)
East Zone
Aaykar Bhawan, 8th Floor
Chowringhee Square
KOLKATA
700069

From
Dr. J. K. Goyal
CCIT, Income tax Office
G.S. Road
GUWAHATI - 781005

ANNEXURE 2

LIST OF DATES

05-04-1988	DPC for the posts of Commissioners of I.T. held
10-05-1988	OA 291/1988 filed by applicant challenging the selections made by DPC
17-05-1989	Order in OA passed quashing the proceedings of DPC
20-03-1990	On appeal by Government ,Supreme Court directed to convene Review DPC within 2 months
19-04-1990	Preliminary memo issued
28-04-1990	Review DPC held ,applicant found fit and recommended for promotion as CIT
31-05-1990	Reply to preliminary memo furnished
16-07-1991	Chargesheet running into 18 pages issued
30-09-1991	Reply to chargememo given
23-06-1993	IO/PO appointed
	Inspection of listed documents not given
01-12-1994	Hearing by inquiry officer
17-05-1995	IO submits report holding one of the charges as 'very marginally proved' ;others not proved
17-09-1996	IO's report made available
22-10-1996	Reply to IO's report (mean time on duty as Election Observer)
10-11-2000	Reminder to finalize proceedings with copy to CVC after reminders in 1997,1998,1999 failed
23-11-2000	File sent to UPSC for advice
05-02-2001	DPC for the posts of Chief Commissioners held ,Sealed Cover procedure adopted
08-03-2001	OA 590/2001 filed against adoption of Sealed Cover procedure in respect of applicant
29-03-2001	OA disposed off with a direction to finalize proceedings within 2 months
24-04-2001	UPSC advised to drop the charges
06-08-2001	On MA by UOI and CCP by applicant order passed to promote applicant provisionally within 2 months whereas 6 months time for finalising proceedings granted to UOI
18-09-2001	UPSC's advice not accepted , file sent for reconsideration
10-10-2001	Representation to UOI with copy to CVC for compliance of above order
18-10-2001	CCP No. 633/2001 filed as order dated 06-08-2001 not complied
29-10-2001	OA 2269/2001 filed seeking promotion in terms of order dated 06-08-2001
30-10-2001	Interim order passed restraining UOI from promoting any officer junior to applicant
09-11-2001	UPSC advises once again to drop the charges
13-11-2001	Sealed cover opened pursuant to order dated 06-08-2001

Attested
Advocate.

23-11-2001	MA 2569/2001 filed by UOI seeking modification of order dated 30-10-2001 rejected
10-12-2001	Order in CCP passed –compliance to be reported by 08-01-2002
10-12-2001	UOI filed CW 7483/2001 for modification of order dated 23-11-2001 before High Court
11-12-2001	Order dated 23-11-2001 confirmed ,UOI directed to comply with order dated 06-08-2001 within 2 weeks
14-12-2001	File sent to ACC for approval for provisional promotion
20-12-2001	ACC approves promotion and directs the Department of Revenue to fix responsibility for inordinate delay in finalisation of disciplinary proceedings
28-12-2001	Order of provisional promotion
04-01-2002	Representation to CVC for getting the disciplinary proceedings finalised expeditiously
08-01-2002	Reference to DOP on UPSC's advice
15-01-2002	DOP advises to drop the proceedings
28-01-2002	6 weeks time allowed from 08-01-2002 for finalisation of disciplinary proceedings in MA 177/2002 filed by UOI on 10-01-2002
19-02-2002	No order in disciplinary proceedings passed and they abated by virtue of above order
20-02-2002	Disciplinary proceedings closed for which order received on 05-03-2002
20-02-2002	Prayer made for regularisation of provisional promotion
20-02-2002	Show cause memorandum dated 18-02-2002 received to file explanation within 15 days
20-02-2002	Order of suspension dated 18-02-2002 issued without waiting for 15 days time
01-03-2002	Copies of documents requested to enable filing of reply to show cause dated 18-02-2002
05-03-2002	OA No. 76/2002 filed against order of suspension
27-03-2002	UOI sought adjournment
01-04-2002	Documents are informed to be at Kolkata
02-04-2002	Request made to DI Kolkata to supply copies of documents

Attested
Advocate.

ANNEXURE 3

159

No.18/5/2001-EO(SM-II)
Government of India
Secretariat of the Appointments Committee of the Cabinet
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training
****

New Delhi, the 26.12.2001

Department of Revenue may please refer to their O.M. No. A-32011/9/2001-AD-VI dated, 14.12.2001.

2. The Appointments Committee of the Cabinet has approved the promotion of Shri J. K. Goyal to the grade of Chief Commissioner of Income Tax for vacancies relating to the year 2001-2002 w.e.f. the date the officer assumes charge of the post and until further orders. The promotion is on provisional basis subject to final orders to be passed in the pending disciplinary proceedings against Sh. Goyal. Shri J. K. Goyal will be placed at (Sl.No.29A) below Sh. M. H. Kherawala (Sl. No.29) and above Shri J. G. Pendse (Sl. No.30).

3. The ACC has further directed that the Department of Revenue may complete the long pending disciplinary case without any further delay and fix responsibility for the inordinate delay.

4. CR dossier received with the proposal is returned herewith, the receipt of which may please be acknowledged.

Sd/-
(D.P. Goel)
Under Secretary to the Govt. of India
Tel No.3013913

Attested
Advocate.

ANNEXURE - A/14.

160

LIST "A"

LIST OF IRS (INCOME TAX) OFFICERS AGAINST WHOM THE COMMISSION HAS ADVISED LAUNCHING OF CRIMINAL PROCEEDINGS SINCE 1.1.90.

S. No.	NAME OF THE OFFICER (WITH CADRE & YEAR OF ALLOTMENT	DESIGNATION & DEPARTMENT AT THE TIME OF COMMISSION OF OFFENCE	COMMISSION'S ADVICE WITH DATE	DATE OF ISSUE OF SANCTION ORDER
	Shri Bani Singh	Asstt. Commissioner Delhi	Prosecution 05.11.1999	27.12.1999
	Shri Hargovind Arora	Asstt. Commissioner Gurgaon	Prosecution 20.05.1996	10.07.1996
	Shri Rajiv Kumar	Asstt. Commissioner Mumbai	Prosecution 28.09.1999	02.09.2000
	Shri S.R. Goyal	Member (Retd.) Delhi	Prosecution 18.06.1998 Major Penalty 18.06.1998	Information awaited
	Shri V.N. Srivastava	Then CIT, Mumbai	Prosecution 23.05.2000	Information awaited
	Shri Madhusudan Thanvi	CIT and Member (appropriate Authority), Ahmedabad	Prosecution 06.09.2000	Information awaited
	Shri P.C. Hadia	Commissioner and Member (AA), Ahmedabad	Prosecution 06.06.2000	Information awaited
	Shri Om Dutt Mahindra	Then Chief Engineer & Member (Valuation) (AA), Mumbai	Prosecution 06.06.2000	Information awaited

Attested

P. K. Tiwari
Advocate

Attested
Advocate.

	Shri N.R. Solanki	Then ACIT (AA), Ahmedabad	Prosecution 06.06.2000	Information awaited
• 1	Shri D.S. Khoba	Then ACIT (AA) Ahmedabad	Prosecution 06.06.2000	Information awaited

LIST "B"

LIST OF IRS (INCOME TAX) OFFICERS AGAINST WHOM THE COMMISSION HAS ADVISED IMPOSITION OF A MAJOR PENALTY SINCE 1.1.90.

S. No.	NAMT OF THE OFFICER (WITH CADRE & YEAR OF ALLOTMENT)	DESIGNATION & DEPARTMENT AT THE TIME OF COMMISSION OF MISCONDUCT	COMMISSION'S ADVICE WITH DATE	NATURE OF PUNISHMENT IMPOSED (WITH DATE)
	Shri B.N. Ranganath	Asstt. Commissioner Bangalore	Major Penalty 31.01.1995	Information awaited
	Shri K.R. Subbaraman	Asstt. Commissioner (Retd.), Chennai	Major Penalty 22.09.1997	Information awaited
	Shri V.N. Wani	Asstt. Commissioner (Retd.), Mumbai	Cut in Pension 19.05.1997	15.02.2001
	Shri H.L. Nagpal	Asstt. Commissioner Ajmer	Token Cut in Pension 09.08.1999	Information awaited
	Shri O.P. Chaudhary	Asstt. Commissioner (Retd.), Delhi	Major Penalty 11.08.1999	Information awaited
	Shri R.G. Kukreja	Asstt. Commissioner (Retd.), Mumbai	Cut in 10% Pension 27.11.1997	Information awaited

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P. K. Tiwari
Advocate

Attested
Advocate.

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	Shri M.V. Javali	Asstt. Commissioner (Retd.), Bangalore	Cut in Pension 31.03.1995	Information awaited
	Shri S.N. Halder	Asstt. Commissioner (Retd.), Calcutta	Cut in Pension 02.12.1996	09.11.2000
	Shri P.N. Dixit	Asstt. Commissioner 'medabad	Major Penalty 17.04.1997	Information awaited
	Shri I.M. Vaghela	Asstt. Commissioner (Retd.), Navsari	Cut in Pension 23.06.1998	Information awaited
	Shri B.N. Mukherjee	Asstt. Commissioner Calcutta	Major Penalty 02.09.1997	25.10.2000
	Shri A. Banerjee	Asstt. Commissioner (Retd.), Calcutta	Major Penalty 19.05.1997	03.01.2001
	Shri S.D. Nyayanirgune	Asstt. Commissioner (Retd.), Mumbai	Major Penalty 16.09.1996	Cut in 20% pension for 5 years 08.01.1999
	Shri Arbindo Ghosh	Asstt. Commissioner (Retd.), Calcutta	Cut in Pension 02.12.1996	Information awaited
	Shri R.S. Mandal	Asstt. Commissioner (Retd.), Calcutta	Cut in Pension 07.11.1997	Information awaited
	Shri J.P. Abhichandani	Asstt. Commissioner (Retd.), Mumbai	Cut in Pension 05.01.1998	Information awaited
	Shri K.S. Minhas	Asstt. Commissioner Patiala	Major Penalty 11.09.1996	Reduction of Pay by 1 stage for 1 year without cumulative effect 29.04.1998
	Shri J.M. Sahay	Dy. Commissioner Calcutta	Major Penalty 15.10.1993	Reduction in pay by 1 stage for 2 years without cumulative

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				effect 30.04.1996
	Shri S.C. Jain	Dy. Commissioner Baroda	Major Penalty 03.12.1996	Information awaited
	Shri P.K. Mandal	Dy. Commissioner, Calcutta	Major Penalty 06.09.1993	Withholding of increments for 2 years without cumulative effect 18.05.1999
	Shri J.B. Sangma	Joint Commissioner, Calcutta	Major Penalty 13.10.1997	Reduction in Pay by 1 stage without cumulative effect for 4 years 17.03.1999
	Shri S.K. Tyagi	Dy. Commissioner, Mumbai	Major Penalty 11.05.1992	Information awaited
	Shri V.M. Patki	Dy. Commissioner (Retd.), Mumbai	Major Penalty 06.06.1994	Withholding of 20% Pension for 3 years 23.05.1996
	Shri I.A. Theba	Dy. Commissioner (Retd.), Rajkot	Cut in Pension 02.04.1998	Information awaited
	Shri B.K. Sinha	Dy. Commissioner, Calcutta	Major Penalty 16.09.1998	Information awaited
	Shri V.D. Trivedi	Commissioner, Chandigarh	Major Penalty 13.11.1998	Information awaited
	Shri V.S. Banthia	Commissioner, Calcutta	Major Penalty 22.10.1998	Information awaited
	Shri V.N. Srivastava	Commissioner, Mumbai	Major Penalty 13.11.1998	Information awaited

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P. K. Tiwari
Advocate

Attested
Advocate

	Shri C.U. Choure	Commissioner (Retd.), Nasik	Cut in Pension 29.02.1996	Cut in 20% monthly pension for 3 years 03.08.1998
	Shri G. Ramdas	Commissioner, Chennai	Major Penalty 13.10.1999	Information awaited
	Shri G.S. Bhagia	Commissioner (Retd.), Mumbai	Cut in 25% Pension 31.07.1997	Information awaited
	Shri K.K. Dhar	Commissioner (Retd.), Delhi	Cut in Pension 20.03.1991	Cut in 50% Pension permanently 25.10.1996
	Shri B. Narain	Commissioner (Retd.), Chandigarh	Cut in Pension 04.08.1994	Information awaited
	Shri Dilip Shivpuri	Dy. Commissioner, Jaipur	Major Penalty 17.08.1998	12.03.2001
	Shri A. Dev Verma	Dy. Commissioner, Mumbai	Major Penalty 08.03.1995	Charges dropped 22.12.1998
	Smt. Swati S. Patil	DCIT, Belgaum (Now Addl. CIT)	Major Penalty 28.03.2001	Information awaited

Attested

. K. Tiwari
Advocate

Attested
Advocate.

ANNEXURE-5

165

Four shortlisted for CBDT senior posts

HT Correspondent
New Delhi, September 25

THE GOVERNMENT has shortlisted chief commissioners of income tax — A.K. Mohanty, A. Mukhopadhyay, Satrajit Chowdhari and D.N. Sinha — for vacancies in the Central Board of Direct Taxes (CBDT).

The Department of Revenue had recommended 21 of the seniormost officers for the posts.

Central Board of Direct Taxes chairman O.P. Srivastava is expected to retire in January next, while R.K. Pathania, member, CBDT, has been posted at the Settlement Commission.

Taking into account the requirement of minimum balance service as Central Board of Direct Taxes member and also the vigilance status of the officers, the government did not consider the cases of Gunjit Singh, S.C. Saxena, K.V.M. Pai, C.V. Padmanabhan, V.D. Trivedi, M.M. Joshi and J.S. Ahluwalia.

The Central Bureau of Investigation (CBI) had sought sanction for prosecution of Thanvi in a matter pertaining to his tenure as member, Appropriate Authority.

In the case of A. Mukhopadhyay, it was noted some unsigned complaints were received though this would not come in his way for appointment as member, Central Board of Direct Taxes.

The shortlisting of four members for the CBDT comes close on the heels of the Centre's decision not to give extension to present chairman O.P. Srivastava.

H.T.
Sept. 27, 2001.

Attested
Advocate.

ANNEXURE 6

IN THE OFFICE OF THE COMMISSIONER OF INCOME TAX (APPEALS)

G U W A H A T I.

166

Date of order : 21-06-2001.

Appeal No. Guwa- 16/2001-02.

Instituted on 21.05.2001 from the order of the Additional Commissioner of Income-Tax (Assessment), Special Range-I, Guwahati. (Shri J. C. Pegu).

1.	Year of Assessment	:	1998-99.
2.	Name of the Appellant	:	M/.s. Siang Tea & Industries Private Limited, Sector- 'C', Itanagar, Arunachal Pradesh.
3.	Income Assessed	:	Rs. 50,00,000.00
4.	Tax Demanded	:	Rs. 25,16,383.00
5.	Section under which order appealed against was passed	:	144 of the I.T.Act, 1961.

Date of hearing : 21-06-2001.

Present for the appellant : Shri B. K. Agarwalla, FCA & A/R & Shri U. K. Bajoria, ITP & A/R.

APPELLATE ORDER & GROUNDS OF DECISION.

This appeal is directed against the order of the Assessing Officer (A.O) passed u/s 144 of the Income Tax Act, 1961. The appellant company ismainly engaged in growing, manufacturing and sale of tea.

At the outset , the appellant has objected against the completion of assessment u/s 144 of the Act by way of taking resort to section 145 of the I.T. Act without affording any opportunity to the appellant and violating the rules of natural justice as envisaged under section 143(2). It is very much apparent from the assessment order that no date of hearing has been fixed by the A.O. and no proper opportunity was given to the appellant to represent its case properly. It is also very e much apparent from the order itself that the A.O. has not gone through the accounts, nor he examined the details. The assessment purportedly made u/s 144 without any basis is liable to be considered null and void.

I have gone through the assessment order and I find that the A.O. had completed the assessment ex-parte without affording any opportunity to the appellant, which is very much apparent from the preamble of the assessment order.

Attested
Advocate.

Without prejudice to the above, the assessing officer states that during the year the appellant has not computed income from purchased green leaf valued Rs.3,97,380.00 While completing the assessment the Assessing officer had computed the total income of the appellant by taking the entire amount of Green Leaves purchase worth Rs. 3,97,380.00 as 100% taxable income of the appellant.

It was contended that the Assessing Officer had erred in computing the total income of the appellant by taking the entire amount of Green Leaves purchase Rs. 3,97,380.00 as 100% taxable income of the appellant. The proportionate income attributable to greenleaves purchased , quantity amounting to 72231 kgs. ought to have been charged to 100% taxable income under the Income Tax Act, and hence the Assessing officer may kindly be directed to compute the income attributable to green leaves purchase quantity accordingly.

I have considered the submission of the A/R and in view of the clarification raised before me this issue is restored to the file of the assessing officer to this limited extent who will examine the case throughly and adjudicate the issue on the basis of facts as narrated above.

(Direction).

Interest Rs. 37,97,716.00

The appellant has debited Rs. 37,97,716.00 towards interest and the details of the such interest payment were not furnished and hence the Assessing officer disallowed the interest payment.

The appellant has submitted that out of the aforesaid sum of Rs. 37,97,716.00 , Rs. 4,89,328.77 was paid to Tea Board , Calcutta and the balance amount of Rs. 33,08,387.77 was paid to Vijaya Bank, Itanagar towards interest on Term Loan during the financial year 1997-98.

That the interest amount of Rs. 4,89,329.77 was actually paid to the Tea Board vide DD No. 205147 dated 17.03.98 for Rs. 2,79,232.85 both drawn on Vijaya Bank, payable at Calcutta.

That the amount of interest Rs. 33,08,387.77 due to Vijaya Bank, Itanagar was also actually paid within the due date as contemplated under section 139(1) of the Income Tax Act, 1961.

That a copy of certificate in connection with the aforesaid payment of interest amounting to Rs. 33,08,387.77 obtained from Vijaya Bank , Itanagar, is enclosed herewith.

contd....3.

Hence, the appellant has submitted that the Assessing Officer may kindly be directed to allow the entire amount of interest Rs. 37,97,716.00.

I have considered the submission of the A/R. This issue is also restored to the file of the assessing officer to this limited extent with a direction to examine the evidences of paymeny asn narrated above and allow the amount of interest as admissible to the appellant.

(Direction).

Rejection of Books of Account u/s 145.

That the Assessing officer has held that the audited accounts furnished with the return of income do not contain details of green leaves consumption.

Quote :

" In the audited Account, the auditor has not given any details of consumption of green leaves. Under the circumstances, it is difficult to verify the details of green leaves consumed i.e. produced".

Unquote :

In this connection, it was submitted that the quantity of green leaf consumed both own leaf and purchased leaf were duly disclosed in the audited statement of accounts vide Notes on Accounts attached to the annual accounts. It was further submitted that as per the Notes to the Accounts the quantity of own green leaf consumed is 1116991 kgs. and that of purchased green leaf consumed is 72231 kgs.

It was also contended that in the course of examining the accounts of the assessee, the assessing officer further failed to consider the elements which are essential for invoking the provisions of Section 145(3) which are as under :

1) Whether the assessee has regularly employed a method of accounting ?
2) Even if regular adoption of a method of accounting is there, whether the annual profits can be properly be deduced from the method employed ?
3) Whether the accounts maintained are complete in the sense that there is no significant omission therein ?
4) Wherether the accounts are correctly maintained ?
5) Whether the accounting standards notified by the Central Govt. have been regularly followed by the assessee ?

Attested

Advocate

contd...4.

If the assessing officer's finding on all these questions is in affirmative, the assessee's profit is to be computed on the basis of its accountsin such a case section 145(3) can not be invoked.

In this connection, the A/R has placed reliance in the decision on Md. Umer Vs. CIT, (1975) 101 ITR 525 (PAT).

It was further submitted that Section 145(3) can be invoked only if the aforesaid elements attracting the provisions of Section 145(3) are found to exist. A clear finding to that effect along with the materials on which such finding is based has to be made out and given by the assessing officer. No assessment u/s 145(3) can be sustained if the assessing officer has not considered and recorded a finding against the assessee as to whether he has been regularly employing a method of accounting or whether his income, profits or gains can be properly deduced from his method of accounting if he has been regularly employing a method of accounting or whether accounts are correct and complete, and assessing officer's decision on these matter is not to be a subjective or arbitrary decision but a judicial decision and can not be accepted if there is no material to support his finding (S. Veeriah Readdiar Vs. CIT (1960) 38 ITR 152, 170 (Ker), CIT Vs. McMilan & Co., (1958) 33 ITR 182 (SC) , Pandit Bros. Vs . CIT (1954) 26 ITR 159 (Punj).

It was also asserted that once the books of accounts are rejected then profit has to be estimated on the basis of proper material available. (Dabros Industrial Co.(P)Ltd. Vs. CIT (1977) 108 ITR 424 (Cal)- An assessing officer is not fettered by technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence in a court of law. Nevertheless, the assessing officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support an assessment u/s 143(3)- (Dhakeswari Cotton Mills Ltd. Vs. CIT (1954) 26 ITR 775, 782 (SC).

Under the circumstances it was submitted that the Assessing Officer has rejected the books of accounts without any basis when the basic elements essential for invoking the provisions of Section 145(3) are found missing and the estimation of the total income of the assessee at Rs. 50,00,000.00 is nothing but a guess work.

contd....5.

Attested

Advocate.

-: 5 :-

In view of the above the A/R has submitted that the Assessing officer may kindly be directed to accept the books of accounts of the appellent and compute its total income by applying Rule 8 of the I.T.Rules, 1962.

I have considered the submission of the Ld. A/R and I find enough force in these submissions, the A.C. is accordingly directed to accept the books of accounts of the appellant and compute its total income as per the directions given above by applying rule 8 of the I.T.Rules, 1962.

In the result, the appeal is disposed of as above.

(H. Shullai),
Commissioner of Income Tax (Appeals),
Guwahati.

Memo No.....Date.....
Copy forwarded to the ITO with Record

C I T, N E R

I. A. C.

Appellant with I.T.-7
by order etc.

Senior P.
C. I. T. (Appeals)
GUWAHATI

Attested
Advocate.

29.07 8.8 No AD

IN THE OFFICE OF E COMMISSIONER OF INCOME-TAX (APPEALS)-II, BHUBANESWAR, ORISSA.

Date of Order: 06.08.1999.
I.T.Appeal No.: 129/Co./98-99

Instituted on : 12.01.1999
from the Order of the *Jt.C.I.T., Special Range, Bhubaneswar.*
(Shri C. R. Patl)

	of assessment	:	1991-92
	of the appellant	:	M/s. Powmex Steels Limited, 3A, Shakespeare Sarani, Calcutta - 700 071
(3)	Income assessed	:	Rs.1,02,02,710/-
(4)	Tax demanded	:	Rs.56,64,351/-
(5)	Section under which assessment was made	:	U/s.143(3)/254

Date of hearing : 29.07.1999

Present for appellant - Shri D. B. Desai, FCA.

APPELLATE ORDER AND GROUNDS OF DECISION

The appeal is directed against the order of the Jt. Commissioner of Income-tax, Special Range, Bhubaneswar passed U/s.143(3) read with section 254 of the Income-tax Act. The appellant has mainly contested the following issues in its grounds of appeal :

(1) Proper and sufficient opportunities of hearing have not been afforded thereby denying the principles of natural justice in completing the reassessment.

(2) Taxability of the interest earned by the appellant as income from other sources and denial of deduction of expenditure against such income, thereby not giving effect to the direction of the Hon'ble I.T.A.T.

(3) Disallowance of depreciation and benefit U/s.35AB of the Act. and

(4) Findings on commencement of business activity.

Contd. Page..2

Annexure 3
Advocate

2.1 The A.O. while completing the reassessment found that the original assessment of the appellant was intially confirmed by the C.I.T.(A) in his order dated 30.08.1994 and on further appeal the Hon'ble I.T.A.T. in their order dated 24.07.1997 in ITA No.226(CTK) of 1994 set-aside the assessment to the file of the A.O. after giving some directions and making specific observations.

2.2 The A.O. while considering the additions of interest income required the appellant to explain the taxability of the said income keeping in view the decisions of Hon'ble Supreme Court in their order dated 08.07.1997 in the case of Tuticorin Alkali Chemicals & Fertilisers Limited Vrs. C.I.T. *[227 ITR 172]*. Thereafter, after considering the written submission of the appellant and the arguments of its A.Rs, the A.O. came to the conclusion that the Hon'ble I.T.A.T. has not given any specific direction as regards to the taxability of the interest income but, has only asked the A.O. to reconsider the claim of the appellant as per Para-8 of their appellate order. The A.O. further held that the Hon'ble Supreme Court has overruled the decisions of the Hon'ble Orissa High Court in the case of C.I.T. Vrs. Electro Steel Orissa Ltd. *[211 ITR 552]* and the decisions of the Hon'ble Andhra Pradesh High Court in the case of C.I.T. Vrs. Nagarjuna Steels Ltd. *[171 ITR 665]* in their order dated 08.07.1997 prior to the order dated 24.07.1997 of the I.T.A.T. He accordingly held that the decision of the Hon'ble Apex Court is binding and can not be over looked in the set-aside proceedings.' While doing so the A.O. relied on the decision of the Hon'ble Supreme Court in the case of A.L.A. Firm Vrs. C.I.T. *[189 ITR 285]*. The A.O. following the decision of the Hon'ble Apex Court further held that there was no ambiguity in the said order and accordingly interest payable by the appellant on the borrowed capital for purchase of plant and machinery and its installation was not considered by him for deduction U/s.57 while computing income U/s.56 of the Act.

2.3 The A.O. further concluded that the cases which have been relied upon by the appellant in support of the claim of deduction U/s.57 of the Act. are not applicable in the appellant's case and he did not allow deduction on interest payable on the borrowed money from the interest earned on short term deposits as the appellant's business has not commenced during the previous year relevant to the assessment year. He also did not allow the expenses under different heads claimed by the appellant towards cost of public issue of shares as the same can be amortised U/s. 35D of the Act. after commencement of production by the appellant. It was also held that the interest has been received by the appellant on the deposits of the public issue funds and there is no direct

Contd..Page..3

expenditure which has been wholly and exclusively incurred for earning such income. In the result interest income accruing on public issue funds amounting to Rs.71,61,472/- and interest on short term deposits out of borrowed funds amounting to Rs.30,41,242/- were taken as income from other sources.

2.4 The A.O. did not allow deductions claimed by the appellant for depreciation U/s.32 of the Act. and for expenditure on technical know-how U/s.35AB of the Act. on the ground that the appellant has not commenced any business. While doing so, the A.O. considered the submissions of the appellant in its letter dated 14.10.1998 and other submissions and did not agree with the appellant's claim that there was genuine purchase and sales activities of high speed steel during the year. He did not also accept the appellant's submission made before the Hon'ble I.T.A.T. that the appellant made successful attempt to commence manufacturing operations and before the manufactured commodities are taken to the market it engaged itself in trading activities to know the market behaviour of the said commodity. The A.O. held that the appellant's action by entering into isolated transaction at the tail end of the accounting year was an after thought based on the notes given on Page-8 of the prospectus under the heading "Marketing & Sales Arrangements".

2.5 The A.O. further concluded that the appellant's business was manufacturing of high speed steel and trading of such manufactured goods, which was evident from the information given by it in Part-III of the original return and first revised return. The A.O. further held that the appellant's installed capacity is well below the demand of the commodity and there was no difficulty in selling its products for which there was any necessity to explore the market behaviour/market demand of the manufactured goods. It was further held by him that there was no specific placement of any order for purchase or any order for sale to substantiate the claim of the appellant. The A.O's order at Page-7 & 8 on the trading activity of the appellant as not genuine is quoted as under :

> *"Thus, on a careful consideration of the photocopies of the purchase and sales documents filed by the assessee, it clearly shows that for carrying out the purported trading transactions at its administrative office at Hyderabad, the assessee in reality acted as an agent or broker between some Bombay and Hyderabad parties. Under what circumstances the management of the assessee company embarked upon the proposed trading venture for ascertaining the market behaviour/demand have not been substantiated with any material. No evidence/material whatsoever, have been furnished for substantiating the*

Contd. Page..4

Attested

Advocate.

claim that for ascertaining the market behaviour the management of the company decided to enter into trading at the fag end of the accounting year. The submissions made in the course of the present proceeding that the trading business was done to recover part of cost incurred on marketing people is also not true nor the same has been substantiated with any evidence. Further, the other contention that the assessee started trading activity when it was known that normal production will not be started within 31.03.1991 is merely an afterthought.

The question whether a business has been set up or not is always one of the fact which has to be decided on facts and in the circumstances of each case. It has not been explained as to how the isolated/stray transactions had any nexus with the chain of activities required for its manufacturing project. Rather, the same were totally unconnected with and hence, separate from the manufacturing project. Thus, on a careful consideration of the facts and circumstances of the case, it clearly shows that no real trading business as an organised and continuous activity was set up by the assessee during the previous year".

2.6 The A.O. relying on the decisions of Hon'ble Supreme Court in the case of C.I.T. Vrs. Durga Prasad More *[82 ITR 540]* and Sumati Dayal Vrs. C.I.T. *[214 ITR 801]* and after considering the objections of the appellant company and other facts as has been mentioned earlier came to the conclusion that the appellant did not carry out any business in the true sense during the year and therefore is not entitled for deduction U/s.32 and 35AB of the Act.

3.1 In course of hearing of appeal A.R., Shri D. B. Desai, FCA appeared and argued the case. It was contended that the Hon'ble Tribunal while passing order has classified the disputed issues into two categories - the first being the issue of taxability of interest earned by the appellant by depositing borrowed funds and public issue funds in the short term deposits and the second being the issue of claim of depreciation and deduction U/s.35AB of the Act. The A.R: referred to the order of the I.T.A.T. in paragraph-6 and paragraph-14, which deal with the above two issues. Compliance with the first issue was made by the appellant in its letter dated 08.10.1998 and that with the second issue was made by its letter dated 14.10.1998.

3.2 It was contended that the appellant made detailed submission in relation to the trading activity supported by the photocopies of the following documents :

a) Prospectus for issue of shares to the public;

b) Invoices in support of Sale and Purchase of goods trades;

Contd.Page..5

Attested
Advocate.

c) Demand for Sales tax raised by the Sales Tax Authorities;

d) The 6th Annual Report for the year ended 30th June, 1991;

e) Order U/s.143(3) for assessment year 1992-93.

This is in addition to the details filed by the appellant in course of the original assessment proceedings.

3.3 It was maintained that the A.O. has disbelieved the submissions made in course of the remand proceeding without giving the appellant any opportunity to explain or submit further evidences although request to that effect has been made in its letter dated 14.10.1998 as well as in course of personal hearing. It was also stated that the appellant was not given any opportunity to provide supplementary evidence to defend its case. The A.R. accordingly, argued that by denying proper opportunity of being heard there has been gross violation of principles of natural justice and on that score itself, the disallowance made in the order U/s.143(3)/254 claimed to be bad in law.

4. The A.R. while arguing on the first issue as regards to taxability of interest earned by the appellant contended that the A.O. passed a fresh assessment order retaining the total income determined in the original assessment, which is beyond his competence and jurisdiction. It was stated that the A.O. has nullified the order of the I.T.A.T. by wrongly assuming that the Tribunal has set-aside both the issues for de-novo consideration by him. It was claimed that the A.O. failed to appreciate that the issue set-aside for de-novo consideration by the I.T.A.T. is related to the second issue only i.e. the question of grant of depreciation and deduction for know-how fees U/s.35AB of the Act. The A.R. stressed that as far as the first issue is concerned, the Tribunal has categorically held that the interest liability and the expenditure for issue of share should be allowed as deduction against interest earned by the appellant and the balance should be capitalised. The A.R. referred to the paragraph-6 of the order of the I.T.A.T., which is stated as under :

> *"We may further observe that sections 56 or 57 do not directly apply to the facts of the case as explained in the case of Nagarjuna Steels Ltd. (supra) and hence, the question of application of the decision of the Hon'ble Supreme Court in the case of Bijay Laxmi Sugar Mills cited (supra) does not arise. Assuming for a moment that the income is assessable u/s.56, as decided by the Tribunal in the preceding year, we are of the opinion that the beneficial interpretation given by the Tribunal in the assessee's own case for the earlier assessment year does not call for reconsideration upon reading the judgement of the Hon'ble Supreme Court in the case of Bijay Laxmi Sugar*

Attested
Advocate.

Mills (supra). Looking from any angle, we are of the opinion that the addition made by the assessing officer is not in accordance with law. Assessing Officer is directed to reconsider the claim in the light of our aforesaid directions."

3.5 Based on the above, the A.R further repeated that there was no doubt whatsoever that the A.O. had no jurisdiction, competence or mandate to reverse the decision of the I.T.A.T on the question of assessability of interest of Rs.102.02 lakhs earned by the appellant before commencement of production. It was further impressed that the Hon'ble I.T.A.T had not only relied on the decision of the jurisdictional High Court, but also the I.T.A.T's order in appellant's own case for the assessment year 1990-91.

3.6 The A.R. further contested that the decision of the A.O. in unilaterally reversing the order of the I.T.A.T by applying the decision of the Hon'ble Supreme Court in Tuticorin Alkali Chemicals and Fertilizers Ltd. *[227 ITR 172]* is unsustainable in law. It was stated that although the decisions based on which the Hon'ble I.T.A.T passed their order has not been approved by the Hon'ble Supreme Court, that does not ipso-facto authorise the A.O. to override the decision of the I.T.A.T. particularly when the I.T.A.T. had not set-aside or remanded the particular issue for de-novo consideration by the A.O.

3.7 The A.R. further mentioned that the I.T.A.T's decision in the appellant's own case for the assessment year 1990-91 has been referred to the Hon'ble Orissa High Court U/s.256(2) of the Act. and the order of the I.T.A.T. for the assessment year 1991-92 has also been referred to U/s.256(1) of the Act. In view of the above, the A.R. submitted that until the Hon'ble High Court decides the reference application, the A.O. has no jurisdiction to reverse the decision of the I.T.A.T, on the ground that the decision of the Hon'ble Supreme Court has overruled the principles upheld by the Andhra Pradesh High Court in Nagarjuna Steels followed in the case of Electro Chem Orissa Ltd.

3.8 The A.R. further stressed on judicial discipline, which demands that the decision of the higher authority must be respected by the lower authorities. In this connection he relied on the decision of the Hon'ble Supreme Court in U.O.I Vrs. Kamalakshi Finance Corporation *[(55) ELT 433]* and the decision of the I.T.A.T. in the case of Smt. Padma Chary Vrs. I.T.O *[59 ITD 350]*. The A.R. further added that when the Tribunal gives a direction to the A.O., the A.O. must pass orders strictly in conformity with such directions and the authority concerned can not enlarge its scope and make an order beyond its scope. In this connection he referred to the

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Advocate.

decision of the Hon'ble Calcutta High Court in H.C. Basudeo Prasad Agarwalla Vrs. I.T.O & Others *[180 ITR 388]*, the decision of the Hon'ble Allahabad High Court in the case of Sri Vindhya Vasini Prasad Gupta Vrs. C.I.T *[186 ITR 253]*, the Hon'ble Supreme Court in the case of Bhopal Sugar Industries Ltd. Vrs. I.T.O *[40 ITR 618]* and the Madras High Court in the case of Seshasayee Paper and Boards Ltd. Vrs. I.A.C *[157 ITR 342]*. He quoted the observation of the Madras High Court, which is as under :

> *"even a wrong order has a finality and unless that finality is distributed by a process known to law or by a process authorised by law, the rights of assessee and the Revenue will continue to be governed by the order. A decision of the Supreme Court will not automatically have the effect of vacating the order of the Tribunal which has been statutorily made final under Section 254(4) of the Income Tax Act 1961."*

3.9 Without prejudice to the above, the A.R. contended that even if the interest income assessed as income from other sources, there would be no positive income as deduction for interest payable by the appellant for borrowed funds and the expenditure for issue of share is to be set off against such income from other sources as per the decision of the Tribunal and that part of the decision is not covered by the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd.

3.10 The A.R. further referring to the decision of the Supreme Court in the above case contended that the question of taxability of interest paid on borrowed money U/s.57 was not before the Hon'ble Court. The A.R. was of the view that the question of allowability of expenditure U/s.57 has been dealt with by the Hon'ble Supreme Court in the case of C.I.T. Vrs. Rajendra Prasad Moody and C.I.T. Vrs. Raghunandan Prasad Moody reported in *115 ITR 519* . The A.R. also relied on the decision of Calcutta High Court in the case of C.I.T. Vrs. New Savan Sugar & Gur Refinery Co. Ltd. *[185 ITR 564]* and contended that the Hon'ble Supreme Court have neither overruled nor questioned the correctness of the decision of Calcutta High Court in the above case. The Apex Court did not examine this aspect, as the same had not been referred to it. It was accordingly contended that even if on the basis of the decision of the Apex Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. the interest is assessed under the head "income from other sources", it would be incumbent to grant deduction of the corresponding interest expenditure U/s.57(iii) of the Act and the resultant income would be NIL or negative. The A.R. accordingly, pleaded not to up-hold the addition made by the A.O. under the income from other sources.

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3.11 The A.R. while taking up his arguments in favour of allowance and depreciation U/s.32 and the grant of deduction U/s.35AB of the Act stated that the A.O. is not justified in law in holding that until the appellant commences manufacture of high speed steel it is not eligible to claim any deduction whatsoever. He termed such view as erroneous and in support of his claim he relied on the decision of Hon'ble Bombay High Court in the case of Western India Vegetable Products Vrs. C.I.T. *[26 ITR 151]* and C.I.T. Vrs. Forging & Stamping Pvt. Ltd. *[119 ITR 616]* and Industrial Solvents & Chemicals Ltd.'s case *[119 ITR 608]* and contended that what is required to be considered is set up of business and not the commencement of business. He also referred the decision of Hon'ble Supreme Court in the case of C.W.T. Vrs. Ramaraja Surgical Cotton Mills Ltd. *[63 ITR 478]* wherein the Court has observed as under :

> *"It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up."*

The A.R. further made the following submissions :

(a) In the appellant's case there was delay in commencement of manufacturing operation due to technology failure and non-cooperation of the technical collaborator. However, the trading operation started and actual purchase and sale took place during the year ended 31.03.1991.

(b) During the accounting year ended 30.06.1992 trial run of the factory was held and substantial amount of production was achieved, which resulted in substantial sale during the assessment year 1993-94.

(c) Continuity of event started in this assessment year continued thereafter on regular basis.

(d) There is no hard and fast rule that in every case there must first be manufacture followed by sale of such manufactured product.

(e) The appellant started trading operation first mainly to get a feel of the market, keep the marketing people engaged and initiate the cost recovery process through the process of trading.

3.12 The A.R. contended that the A.O. did not consider the above points in the remand proceedings and has come to a wrong conclusion that no deduction can be claimed before commencement of manufacturing. He stressed that there could be no doubt that not only the business was set up but, it was also carried out during the year ended 31.03.1991. He, therefore, pleaded for deduction U/s.32 and 35AB of the Act. The A.R. also pressed for the carry forward of unabsorbed business loss and allowances consequent to the admission of its grounds of appeal.

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Attested
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4.1 I have considered the grounds of appeal, order of the A.O. and the arguments of the A.R. on the date of hearing.

4.2 While considering the first ground of appeal i.e. denial of principles of natural justice, I find that the A.O. has rejected certain claim of appellant without giving reasonable opportunity of being heard although the appellant had requested for further opportunity in its letter dated 14.10.1998. The appellant's case has been heard within a short span of 10 days ranging from 12.10.1998 to 22.10.1998 as is evident from the assessment order. Considering the nature of the case and various submissions made by the appellant, further opportunity should have been given before finalising the assessment.

4.3 The Hon'ble Tribunal in their order have classified the disputed issues in two categories viz. (a) the issue as regards taxability of interest earned by the appellant by depositing borrowed funds and public issue of funds in the short term deposits and (b) the issue of claim of depreciation and deduction U/s.35AB of the Act.

4.4 After carefully considering the arguments of the A.R. on the first issue I am inclined to agree with him that the A.O. has wrongly assumed that the Tribunal has set aside the case on this issue for de-novo consideration. Infact, the issue which was set aside for de-novo consideration by the I.T.A.T. related to the second issue only i.e. the question of grant of depreciation and deduction for know-how fees U/s.35AB of the Act.

The Hon'ble I.T.A.T. in their order in ITA No.226 (CTK) of 1994 dated 24.07.1997 at paragraph-8 observed as under :

> *"We have carefully considered the rival submissions and perused the records. The latest decision of the Hon'ble Orissa High Court, which is binding upon us, is reported in 211 ITR 552 (C.I.T-Vrs-Electro Chem Orissa Ltd.) and is direct authority on the point as to the assessability of interest earned by an assessee during pre-commencement period on short term deposits made. The Hon'ble High Court, in turn followed the decision of the Andhra Pradesh High Court in the case of Nagarjuna Steels Ltd.(supra) in coming to the conclusion that the interest earned by Electrochem Orissa Limited from short term deposit should not be treated as income earned under the head income from other sources.*
>
> *"(First 10 lines of para 8 in page 5 of the order)"*
>
> *.....By respectfully following the decisions of the Jurisdictional High Court, we are of the opinion that the interest liability and the expenditure for issue of shares*

Advocate

should be allowed as deduction against the interest earned by the assessee and the balance should be capitalised. We may further observe that section 56 or 57 do not directly apply to the facts of the case as explained in the case of Nagarjuna Steels Ltd.(supra) and hence, the question of application of the decision of the Hon'ble Supreme Court in the case of Bijay Laxmi Sugar Mills (cited supra) does not arise.

.....We are of the opinion that the addition made by the Assessing Officer is not in accordance with law. Assessing Officer is directed to reconsider the claim in the light of our aforesaid direction."

(From last line of page 7 to line end of para 8 of the order).

4.5 From a plain reading of the above order, it is clear that the Hon'ble Tribunal has held that the addition made by the A.O. is not in accordance with the law and they have directed to deal with the claim of the appellant in the reassessment proceeding accordingly.

4.6 In view of the above, the A.O. is not justified to come to a conclusion that the issue of taxability of interest has been set-aside to his file for de-novo consideration. Even if the word *reconsideration* has been used, the Tribunal has passed specific order to the effect that the interest liability and expenditure for issue of shares should be allowed as deduction against interest earned by the assessee and the balance should be capitalised. Further, the Tribunal has specifically observed that the addition made by the A.O. is not in accordance with the law.

4.7 The A.O., therefore, while making reassessment had to give effect to the order of the I.T.A.T. unless the said order is reversed by the Hon'ble High Court or rectified by the Hon'ble Tribunal themselves. It is true that the Hon'ble Tribunal while giving the above direction followed the decision of the Hon'ble Orissa High Court in the case of C.I.T. Vrs. Electro Chem Orissa Ltd. *[211 ITR 552]* and the Hon'ble Andhra Pradesh High Court in the case of Nagarjuna Steels Ltd. *[171 ITR 863]*. These two decisions have been overruled by the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. *[227 ITR 172]*. It is also a fact that the order of the Hon'ble Supreme Court was passed prior to the order of the Hon'ble Tribubnal. This means by the time the order was passed by the Tribunal relying on the decision of the jurisdictional High Court, the decision of the jurisdictional High Court has already been overruled. Further the contention of the A.R. that the Hon'ble Supreme Court was not called upon to decide whether the corresponding interest payable by the assessee on the borrowed money was allowable as deduction U/s.57(iii) of the Act is not correct. Infact

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the Court has considered the admissibility of deduction U/s.57 of the Act. and in this connection I fully agree with the finding of the A.O. that the Apex Court has already decided on this point. Inspite of all these, unless the order of the Hon'ble Tribunal is rectified or reversed, the A.O. has no scope to go beyond the order passed by the I.T.A.T. This is in accordance with the decision of the Madras High Court in the case of Seshasayee Paper and Boards Ltd. *[157 ITR 342]* wherein it is observed that even a wrong order has a finality and unless that finality is disturbed by a process known to law or by a process authorised by law, the rights of assessee and the Revenue will continue to be governed by the order.

4.8 In view of above, the A.O. is not justified to modify the order of the I.T.A.T. by applying the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. *[227 ITR 172]*.

4.9 While considering the other grounds of appellant on claim of depreciation allowance and deduction U/s.35AB of the Act, I find that the A.O. has come to the conclusion that the business of the appellant has not commenced as there have been isolated purchase and sales towards the fag end of the year and that the appellant has merely worked as an agent and has not engaged itself in any real trading activity. He has also come to the conclusion that the appellant's business activity was basically manufacturing of high speed steel and trading of the same thereafter. Although the above finding of the A.O. is based on evidence in the original and first revised return, further opportunity should have been given to the appellant before coming to the above conclusion in view of the directions contained in the order of the Hon'ble I.T.A.T. in ITA No.228 (CTK) of 1994. Keeping in view the decision on ground no.1, I find further opportunity should be given to the appellant to explain its case on the commencement of business as reasonable opportunity was not given at the time of reassessment proceedings. It will therefore be reasonable to set aside the assessment made by the A.O. for re-examination of the claim of the appellant with reference to the claim of depreciation and deduction U/s.35AB of the Act. While doing so, the A.O. will also look into the stand taken by the appellant as regards to commencement of business while claiming non-taxability of interest income from short term deposits.

4.10 However, as far as the claim of the appellant on taxability of interest income is concerned, the A.O. will follow the direction of the I.T.A.T. as per para 4.4 of this order.

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Attested
Advocate.

[12]

1.11 In view of the above, the assessment is set aside and appeal may be treated as allowed.

sd/-
(K. C. Sarangi)
Commissioner of Income-tax (Appeals)-II,
Bhubaneswar.

Certified to be true copy :

Copy to the CIT/Addl C.I.T./A.O./Appellant along with the D.N.

(K. C. Sarangi)
Commissioner of Income-tax (Appeals)-II,
Bhubaneswar.

Attested
Advocate

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आई०टी०एन०एस०-55/ITNS-55

आयकर आयुक्त (अपील)/ ~~आयकर उपायुक्त~~ (अपील) के कार्यालय में
In the Office of the Commissioner of Income-Tex (Appeals)/
~~Deputy Commissioner of Income-Tex (Appeals)~~
GUWAHATI

आदेश की तारीख/Date of order..**30/4/2001**.....

अपील संख्या/Appeal Number..**Guwa-189/2000-01**

Instituted on 12/3/2001 from the order of the DCIT, Investigation Circle-1, Guwahati (G.C. Das)

1. अपील दायर करने की तारीख/Date of Institution of appeal.

2. अधिकारी का नाम और पदनाम जिसने निर्धारण आदेश जारी किया।
Name & Designation of the officer who made the assessment order

3. निर्धारण वर्ष/Assessment year — **Block Period - 1/4/1988 to ~~1/12/1999~~ 31/3/1998 & 1/4/98 to 4/2/1999**

4. अपीलार्थी का नाम/Name of Appellant — **Down Town Hospital Ltd., G.S. Road, Dispur, Guwahati**

5. निर्धारित आय/Income assessed — **Rs.73,52,363/-**

6. माँगा गया कर/शास्ति/जुर्माना/ब्याज/Tex/Penalty/Fine/Interest demanded — **Rs.40,62,670/-**

7. धारा जिसके अधीन आदेश जिसके विरुद्ध अपील की गई है, पास किया गया था।
Section under which the order appealed against was made. — **158BC(c)/143(3)**

सुनवाई की तारीख
Date of hearing..... **26/4/2001**

अपीलार्थी की ओर से उपस्थित
Present for the Appellant..... **S/Shri M.L. Sharma & D. Mitra, A/Rs**

विभाग की ओर से उपस्थित
Present for the Department.....

अपील आदेश और विनिश्चय के आधार
APPELLATE ORDER AND GROUND OF DECISION

This appeal is directed against the order of the A/O passed u/s. 158BC(c)/143(3) of the Income-tax Act, 1961.

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Contd....2/-(P.T.O.)

(2) The first ground of appeal is general in nature, hence no decision is considered necessary.

(3) In GROUND NOs.2 & 3 of the appeal, the appellant is agitating against the A/O's action in making an addition of Rs.67,71,118/- to the appellant's income by treating the same as undisclosed income of the appellant.

(3.1) In order to resolve this issue, it is necessary in brief the facts of the case. The appellant is a public limited company running a Hospital at Guwahati. A search u/s.132(1) of the Income-tax was conducted in the hospital premises of the appellant as well as in the residence of its Managing Director, Dr. N.N. Dutta on 4/2/1999 and as a result of the search, large number of accounts, documents and other relevant papers were seized by the search party. Subsequently, a notice u/s.158BC of the Income-tax Act was served on the appellant by the A/O on 25/6/1999 requiring it to submit its return of income for the entire block period commencing from 1/4/1988 to the date of the search. The appellant company submitted its block period return within the specified time inter alia surrendering Rs.5,81,245/- as its undisclosed income which pertained to two assessment years only iee., assessment year 1997-98 and 1998-99 respectively. It has been observed by the A/O that in the course of the search, along with other books of accounts and papers, some registers relating to Indoor Patient Department (I.P.D.) marked as I.P.D.(Main), I.P.D. (Annexe) and I.P.D.(Credit) and totalling 42 in numbers were found and seized, which related to financial years 1992-93 to 1998-99 i.e., upto the date of search which was on 4/2/1999. The A/O has elaborately mentioned in his order the description and markings of these registers. It is further observed by the A/O that these registers contain details of room number, patient's name, receipt and bill numbers of the hospital, amount of advance collected from the patientsgnet receipt amount, name of the consultant Doctor and amount of fees collected for such consultant from the patient. These registers are maintained on a day to day basis. The fees collected on account of consultants' fee from the patient are not accounted in the main books of the appellant as the same are paid to the concerned visiting consultants in cash after deducting 10% as service charges from such consultant's fees Similarly, in case of referred patients, iee., patients belonging to corporate bodies and other organisations, the fees of the consultants are entered in the bill of the hospital and the same is paid by an account payee cheque to the consultants when the bill amount is received after deducting service charges of 10% from such

Contd.....3/-

Advocate.

consultation fee. The appellant has regularly credited service charges in its books of account under the head 'Nursing Care' including service charges. In this connection, it was further mentioned by the A/O in his order that the aforesaid consultancy fee is paid to the concerned consultant after deducting hospital's service charges and after obtaining signatures of the respective consultants in the receipt register. These receipt registers pertaining to the financial years 1994-95 to 1998-99 were also seized and the A/O verified the payment of such consultancy fee as claimed by the appellant.

(3.2) It transpires from the order of the A/O that in order to verify the correctness of the appellant's claim regarding payment of consultancy fees to various doctors in all thede years involved in the block period, he issued notices u/s. 131 of the Income-tax Act to various doctors to confirm whether they received such fee in the respective years from M/s. Down Town Hospital, the appellant.

(3.3) According to the A/O a number of consultants confirmed the receipts fully, whereas some of the consultants either did not confirm the receipts or confirmed the same partly. For reasons recorded in this regard in his assessment order, the A/O treated the unconfirmed part of the consultants fee for the entire block period amounting to Rs.67,59,859/- as the appellant's undisclosed income with yearwise break-up given in his assessment order. The so called undisclosed income of every year for the entire block period has been added by the A/O under the head 'Income from undisclosed consultancy fees' with yearwise details as under :-

Assessment year	Undisclosed income added
1993-94	Rs. 9,72,751/-
1994-95	Rs. 9,36,702/-
1995-96	Rs. 5,24,546/-
1996-97	Rs.14,70,203/-
1997-98	Rs.16,08,275/-
1998-99	Rs. 6,11,276/-
1999-2000 (from 1-4-98 to 4/2/1999)	Rs. 6,36,106/-
TOTAL -	Rs.67,59,859/-

In addition to the above, for assessment year 1999-2000, i.e., the year in which the search took place and for which the return was not due at the time of search, the A/O also added Rs.2,838/- for unreconciled disprepancy in service charges and Rs.8,421/- as unexplained cash, which formed part of the total cash of Rs.563,373/- which was found in the hospital premises of the appellant during the course of search on 4/2/1999. Thus, the A/O made a total additio of Rs.67,71,118/-(i.e., Rs.67,59,859/- + 2,838/- + 8,421/-) by treating the same as the appellant's undisclosed income for the

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entire block period. It is against this addition that the appellant has come up in appeal before me.

(3.4) The A/R of the appellant has vehemently objected against the arbitrary manner in which theA/O made the aforesaid additions. In this connection, it is submitted ha that at no point of time in the course of the hearing, the appellant was given an opportunity and was confronted with the material, if any, which was gathered by the A/O from various doctors as a result of the enquiry made by him and the appellant was kept totally in the dark about the same. According to the A/R, section 142(2) of the Income-tax Act enables the A/O to make enquiries and gather relevant materials from any source. But before such material is applied against the appellant, it becomes mandatory on the part of the A/O to allow adequate opportunity of being heard to the appellant to explain or rebutt the material gathered against him and only after affording such opportunity, the A/O can apply such material against the appellant. In case the A/O fails to compaly with the- aforesaid provisions of section 142(3) and uses any material gathered by him without giving a proper information and opportunity to the appellant to explain the matters, then the assessment made on the basis of such material shall be bad in law. In this case, according to the appellant company, it was not at all aware as to when the letters of inquiry were sent to the garious doctors and what replies were given or not given by them to the A/O. Adcording to the A/R, the A/O has applied the rule of thumb without bokhering for the provisions as provided under the Income-tax Act, 1961 and such arbitrary addition, according to them, cannot be sustained.

(3.5) Proceeding with his arguments, it is further submitted by the A/R that in this case, the A/O flouted the well established principles of natural justice and had clearly committed errors by placing reliance on material or information, if any, gathered from 13 Doctors, the contents of which, was never made available to the appellant. On this proposition, it is further contended that in the seized registers referred to above, not only the day to day details of consultants fee was available but there was other details including date, patient's name and Indoor Patients card number, room number, particulars of hospital bill and advance received from such patient at the time of his admission. Then again, the registers seized contained full details of the amounts as and when paid to the concerned consultants by the hospital along with their respective signatures and date.

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Commissioner of Income-tax (Appeals) Guwahati-5 Saikia Commercial Complex, Sreenagar, G. S. Road.

Attested
Advocate.

(3.6) Apart from the above factual submissions, the A/R of the appella-nt has also cited before me a number of case laws including the ITAT's decisions wherein it has been clearly held that if any adverse material is collected at the back of the assessee, the same cannot be used against the assessee without affording specific opportunity of being heard and also without opportunity to cross examine the person from whom the material is gathered and that additions, if any, made in absence of such opportunity, cannot be sustained within the four corners of law. To be more specific, the A/R has placed reliance on the following decisions onthe above point : -

Assam Forest Products (P) Ltd. Vs. CIT (1997) 110 ITR 558 (Gauhati)

Addl.ITO Vs.Pankunnam Traders (1976) 102,ITR 366-370-1(Kerala)

Ravi Prakash Agarwala (HUF) Vs. ACIT (2000) 67 TTJ (Delhi) 234

Smt.Rajrani Gupta Vs. DCIT (2000) 72 ITD 155 (Mumbai)

Jai Krishan R.Agarwal Vs. ACIT (2000) 113 Tasman 34 (Pune)

Alok Agarwal Vs. DCIT (2000) 67 TTJ (Delhi) 109

Thus, by drawing my attention to the legal infirmity of the A/O's order, it is forcefully submitted by the A/R that the inference drawn by the A/O, on the basis of his so-called enquiry and resultant adverse finding against the appellant, was bad in law and as such the same cannot be sustained.

(3.7) In addition to the above submissions which are mainly against the validity of A/O's order, the A/R has specifically drawn my attention to the additions made as undisclosed income in assessment year 1999-2000 i.e., the year in which the search took place. It is already mentioned in the preceeding paragraphs that the search was conducted in this case on 4/2/1999 whereas the duration of the financial year was from 1/4/1998 to 31/3/1999. For the period from 1/4/1998 to 4/2/1999, the A/O has treated the following amounts as the appellant's undisclosed income:

i) Income from unconfirmed consultancy fee : Rs. 6,36,106/-

ii) Income from undisclosed service charges : Rs. 2,838/-

iii) Income from unexplained cash: Rs. 8,421/-

Contd.....6/-

Commissioner of Income-tax (Appeals) Sreenagar, G. S. Road, Guwahati-5 Commercial Complex

(6)

According to the A/R, the A/O has wrongly interpreted the meaning of undisclosed income as defined in section 158B(b) of the Income-tax Act. On this proposition, it is wrongly asserted that as per the provisions of sub-section (3) of section 158BA of the Income-tax Act, the position is crystal clear when it directs that if any income relates to an assessment year for which the previous year has not ended or the due date of filing of the return has not expired under section 139(1) and such income or the transactions relating to such income are recorded on or before the date of the search in the books of account or other documents maintained in the normal course relating to such previous years then the said income shall not be included in the block period. On the basis of above proposition of law, it is, therefore, strongly contended before me that since the search took place during the financial year 1998-99 which was relevant to assessment year 1999-2000 and for which the due date for filing the return of income u/s. 139(1) was on or before 30/11/1999 and that since all the transactions pertaining to consultancy fee collected and paid to the concerned visiting consultants were duly recorded in the regular records of the appellant, it was erroneous on the part of the A/O to treat such regular income of the appellant pertaining to consultancy fee as undisclosed income relating to assessment year 1999-2000. However, the A/R has offered no explanation regarding treatment of service charges of Rs.2,838/- and unexplained cash of Rs.8,421/- both totalling Rs.11,259/- as undisclosed income of the appellant pertaining to period from 1/4/1998 to 4/2/1999 and forming part of the block period.

(3.8) The A/Rs have also made a scathing attack on the accuracy of the figures which have been worked out by the A/O from assessment year 1993-94 to 1998-99 in respect of the consultancy fee paid to 13 Doctors and the basis followed for working out the unconfirmed consultancy fee in the respective years for treating the same as the appellant's undisclosed income. On this issue, it is further submitted before me, that in the course of the hearing of the case, the appellant filed before the A/O a fullyearwise detail of consultancy fee of each of the aforesaid 13 Doctors which was sorted out from the seized registers on a day to day basis and the same reflected the correct position of consultancy fee paid to the aforesaid Doctors yearwise. A copy of such details was also produced before me for my verification. But according to the A/Rs, the A/O was totally silent about such details having been filed before him for his verification by the appellant. On the other hand, the A/O has relied upon his own figures which unfortunately did

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not tally with the figures provided by the appellant and even the same were not made known to the appella-nt for his comments or rebuttal. Further, whatever figures were either not confirmed by the concerned Doctors or there was any discrepancy in the aforesaid figures and the figures provided by the concerned Doctors, the same were outrightly treated as undisclosed income of the appellant and that too by keeping the appellant totally in the dark and also without affording any opportunity of whatever whatsoever nature to the appellant. In order to prove his point, the A/R has taken me to the last two pages of the A/O's order wherein the names of 13 visiting consultants who confirmed partly have been shown along with yearwise description as under from financial year 1992-93 to 1998-99 : -

1) Amount received (after deducting 10% service charge
2) Amount confirmed
3) Balance - (This amount has been treated as appellant's undisclosed income without any sort of verification)

The A/Rs have also established before me that the figures of consultancy fee received as worked out by the A/O was by and large not correct in all the above cases.

(3.9) For all these reasons, it is, therefore, submitted before me that both in law as well as on facts, the order of the A/O was bad and unsustainable and consequential additions made by him should be deleted.

(3.10) I have considered the submissions of the A/Rs as fully discussed above and also examined the material produced before me. The only issue which requires decision on my part is to decide whether the addition of Rs.67,71,118/- made by the A/O is justified on the facts and in the circumstances of the appellant's case. On going through the records of the appellant it appears that the A/O had disbelieved the genuineness about the appellant's claim in respect of consultancy fee paid to various consultants in all the years involved in the block period. In the preceeding paragraphs, I have already discussed in details the detailed arguments of the appellant as placed before me challenging the legality and factual correctness of the A/O's action. As already mentioned, the search u/s.132(1) of the Income-tax Act took place in this case on 4/2/1999 and the last date for completion of the block assessment was 28/2/2001. On the basis of the appraisal report, the A/O issued notices to a number of Doctors/ consultants whose names appeared in the seized registers to confirm whether they received consultation fee as specified in the notice itself from Down Town Hospital Ltd. during the financial years 1997-98 and 1998-99 respectively. This notice was issued in June, 2000 and thereafter there appears to be no follow up action on the

part of the A/O right upto the month of January,2001. Only in the middle of February,2001 when the case was getting time-barred,the A/O issued further notices to a number of Doctors u/s. 131 of the Income-tax Act requiring their compliance. It appears that inspite of the short notices given by the A/O,a number of Doctors appeared before him and confirmed having received the consultancy fee as informed to them. However,in case of 15 Doctors as mentioned in the A/O's order,there was either no confirmation,partial confirmation or there was a difference in the yearwise figures and such difference was straightway treated as undisclosed income of the appellant as fully reflected yearwise in the A/O's order. Such figure was worked out by the A/O at Rs.67,59,859/- .But it is very strange to note that the A/O did not confront the appellant about the result of his enquiry which was the crux of the entire issue in dispute and had thus clearly violated the mandatory provisions of section 142(3) of the Income-tax Act.

(3.11) On this issue,I fully agree with the objections raised by the A/Rs as fully discussed in the preceeding paragraphs and for this serious irregularity in the A/O's order,the finding and conclusion arrived at by the A/O can not be sustained. I have also gone through the various case laws relied upon by the A/Rs as in support of their submissions and find out that the same fully support the appellant's case. Then, on making a test check of the yearwise figures of consultancy fees worked out by the A/O,I find that the same are not factually correct. On the other hand,in support of its case,the appellant has produced before me the yearwise details of such fees which has been worked out from the seized registers on the day to day basis and ona test check,I find that in each year, the figures do not tally with the figures worked out by the A/O.

(3.12) Then again,I find that there was no justification in not accepting the correctness of appellant's figures which were fully verifiable as per the hospital records on a day to day basis and I fail to understand as to what prompted the A/O to accept the consultancy fee figures as confirmed by the Doctors which were without any basis and not supported by any documentary evidance whatsoever. In my opinion, in the given situation and on the basis of material available with the A/O from appellant's seized records,sect action u/s. 158BD of the Income-tax Act is required to be taken in case of the erring Doctors and there was hardly any justification in making such baseless addition in the hands of the appellant. Further,for detailed reasons recorded in the foregoing

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paragraphs, I also agree with the A/Rs that in view of the provisions of section 158BA(3), the so-called unconfirmed consultancy fee of Rs 6,36,106/- pertaining to the period from 1/4/1998 to 4/2/1999 cannot also be treated as undisclosed income of the appellant. Thus having regard to the totality of the facts and circumstances of the case and after taking into consideration the material and arguments placed before me by the A/R of the appellant, I have no hesitation in holding that the A/O failed to make out a proper case for treating Rs.67,59,859/- as undisclosed income of the appellant for the block period for alleged inflation and discrepancy in consultation fees paid to the Doctors. I, therefore, delete the same thereby resulting in a relief of Rs.67,59,859/-.

(3.13) Regarding the addition of Rs.2,858/- on the ground of unrecorded service charges and Rs.8,421/- on the ground of unreconciled cash found at the time of search, I have already concluded that the appellant has offered no explanation for the same and thus this addition of Rs.11,259/- calls for no interference on my part and as such the same is confirmed.

(4) In the result, the appeal is disposed of as above.

Sd/-(H. SHULLAI)
Commissioner of Income-tax (Appeals)
Guwahati

Memo No.....Date.....

Copy forwarded to the ITO with Record

C I T. N E R

I. A. C.

Appellant with [illegible]/-
by order etc.

STENOGRAPHER
C. I. T. (Appeals)
GUWAHATI

pkk

Commissioner of Income-tax (Appeals) Sreenagar, G. S. Road. Saikia Commercial Complex Guwahati-5

आई०टी०एन०एस०-55/ITNS-55

19.4.2001
29.5
30.5
Dr A.P.
Sale record found

आयकर आयुक्त (अपील)/आयकर उपायुक्त (अपील) के कार्यालय में
In the Office of the Commissioner of Income-Tax (Appeals)/
~~Deputy Commissioner of Income-Tax (Appeals)~~

GUWAHATI

आदेश की तारीख/Date of order..... 30/5/2001

अपील संख्या/Appeal Number... Guwa-7/2001-02

Instituted on 19/4/2001 from the order of the JCIT, Special Range, Guwahati (J.C.Pegu)

1. अपील दायर करने की तारीख/Date of Institution of appeal

2. अधिकारी का नाम और पदनाम जिसने निर्धारण आदेश जारी किया।
Name & Designation of the officer who made the assessment order

3. निर्धारण वर्ष/Assessment year — 1998-99

4. अपीलार्थी का नाम/Name of Appellant — George Williamson (Assam) Ltd., Williamson Magor House, Six Mile, Khanapara, Guwahati

C 5. निर्धारित आय/Income assessed — Rs.11,31,90,680/-

6. मांगा गया कर/शास्ति/जुर्माना/ब्याज/Tax/Penalty/Fine/Interest demanded — Rs. 1,29,51,432/-

7. धारा जिसके अधीन आदेश जिसके विरुद्ध अपील की गई है, पास किया गया था।
Section under which the order appealed against was made. — 143(3)

सुनवाई की तारीख
Date of hearing..... — 29/5/2001

अपीलार्थी की ओर से उपस्थित
Present for the Appellant..... — S/Shri K.L. De & N.K. Mukherjee.

विभाग की ओर से उपस्थित
Present for the Department.....

अपील आदेश और विनिश्चय के आधार
APPELLATE ORDER AND GROUND OF DECISION

This appeal is directed against the order of the A/O (Assessing Officer) passed u/s.143(3) of the Income-tax Act, 1961.

234/GIFS/Cal/97—15,00,000 Copies—March 99—MGITBPChdg

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(2) The appellant is engaged in the busines of cultivation and manufacture of tea.

(3) The appellant has made a written submissio and has filed a paper book.

(4) GROUND NO.1(a) & (b) - These two grounds are directed against the observation by the A/O that the appellant was liabl to deduct tax at source u/s.195(1) of the Act from payment of Rs.5,87,90,520/- made to non-resident agents on account of comission, brokerage,warehousing charges,selling and other expenses and disallowing of the expense of Rs.5,87,90,520/- by invoking the provisions of section 40(a)(i) 40(a)(i) of the Act for non-deduction of tax at source.

(4.1) The A/R has submitted that in course of the assessment the appellant had explained its claim for the deduction of the expenses by a letter dated 31/1/2001.A copy of the letter has been submitted at pages 1 - 4 of the paper book. It was explained that as per provisions of section 195(1) tax was required to be deducted at source only if the sum payable to the non-resident was chargeable to tax in India. The services in consideration of which commission,brokerage, warehousing charges etc.were paid were rendered entirely outside India. Hence,the income from commission,brokerage etc.did not arise or accrue or were not deemed to have arisen or accrued in India to the non-residents. The income from brokerage,commission,warehousing charges etc. were also entirely received by the non-resident outside India. In view of these facts there being no chargeable income liable to tax in India the provisions of section 195 were not applicable to the payments made and,therefore,disallowance u/s.40(a)(i) was not called for ,for non-deduction of tax u/s.195. In support of this proposition,the A/R has referred to various judicial decisions,circulars,issued by the Board and also D.T.Agreement (Direct Tax) between the Govt. of India and the Govt. of the U.K. The reasons as to why the appellant was considered by the A/O as liable for deduction of tax u/s.195(1) and the payment was liable for disallowance u/s.40(a)(i) has been discussed at pages 5 & 6 of the assessment order. It was contended that the reasons given by the A/O are all erroneous in facts and in law.

(4.2) The A/R has further submitted that the appellant carried on business of cultivation,manufacture and sale of tea. A substantial quantity of the tea manufactured was exported to the U.K. where it was sold for and on its behalf by its selling agent,George Williamson Co. Ltd.,a company incorporated in the U.K.(hereinafter referred to as the agent). The appellant entered into an agreement with

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Advocate

the agent.The agreement was approved by the RBI. A copy of the agreement approved by the RBI has been furnished at pages 5 & 6 of the paper book.The agreement with the broker Cohen & Griffith Ltd. was similarly approved by the RBI. A copy of this agreement has also been furnished at pages 7 & 8 of the paper book. The commission,brokerage,warehousing charges and selling and other expenses payable in connection with the export sale was specified in the agreement. The RBI also accorded its approval for deduction by the overseas agent of commission and brokerage from the export sale proceeds. A copy of the letter of approval of the RBI dated August,1994 has been furnished at page 9 of the paper book. Accordingly,the selling agent realised the sale proceeds of the tea in the U.K. and reimbursed itself for the expenses incurred for and on account of brokerage,warehousing charges,selling and other expenses and also deducted commission receivable by it for services rendered and the net amount was remitted to the appellant in India.It was further submitted that the fact of deduction by the foreign agent of commission and brokerage from the export sale proceeds was duly shown in the Exchange Control Declaration (GR) Form No.AV which was submitted to the RBI through the authorised dealer. A few specimen copies of commercial invoice and the corresponding GR Form submitted to the RBI were furnished at pages 10 - 28 of the paper book.

(4.3) The A/R has further submitted that the expenditure incurred on brokerage,warehousing charge,selling and other expenses and commission paid to the agent were not credited to the account of the payee but were debited by the appellant to Revenue A/c. and the gross sale proceeds were credited to the sales a/c. and shown in the P & L a/c.

(4.4) The A/R has further submitted that u/s. 195 ,any person responsible for paying to a non-resident or to a foreign company any sum chargeable under the provisions of the Act shall at the time of credit of such income to the account of the payee or at the time of payment thereof deduct income tax thereon at the specified rate.Simply stated,tax is required to be deducted u/s.195 only when the sum payable is chargeable under the provisions of the Act and the chargeability of any payment received by the non-resident is determined under the provisions of section 5(2) and section 9(1)(i) of the Act.

(4.5) The A/R has further submitted that the scope of total income of a non-resident is prescribed by section 5(2) of the Act. According to this section,the income which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India constitutes total income of a non-resident. Explanation (1) of section 5(2)

further provides that income accruing or arising outside India shall not be deemed tobe received in India within the meaning of the said section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

(4.6) Section 7 of the Act provides income which is deemed to be received in India. However, the income referred to in the said section have no relevance to the case under consideration.

(4.7) Section 9 of the Act refers to income which is deemed to accrue or arise in India. Section 9(1)(i) provides that all income accuring or arising through or from any business connection in India shallbe deemed to accrue or arise in India. The explanation to the said clause provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed to accrue or arise in India shall be only such part of the income asis reasonably attributable to the operations carried out in India.

(4.8) It was further submitted by the A/R that an agreement exists between India and the U.K for avoidance of double taxation (DTA). Under Article 7(1) of the DTA, the income arising to an enterprise of the U.K. which does not carry on business in India through a permanent establishment situated in India is to be taxed only in U.K. If the enterprise carries on the business through a permanent establishment in India then only so much of the profits as is attributable to such permanent establishment in India can be taxed in India.

(4.9) The A/R has contended that considered in the light of the statutory provisions and the DTA agreement between India and the U.K the income from brokerage, warehousing charges, commission and other selling expenses of the non-resident is not chargeable to tax in India. The agent is a resident of the U.K. It does not have any place of business, permanent or otherwise, in India. It is an enterprise of the U.K. The persons to whom the agent haspaid on behalf of the appellant, the brokerage warehouse charges etc. are all residents of the U.K and the enterprise of the U.K. having no place of business in India. The agent, broker, warehouse-keeper do not carry on any activity in India in respect of tea exported and sold in the U.K. All the activities relating to sale of the exported tea are undertaken by the said persons outside India. They rendered their service only in the U.K. For earning the commission or warehousing charges or brokerage, no activity whatsoever is conducted in India by any of the non-resident firms. The A/R has accordingly contended that there was no accrual or arising of any income in India in respect of any of the said sum.

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(4.10) The income from commission, brokerage etc. was not also received or deemed to have been received in India. The amount of brokerage, warehousing charges and commission has been paid in the UK by the agent from out of the sale proceeds and accordingly the question of the income being received or deemed to be received in India does not arise.

(4.11) The A/R has further submitted that income accruing or arising only from any business connection in India shall be deemed to accrue or arise in India. The word 'business connection' postulates the carrying on of some activities or operations in India. The agent, in effecting the sales and others rendering the various services, undertook all the operations in the UK and did not undertake any operation in India. In the circumstances, the income in respect of the various disbursements for commission, brokerage or warehousing charges cannot be deemed to accrue or arise in India u/s.9(1)(i) of the Act. Reliance is placed on the decision of the Supreme Court in the case of CIT Vs. R.D. Agarwal & Co. reported in 56 ITR 20 in this regard. It is further submitted that the CBDT has also issued a circular no. 23 dated 23/7/1969 clarifying that a foreign agent of an Indian exporter operates in his own country and no part of his income arises in India.

(4.12) It was further submitted that it has been held by the Supreme Court in the case of Commissioner of Income-tax (AP) Vs. Toshoku Ltd. reported in 125 ITR 525 that even making of entries in the books of the appellant could not amount to receipt of the income in India by the non-resident sales agent and the non-resident could not be charged to tax in India on the basis of such entries.

(4.13) It is further submitted that it is well settled that the provisions of DTA agreement has an over riding effect over the provisions of the Act. In terms of Article 7 of the DTA agreement between U.K. and India the income arising from the various disbursements in question can only be taxed in the U.K.

(4.14) It was contended by the A/R that as per provisions of the Act and the DTA agreement with the U.K. and in view of the judicial decisions and circulars issued by the CBDT, income from brokerage, commission and warehousing charges paid to the non-resident cannot be considered as received or deemed to be received in India or accrued or arose or deemed to accrue or arise in India and, as such, the appellant was not liable to deduct tax u/s.195 of the Act.

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(4.15) Proceeding with his averments, the A/R has further submitted that the claim for deduction of any payment outside India is caught by the mischief of section 40(a)(i) if such sum is chargeable under the Act and on which tax has not been paid or deducted at source. The commission, brokerage etc. in question was not chargeable to tax, is, therefore, required to be deducted. As such, deduction of such sum in computing the business income of the appellant cannot be disallowed u/s.40(a)(i) of the Act for non-deduction tax at source.

(4.16) The A/R has also clarified that the CBDT in its recent circular bearing No.786 dated 7/2/2000 had clarified that the expenditure on payment of commission and other related charges payable to a non-resident for services rendered outside India cannot be disallowed u/s.40(a)(i) for non-deduction of tax u/s.195(1) from such payment since such payments were not taxable in India. A copy of the relevant circular has been furnished at page 29 of the paper book.

(4.17) It was further submitted by the A/R that a circular issued by the tax authorities is not binding on the Courts or on the assessee. However, the interpretation that is thereby placed by a taxing authority on the law is binding on that taxing authority. In other words, the taxing authority cannot be heard to advance an argument that is contrary to that interpretation. In this connection the decision of the Supreme Court in the case of Commissioner of Sales-tax Vs. Indra Industries reported in 248 ITR 338 was referred to.

(4.18) It was urged that considering the submissions, the disallowance of commission, brokerage, warehousing charges and selling and other expenses amounting to Rs.5,67,90,520 may kindly be deleted.

(4.19) The A/R has further submitted that similar disallowances were made in the assessment of the appellant for the preceeding assessment years, but the disallowance had been deleted by the CIT(A).

(4.20) I have carefully considered the facts of the case, the observation of the A/O and the submissions of the A/R. The undisputed facts of the case is that the appellant is a manufacturer of tea and a portion of the tea manufactured was exported and sold in U.K and other countries. The brokerage, commission, warehousing charges, selling and other expenses were incurred in connection with the sale of exported tea. The exported tea was sold for an on behalf of appellant by its ch selling agent, George Williamson & Co. Ltd., a company incorporated in U.K The agency agreement with George Williamson & Co. Ltd. and the agreement with the broker were duly approved by the RBI. In terms of t

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Advocate

of the agency agreement all expenses for effecting the sales in UK like brokerage, warehousing charges are paid by the agent on behalf of the appellant and the agent reimbursed itself for the expenses incurred on account of brokerage, warehousing charges etc. from the sale proceeds of the tea in UK. The agent also deducted commission payable to it for the services rendered in connection with the sales from the sale proceeds and remitted the balance to the appellant in India. The reimbursement of expenses on account of brokerage, warehousing charges selling and other expenses etc. incurred for sale of tea in the UK to the agent and deduction of commission payable to the agent from the sale proceeds was duly approved by the RBI. The expenditure on account of brokerage, warehousing charges or commission to the agent was not credited by the appellant to the account of the respective parties. These expenses were debited to the revenue account as selling expenses and the gross sale proceeds was credited to sales. The entire services for effecting the sale of tea exported for which brokerage commission, warehousing charges and other expenses were incurred, were rendered in UK only and the agent and other persons did not have any place of business and establishment in India.

(4.21) According to the provisions of section 195(1) of the Act the liability to deduct tax could arise in case of payment to a non-resident or to a foreign company of any sum chargeable under the Act. The chargeability of any payment to a non-resident will depend on the applicability of the provisions of section 5(2) and section 9 of the Act.

(4.22) Under the provisions of section 5(2) in the case of a non-resident, all income from whatever source derived which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India is subject to tax in India. Explanation 1 to section 5(2) further provides that income accruing or arising outside India shall not be deemed to be received in India within the meaning of the said section by reason only of the fact that it has been taken into account in the balance sheet prepared in India.

(4.23) Section 9 of the Act refers to the income which is deemed to accrue or arise in India and clause (i) of sub-section (1) of the section provides that all income accruing or arising, whether directly or indirectly, through or from any busines connection in India shall be deemed to accrue or arise in India. Explanation (a) to the said clause provides that in the case of a busine as of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India.

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(4.24) Apart from these facts, an agreement exists between India and UK for avoidance of double taxation (DTA). Under Article 7(1) of DTA agreement the income arising to an enterprise of UK which does not carry on business in India through a permanent establishment situated in India is to be taxed only in UK. If the enterprise carries on the business through a permanent establishment in India then only so much of the profits as is directly or indirectly attributable to such permanent establishment in India can be taxed in India.

(4.25) The income by way of commission, brokerage or warehousing charges has not been received in India by or on behalf of the foreign firms or agent. The amounts of brokerage, warehousing charges and the commission has been paid in the UK by the agent out of the sale proceeds received in the UK. The income cannot, therefore, be said to have been received in India.

(4.26) The agent and the persons to whom the agent paid on behalf of the appellant, brokerage, warehousing charges etc. are all resident of UK and enterprises of UK having no place of business in India. The agent, the broker, the warehouse keeper did not carry on any activity in India in respect of the tea exported and sold in UK and the entire activity for earning commission or warehousing charges or brokerage was undertaken and carried out was outside India. In the circumstances, there cannot be any question of accruing or arising of income from brokerage, commission and warehousing charges in India.

(4.27) The income in respect of the various disbursements for brokerage, commission and warehousing charges made to non-resident agent, brokers and warehouse keeper cannot also be deemed to accrue or arise in India under section 9(1)(i) of the Act. It has been held by the Supreme Court in the case of CIT Vs. R.D. Agarwal & Co., 56 ITR 20 that a business connection involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly and indirectly in the earning of those profits or gains. The agent in effecting sales and others rendering various services undertook all the operations in their own country and did not undertake any operation in India. The circular issued by the CBDT bearing No. 23 dated 23/7/1969 also as clarifies that a foreign agent of an Indian exporter operates in his own country and no part of his income arises in India and his commission is usually remitted directly to him and is, therefore, not received by him or on his behalf in India and such an agent is not liable to Income-tax in India on the commission. The view expressed by the Board in

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the circular has been upheld by the Supreme Court in the case of CIT Vs.Tohoku Ltd., 125 ITR 525. In this case a dealer of Tobacco in India, purchased tobacco and exported it to Japan and France through non-resident sales agent, a Japanese company, and a French business house respectively. Under the terms of the agreement, Japanese company which was appointed as exclusive sales agent in Japan for tobacco exported by the assessee, was entitled to commission of 3% of the invoice amount. The saleprice received on the sale in Japan was remitted wholly to the assessee in India and the assessee debited his commission account and credited the amount of commission payable to the Japanese company in his account books and later remitted the amount to the Japanese company. There was a similar agreement with the French business house in relating to the corresponding area and similar credit and debit entries and subsequent remittance of the commission were made. It was held that the non-resident did not carry on any business operation in the taxable territories; they acted as selling-agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad did not amount to an operation carried out by the non-resident in India contemplated by clause (a) of the Explanation to section 9(1)(i) of the Income-tax Act, 1961. The commission amounts which were earned by the non-residents for services rendered outside India could not be deemed to be income which had either accrued or arisen in India

(4.28) It is worthwhile to mention here that the appellant did not pass any entry in the books of account crediting the agent or any of the foreign firms for the commission, warehousing charges or brokerage paid. As a matter of fact, there was no scope for making any credit entries in favour of the non-resident since the payment were deducted from the sale proceeds before remittance to India. The expenditure incurred on brokerage, warehousing charges and commission were debited to the revenue account as selling expenses and the sale proceeds credited to sales. In my view the position regarding taxability of the amount would not be different even if entries were made in the books of accounts of the appellant crediting the non-resident for payments made. This is evident from Explanation (1) to section 5 of the Act which provided that the income accruing or arising outside India shall not be deemed to be received in India by reason only of the fact that it is taken into account in the balance sheet prepared in India. Any doubt in this regard has been set at rest again by the decision of the Supreme Court in the case of Tohoku Ltd. referred to earlier. In the said decision, the Supreme Court has held that the making of entries in the books of the assessee

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did not amount to receipt, actual or constuctive, by the non-resident sales agent as the amount so credited in their favour were not at their disposal or control and they could not be charged to tax on the basis of receipt of income, actual or constructive, in India.

(4.29) The income arising from disbursement of brokerage, commission, and warehousing charges in the hands of the non-residents was not taxable in India also under the provisions of DTA agreement between India and UK and it is well settled that the provisions of DTA agreement has an over-riding effect over the provisions of the Act.

(4.30) Section 40(a)(i) of the Act provides that the sum chargeable under the Act which is payable outside India and on which tax has not been deducted or paid under chapter XVII-B, shall not be allowed as a deduction in computing the income chargeable under the head 'profits and gains of business'. In other words, the claim for deduction of any payment outside India is hit by section 40(a)(i) if such sum is chargeable under the Act but on which tax has not been deducted at source. The applicability of section 40(a)(i) thus depends on whether the income from commission, brokerage, etc. are chargeable to tax in India. I have held that the commission, brokerage etc. were not chargeable to tax under the provisions of the Act and deduction of the payment could not, therefore, be disallowed for non-deduction of tax. It has also been clarified by the Board vide Circular No.786 dated 7/2/2000 that expenditure on payment of commission and other related charges payable to a non-resident for services rendered outside India cannot be disallowed u/s.40(a)(i) for non-deduction of tax u/s. 195(1) from such payment since such payment were not taxable in India. It is a settled law that circular issued by the Board is binding on the department.

(4.31) Considering in the light of the relevant statutory provisions, the DTA agreement between India and the UK and CBDT Circular No. 786 dated 7/2/2000, I am of the view that the expenditure incurred on payment of commission, brokerage, warehousing charges and selligg and other expenses paid to the foreign agents, brokers and warehouse keepers in the UK cannot be disallowed u/s. 40(a)(i) of the Act for failure to deduct tax from such payment. The disallowance of Rs.5,87,90,520/- is accordingly deleted.

(RELIEF Rs.5,87,90,520/-)

(5) GROUND NO. 2 - This ground relates to determination of the 'export turnover' for purposes of computation of deduction u/s.80HHC by reducing the proceeds from export sales by the amount of commission, brokerage, warehousing charges and selling expenses deducted by the overseas agent.

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(5.1) The A/R has submitted that the tea manufactured by the appellant was partly exported and sold in the UK and other countries. It was explained in course of the assessment that the sale in the foreign markets was made through M/s.George Williamson Co. Ltd., selling agent appointed in the UK The tea exported was received by the agent in the UK stored by them in its godown and then sold to different buyers in London and other foreign countries through auction or M/s.Cohen & Griffiths Ltd., the brokers. According to the terms of the agreement, the agent was entitled to reimbursement of the expenses incurred on payment of warehousing charges, selling expenses and brokerage. Accordingly, the agent deducted the following amounts from the export sale proceeds of Rs.79,40,76,000/- and remitted the balance to the appellant in India.

Commission	Rs. 3,78,97,338/-
Brokerage	Rs. 1,96,71,994/-
Warehousing charges	Rs. 11,79,323/-
Other selling expenses	Rs. 41,865/-
	Rs. 5,87,90,520/-

(5.2) The appellant also explained to the A/O that previously the gross export sale proceeds were used to be brought into India and the expenses incurred by the agent on account of brokerage, warehousing charges etc. and the commission payable to them were subsequently remitted to them. The process involved unnecessarily delay and expenses. Accordingly on representation made by the industries, the RBI permitted the agent to deduct commission, brokerage and other expenses from the gross export sale proceeds and remitted the balance to India. The appellant also brought to the notice of the A/O the decision of the Supreme Court in the case of J.B. Boda & Co.Pvt. Ltd. Vs. CBDT, 223 ITR 271 wherein it has been held that commission expressed in terms of dollars deducted by reinsurance agent operating in India on behalf of the principals abroad from the reinsurance premia collected by them and remittance of the net premia to the foreign principals represented receipt of the commission income in convertible foreign exchange and the benefit of section 80-O was available in respect of commission retained. The appellant accordingly contended before the A/O that commission, brokerage and other expenses deducted from the export sale proceeds should be treated as constituting part of the 'export turnover' for the purpose of computation of deduction u/s.80HHC.

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(5.3) The contention of the appellant was rejected by the A/O on the ground that the decision of the Supreme Court related to section 80-O and was not, therefore, applicable in the interpretation of section 80HHC. The A/O was of the view that since the commission, brokerage, warehousing charges and selling expenses amounting to Rs.5,87,90,520/- was deducted from the sale proceeds the said amount could not be treated as having been received in India in convertible foreign exchange. The A/O also observed that even though it was claimed that the RBI allowed the appellant to adjust commission, brokerage etc. payable to the foreign agent against export sale no evidence in this regard could be furnished.

(5.4) The A/R submitted that the claim of the appellant has been disallowed by the A/O on a literal interpretation of the term "export turnover" appearing in section 80HHC. The commission, brokerage, other selling expenses were payable uneer agreement entered into by the appellant with the agent and brokers and such agreements were duly approved by the RBI. It was further submitted that the RBI expressly authorised the agent to deduct brokerage, commission etc. from the export sales proceeds. The fact of deduction by the overseas agent of commission and brokerage from the export sales proceeds is also duly shown in the Exchange Control Declaration (GR) Form XV which is submitted with RBI through the authorised dealer. The A/R also submitted copies of agreement with the agent and broker which was duly approved by the RBI and also copy of RBI's letter authorising deduction of brokerage, commission etc by the agent, specimen copies of commercial invoice containing the particulars of deduction of commission and brokerage and corresponding GR Forms were also furnished.

(5.5) The A/R has further submitted that under the provisions of section 80HHC(2)(a) as originally introduced there was no requirement for repatriation of the sale proceeds to India. The benefit of deduction of export profit was available only if the sale proceeds were receivable by the assessee in convertible foreign exchange. The clause in its present form was introduced by the Finance Act, 1990 with effect from 1/4/1991. The object of introducing the amendment has been explained by the Board in Circular No.572 dated 3/8/1990, the following extract of the circular is quoted below : -

QUOTE

Under the existing provisions of section 80HHC of the Income-tax Act, exporters are allowed 100% deduction in respect of the profits derived from export of goods or merchandise. One of the conditions for allowing the deduction is that the sale proceed should be receivable in convertible foreign exchange. As a result, the deduction may be allowed even if the foreign exchange is not brought into India. In the absence of such a condition, one of the main purposes of allowing such concessions, namely, to augment the foreign exchange earnings of the country, is being

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defeated. Therefore, section 80HHC has been amended to provide that for obtaining the deduction under this section, the tax payer will be required to bring into India, the sale proceeds of goods or merchandise, in convertible foreign exchange, within a period of six months from the end of the previous year or within such extended period as the Chief Commissioner of Income-tax may allow on being satisfied that the tax payer was prevented from complying with this requirement for reason beyond his control. UNQUOTE

(5.6) The A/R has also clarified that as explained in the circular the underlying object of requiring repatriation of the sale proceeds was to augment the foreign exchange earning of the country. However, the payment of commission, brokerage etc. out of the sale proceeds of exported tea received by the agent outside India did not at all affect the foreign exchange earning of the country since if instead of retaining such foreign exchange abroad for payment of commission brokerage etc. the entire sale proceeds were remitted to India and after such receipt the commission, brokerage was remitted back, there would have been a literal compliance with the provisions of section 80HHC(2)(a) of the Act but the country would not have been any richer in foreign exchange in the process. Such a procedure would result in unnecessary delay in payment of commission, brokerage etc. and would entail needless loss and/or expenses to be incurred.

(5.7) It was further submitted that is is a settled law that the object of all constructions and interpretation of statute is to ascertain the intention of law makers and make it effective. Where the plain literal interpretation of statutory provisions produces a manifestly unjust result which could never have been intended by the legislature, the Court might modify the language used by the legislature, so as to achieve the intention of the legislature and produce a rational construction. The retention of commission, and brokerage abroad which in any event was payable under agreements duly approved by the RBI and receiving the net sale proceeds in India did not in any way affect the object with which the provisions of section 80HHC(2)(a) were amended and could be considered as repatriation in truth and in substance of the entire sale proceeds in India. In support of the contention reliance is placed on the decision of the Supreme Court in the case of CIT Vs. J.H. Gotla, 156 ITR 323,339.

(5.8) According to the A/R, the CBDT, in circular No. 731 dated 20/12/1995 issued in connection with deduction u/s 80-O that the brokerage deducted by reinsurance agents operating in India on behalf of principals abroad from the reinsurance premia collected by them and remittance of net premia to the foreign principals will be eligible for deduction u/s.80-O even though such brokerage is received in Indian currency. A copy of

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the circular has been furnished at page 29A of the paper book.

(5.9) It was asserted by the A/R that the provisions of section 80HHC and section 80-O are similar in so far as it relates to remittance of foreign exchange. Therefore considering the contents of circular number 731 dated 20/12/1995 issued by the CBDT in respect of section 80-O and having regard to the ratio of the decision of the Hon'ble Supreme Court in the case of J.B. Boda Ltd. the commission, brokerage, warehouse charges and selling expenses deducted from the export sale proceeds should be deemed to have been received in convertible foreign exchange.

(5.10) It was further contended that while computing deduction u/s.80HHC in the assessment for the proceedings years the 'export turnover' was similarly reduced by deduction of commission, brokerage, warehousing charges, selling and other expenses paid outside India before repatriation of the sale proceeds but the action of the A/O was not approved by the CIT(A). It is, therefore, urged that the A/O may kindly be directed not to deduct commission, brokerage, warehouse expenses and selling expenses from the gross amount of export sale proceeds in determination of 'export turnover' for purpose of computation of deduction u/s.80HHC.

(5.11) I have carefully considered the facts of the case, the findings of the A/O and the submissions of the A/R. Under the provisions of section 80HHC(2)(a) of the Act prevailing during the year, deduction of the profits derived by the appellant from the export of goods and merchandise to which the section applies is available if the sale proceeds of such goods or merchandise are received in or brought into India by the appellant in convertible foreign exchange within the stipulated period. The requirement of bringing into India, the sale proceeds of goods or merchandise, within the stipulated period was introduced by the Finance Act, 1990 with effect from 1/4/1991. Before the amendment the said provision stood as follows -

> " The sale proceeds of such goods and/or merchandise exported out of India are receivable by the assessee in convertible foreign exchange."

(5.12) The underlying object of the amendment as explained by the Board in circular no. 572 dated 3/8/1990 was to ensure repatriation of the export sale proceeds and thereby to augment the foreign exchange earnings of the country.

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(5.13) The commission and brokerage was paid abroad under agreement with the agent and broker duly approved by the Reserve Bank of India. Besides, the RBI had expressly authorised deduction of brokerage, commission etc. by the agent from the export sale proceeds. Secondly, such retention of a portion of the sale proceeds did not really affect the foreign exchange ~~abroad~~ earnings of the country since it instead such foreign exchange abroad for payment of commission and brokerage the entire sale proceeds were remitted to India and after such receipts the commission and brokerage was remitted back there would have been a literal compliance with the provision as section 80HHC(2)(a) of the act but the country would not have been any richer in foreign in the process. Such a procedure would result in avoidable delay in payment of commission and brokerage and would entail needless loss and/or expenses to be incurred.

(5.14) It has been held by the Supreme Court in the case of CIT Vs. J.H. Gotla, 156 ITR 323, 339 that the object of all constructions and interpretation of statute is to ascertain the intention of law makers and make it effective. Where the plain literal interpretation of statutory provisions produces a manifestly unjust result which could never have been intended by the legislature, the Court might modify the language used by the legislature, so as to achieve the intention of the legislature and produce a rational construction. The retention of commission and brokerage abroad which in any event was payable under agreements duly approved by the RBI and receiving the net sale proceeds in India did not in any way affect the object with which the provisions of section 80HHC(2)(a) were amended and could be considered as repatriation in truth and insubstance of the entire sale proceeds in India.

(5.15) It is worthwhile to refer in this connection to circular no. 731 dated 20/12/1995 issued in connection with deduction u/s 80-O, a copy of which has been furnished at page 29A of the paper book. The provisions of section 80-O required that in order to be entitled to deduction under the section royalty, commission, ~~other~~ fees etc. should be received in India in convertible foreign exchange. It has been clarified by the Board that the brokerage deducted by re-insurance agents operating in India on behalf of principals abroad from the reinsurance premia collected by them and remittance of net premia to the foreign principals will be eligible for deduction u/s.80-O even though such brokerage is received in Indian currency.

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(5.16) In the context of admissibility of deduction u/s.80-O the Hon'ble Supreme Court in the case of J.B.Boda & Co. Ltd. Vs. CBDT ,89 TAXMAN 311 has also observed that to insist on a formal remittance of reinsurance premium to the foreign insurance company first and thereafter to receive the commission from the foreign reinsurance company would be empty formality and meaningless ritual. One pe a perusal of the nature of the transaction and in particular the statement of remittance filed in the RBI regarding the transaction,it was improper to say that the income was generated in India or that the amount was not received in convertible foreign exchange.

(5.17) The provisions of section 80HHC and section 80-O are similar in so far as it relates to remittance of foreign exchange.Therefore,considering the contents of circular no. 731 dated 20/12/1995 issued by the CBDT in respect of section 80-O and having regard to the ratio of the decision of the Hon'ble Supreme Court in the case of J.B. Boda Ltd.,I am of the view that the commission,brokerage,warehouse charges and selling expenses deducted from the export sale proceeds should be deemed to have been received in convertible foreign exchange.

(5.18) Accordingly,the A/O is directed not to deduct commission,brokerage,warehouse expenses and selling expenses paid to non-resident agents,brokers etc. from the gross amount of export sale proceeds in determination of "export turnover" for purpose of computation of deduction u/s.80HHC.

(DIRECTION)

(6) GROUND NO. 3 relates to estimated disallowance out of foreign travel expenses.The appellant incurred an expenditure of Rs.12,08,693/- on account of foreign travel. It was explained in course of the assessment that the foreign travel was undertaken by the Director and Senior Executives of the appellant in connection with export sales promotion. The A/O disallowed an amount of Rs.8,05,836/- being 2/3rd of the expenditure incurred.

(6.1) The disallowance has been made on the ground that the expenditure could not be considered as incurred wholly and exclusively for the purpose of business. The A/O was also of the view that the expenditure was unnecessary since there were three foreign directors staying permanently in the U.K. and there was an agent appointed in the U.K. who could very well look after sales promotion. The A/O has also pointed out that a huge amount of brokerage,commission etc. was paid to foreign agents, brokers in respect of overseas sales. He has also stated that documentary evidence of the export promotional activity in the UK and the results achieved from the foreign visits could not be

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furnished.

(6.2) The A/R has submitted that in the course of the assessment, the appellant had furnished necessary details of foreign travel under cover of letter dated 13/12/2000. The travel was undertaken by the Director and Executives who were directly connected with production, sale and export of tea.

(6.3) It was further submitted that the entire expenditure on foreign travel was incurred for the promotion of export business. The A/R has contended that it is well known that Indian Tea is facing stiff competition in the foreign market from other tea producing countries, such as, Sri Lanka, Kenya and more recently from Vietnam. The appellant company had a big stake in the foreign market since a substantial portion of the tea produced was sold outside the country. The promotion of sales in the export market assumed greater importance since the withdrawal of Russia from the Indian tea market. In the back ground of this scenario of the export market maintenance of close and personal contact with overseas buyers has become all the more necessary in order to know the quantity and quality of tea required by them and plan production and export accordingly. It was submitted that it was because of the sustained efforts of the appellant company that it has been possible to achieve export sales of Rs.79.41 crore during the year. The export sales in the immediately preceeding year was also Rs.60.57 crores. Besides, the appellant was a FERA CO. and a number of its Directors were staying in the UK and the visits to UK were undertaken also for the purpose of discussion of the affairs of the business with the foreign Directors.

(6.4) The A/R has submitted that it has been judicially held that an expenditure incurred for the purpose of business is allowable even it is not remunerative in the final analysis and the decision of the Supreme Court in the case of CIT Vs. Rajendra Pd. Moody, 115 ITR 519 is referred to.

(6.5) It was further submitted that in making the disallowance on the ground that it was not necessary the A/O has clearly over-stepped his jurisdiction. It has been held by the Supreme Court in CIT Vs. Dimraj Giriji, 91 ITR 544 that it is not open to the A/O to prescribe what expenditure an assessee should incur and in what circumstances he should incur such expenditure. Further, it has been held by the Supreme Court in the case of J.K.Woolen Manufacturers Vs. CIT, 72 ITR 612 that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be adjudged from the point of view of the business man and not of the revenue.

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(6.6) It was further clarified that the CBDT in its circular No. 4(C No.27(3)-IT/50) dated 19/6/1950 has enjoined that " the question of admissibility of expenses on visits to foreign country should not be approached from the point of view as to whether such visit resulted in immediately earning profits".

(6.7) The A/R has contended that the A/O was clearly an error in corelating payment of commission and brokerage on export sales and expenditure on foreign travel. Commission and brokerage,and expenditure on foreign travel are twodifferent and totally unconnected charges. Commission and brokerage was paid for services rendered in effecting sales and foreign travel was undertaken for promotion of sale.

(6.8) It was further submitted that similar disallowance was made in the assessment of the preceeding year but after examining the nature of expenses the CIT(A) has been pleased to delete the disallowance in all the years. It was, therefore,urged that the disallowance may kindly be deleted.

(6.9) I have considered the facts of the case, the grounds of disallowance and the submissions of the A/R. I am of the view that the grounds taken for making the estimated disallowance of a part of the foreign travel expenditure is not tenable. The words "wholly and exclusively" does not mean "necessarily". As a matter of fact,the word "necessarily" found its place in section 37(1) of the I.T. Bill 1961 along with the words "wholly and exclusively" but the word "necessarily" was dropped at the select committee stage and the words "wholly and exclusively" were retained. It has been held by the Supreme Court in the case of Eastern Investments Ltd. Vs. CIT 20 ITR 1,4 that the question whether it was necessary for the assessee to enter into a transaction is irrelevant in determining whether the expenditure relating to the transaction should be allowed. Similarly,it has been held,again by the Supreme Court,in the case of Sassoon J.David & Co. P. Ltd.,118 ITR 261 275-76 that an expenditure incurred for promoting the business is allowable even if there was no compelling necessity to incur such expenditure. An expenditure in order to be eligible for deduction need not be profitable. It has been held by the Supreme Court in the case of CIT Vs. Rajendra Prasad Moody,115 ITR 519 that an expenditure incurred for the purpose of business is allowable even if it is unremunerative. The CBDT in circular no.4(C No.27(3)-IT/50) dated 19/6/1950 also enjoin that "the question of admissibility of expenses on visits to foreign country should not be approached from the point of view as to whether such visit resulted in immediately earning profits

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On factual basis also any disallowance was not called for. It is not disputed that a substantial quantity of tea was regularly exported by the appellant to the UK and various other countries and in view of stiff competition faced in the international market sustained efforts are required to be made to retain the market share. Considering the volume of export business of the appellant the expenditure was also quite reasonable. I also find that similar disallowance of foreign travel expenses came up for consideration in the appellant's own case for the preceding years and in deciding the appeals the disallowance has been deleted by me. The disallowance of Rs.8,05,836/- out of foreign travel expenses is, therefore,deleted. (RELIEF Rs.8,05,836/-)

(7) GROUND NO. 4 is directed against the disallowance of Rs.1,30,41,600/- paid to M/s.GLADIOLI ESTATES PVT LTD.(GEPL) towards the cost of organic manure and charges for application thereof in the tea estates.

(7.1) The A/R has submitted that the appellant entered into agreement with GEPL for supply of organic manure and application themof in its various tea estates. According to the terms of the agreement,15 truck load of neem cake,mistard oil cake and cowdung mixture was supplied per hectare and Rs.3,80,000/- per hectare was payable for cost of material and application charges. The appellant also obtained supply of cement worth Rs.28,10,360 from GEPL. The payment for the supply of cement has been allowed in the assessment but payment of Rs.1,30,41,600/- made for supply of manure and application thereof has been disallowed.

(7.2) It was submitted that in the course of the assessment the appellant furnished copies of agreement with GEPL showing gardenwise details of supply of organic manure and payment of application charges and also copies of invoices,vouchers, challans etc. in respect of supply of organic manure and service charges for application. The above facts have also been confirmed and admitted by the A/O in the assessment order. Copies of the agreement have been furnished at pages 30 - 39 of the paper book.

(7.3) In making the disallowance the A/O has observed that summons u/s.131 were issued to GEPL on 14/3/2001 but there was no compliance. Besides,similar expenditure was disallowed in the preceeding years and the facts relating to the expenditure remained the same in in the preceeding years.

(7.4) The A/R has clarified that payment to GEPL for supply of organic manure and application charges was first disallowed in the assessment year 1996-97. The disallowance was repeated also in the assessment year 1997-98. The disallowance in this year has been made on the basis of findings in the assessment order for the year 1996-97 and 1997-98.

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(7.5) As regards the finding in the assessment order for 1996-97 the A/R has submitted that in course of the assessment for the said year the A/O called upon the appellant to state whether any payment was made to four specified concerns including GEPL. The appellant, by its letter dated 20/1/1999 informed the A/O that during the assessment year 1996-97 it had made payment toGEPL only and an amount of Rs.1,02,75,000/- was paid towards cost of organic manure and application charges and Rs.42,19,546/- on account of supply of cement. The appellant also furnished documents and evidence in support of the purchase of organic manure and cement from GEPL as well as proof regarding the services rendered by GEPL in the application of the manure in the tea estates. He also furnished a statement showing gardenwise supply of organic manure and cement. He also furnished copies of letter written to GEPL requesting to undertake application of the organic manure to the tea estates of the appellant company as per terms and conditions mentioned in the said letter.

(7.6) In order to verify the genuineness of the transaction and the details filed by the appellant the A/O issued summons u/s.131 to the principal officer of GEPL and also wrote a letter requiring to furnish information mentioned the min The A/O interalia requested GEPL to furnish the following information and particulars -

a) The mode of transport of organic manure to the different tea estates. If the goods were transported through road, to furnish the vehicle number, date of delivery, manner of payment of vehicle hire charges, place from where the goods were carried and the name and address of the transporter.

b) whether the application of the manure was carried out by GEPL or by any other sub-contractor in case the work of application was carried out through sub-contractors to furnish the full name and address of the sub-contractors, date and mode of payment and supporting bills and vouchers.

~~(7.7)~~ c) PAN/GIR of GEPL along with names & addressof directors and principal officers and the particulars of the respective A/O (assessing officer).

d) Bank statement showing the receipt of payment from the appellant company for the supply and application of organic manure and supply of cement as well as payment by GEPL towards purchase of cement and organic manure including payment to sub-contractors.

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(7.7) It was alleged that the summons to GEPL came back unserved with the Remark 'left'. However,at the request of the A/O,the summons were duly served by the appellant on GEPL at the given address and the notice was duly complied with by the company.

(7.8) M/s.GEPL in its letter dated 1/3/1999 informed that the cement supplied by them to the appellant was purchased from two concerns in Bongaigaon (Assam) and the names and address of the said two concerns was furnished. GEPL further informed that the payment for the purchase was made by account payee Demand Drafts and furnished statement of account of the appellant with the said concerns.

(7.9) As regards organic manure supplied to the appellant,GEPL informed that it had not made any purchase directly from any parties. The work of application of the organic manure in the different tea estates of the appellant company was carried out by the sub-contractors and the arrangement of organic manure carriage thereof to the tea estates and the payment of labour wages and other related expenses connected therewith wasmade by the sub-contractors. GEPL paid to the sub-contractors for the supply of organic manure and services rendered in the application thereof and all payments to the sub-contractors were made by a/c. payee cheques or demand drafts. GEPL also furnished copy of account of the sub-contractors as appearing in its books.

(7.10) The PAN/GIR of GEPL, names and address of its directors and their PAN and particulars of the respective assessing officer were also fu mished.

(7.11) In response to the specific request of the A/O,GEPL also furnished copies of the bills of the sub-contractors who were engaged for supply and application of organic manure.

(7.12) The A/R has submitted that the above facts were duly admitted and confirmed by the A/O in the assessment order for the year 1996-97.

(7.13) It was further submitted that the A/O also issued summons u/s.131 to six sub-contractors located at Dhubri and Gouripur (Assam),examined them u/s.131 and recorded their statement. It was alleged that on local enquiry made by the A/O five other contractors could not be traced at the address furnished by GEPL while,one sub-contractor,namely Manoj Bagaria, died on April,1997.

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(7.14) From the depositions recorded u/s.131 the A/O surmised that the said contractors had denied to have executed any work under GEPL relating to the supply of organic manure to the tea estates of the appellant during the assessment year 1996-97 and as such, there was no expenditure incurred on supply of manure to the tea estates of the appellant.

(7.15) The A/R has contended that the appellant is not concerned with the transactions ~~with~~ which GEPL had with the sub-contractors. Any statement made by such sub-contractors may be used as evidence in proceedings against GEPL as well as in the proceedings against the sub-contractors. It does not however, constitute evidence to the effect that GEPL have not supplied the organic manure to the appellant company or that they have not rendered any services in connection with application of the said manure in the tea estates of the appellant company. It has been confirmed by GEPL that the arrangement of manure and application thereof in the tea estates of the appellant was carried out by them through sub-contractors. It has also been confirmed by GEPL that the payments made to the sub-contractors were through account payee cheques or demand drafts. Further, there is no evidence to show that the payments which were made by GEPL to the sub-contractors were siphoned back to GEPL.

(7.16) It was also contended that there is no allegation by the A/O to the effect that the supplies of organic manure have not been received by the appellant and the receipt of the supplies have not been recorded in the books of account of the appellant. Therefore, the appellant is not concerned regarding the source from which the sub-contractors acquired the supplies made to the appellant so long as the appellant received the supplies of the organic manure and had no complaint about the said supply. Therefore, the presumption of the A/O that since the sub-contractors of GEPL had allegedly denied in their depositions to have executed any contract work under GEPL or to have heard their name or to have received any payment from them, this by implication would mean that GEPL had not delivered the organic manure to the appellant company or rendered services in connection with the application of the said manure in the tea estates of the appellant company is wholly unjustified, unwarranted, unfounded, incorrect and without any basis.

(7.17) The A/R has further pointed out ~~that~~ that the A/O, through his letter dated 12/3/1999 forwarded the depositions of the six sub-contractors recorded on oath under section 131 to the appellant alleging that it was apparent from the said depositions of the sub-contractors that the amount

of Rs.1,02,75,000/- paid to GEPL on account of supply of the organic manure and the application charges thereof was not incurred at all by the appellant company. The A/O therefore, asked the appellant to show cause why the entire amount paid to GEPL should not be disallowed as bogus expenditure.

(7.18) The appellant company responded to the show cause through its letter of 19th March,1999 in which the appellant company categorically stated that it never dealt with the parties whose depositions were sent to the appellant. Consequently,the appellant informed the A/O that it was unable to comment with regard to the alleged statement of the sub-contractors u/s. 131. The bonafide of the appellant is proved by the fact that it forwarded to GEPL the depositions of the sub-contractors sent by the A/O and requested the A/O to directly deal with GEPL in the matter. The A/O instead of confronting GEPL with the depositions given by the six sub-contractors on path under section 131 concluded that the appellant tried to shirk its responsibility by requesting the department to deal directly with GEPL. It was submitted that the appellant had nothing to do with the said sub-contractors. The said sub-contractors had privity of contract with GEPL who engaged them for undertaking the supply of the organic manure and application of the said manure in the tea estates of the appellant company. Further,the said sub-contractors did neither raise any bills on the appellant for the supplies and the services rendered nor did the appellant make any payment towards the supplies and the services rendered to the sub-contractors. Accordingly,the appellant was legally right in contending that it was unable to comment on the depositions given by the sub-contractors as it had no dealings with them. The appellant to show its bonafide,forwarded the depositions to GEPL who had engaged the sub-contractors for the supply and the rendering of the services and rightly requested the A/O to deal the matter directly with GEPL. The allegation of shirking of responsibility on the part of the appellant,is, therefore, wholly unwarranted.Moreover,the conclusion drawn by the A/O based on the response given by the appellant through its letter dated 9th March, 1999 to the effect that the appellant had no answer is not at all legally tenable in view of the submissions made hereinabove.

(7.19) It is true that as observed by the A/O the appellant has to prove that the expenses claimed by it have actually been incurred for the purpose of the business of the appellant. But the further observation of the A/O that in the instant case the appellant company had failed to prove the genuineness of the expenses since the sub-contractors of GEPL denied having supplied the organic manure or rendered services in connection with

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the application thereof is wholly incorrect, unfounded, unwarranted, illegal and based on mere surmise and conjecture. It may be relevant here to note in this connection that there is no challenge by the A/O regarding the reasonableness of the expenditure incurred by the appellant under section 40A(2) of the Income-tax Act, 1961. This is the only section in the Income-tax Act under which reasonableness of the expenditure can be challenged and that too if the payments are made to parties specified in section 40A(2)(b) of the Income-tax Act, 1961. The reasonableness of the expenditure could be gone into only for the purpose of determining whether in fact the amount was actually spent. The factum of the payment by the appellant to GEPL in respect of the expenditure incurred by the appellant on account of supply of the organic manure and the services rendered in connection with the application thereof in the tea gardens of the appellant company is not disputed since the payment has not been challenged., its reasonableness cannot be questioned. Further, there is no dispute that the money flowed out of the coffers of the appellant company to GEPL on account of the supply of the organic manure and the services were rendered in connection with the application thereof in the tea estates of the appellant company. There is no allegation by the A/O that the money which went out of the pocket of the appellant had flowed back to the appellant. There is also no allegation by the Revenue to the effect that GEPL were benamidars of the appellant. Moreover, there is no allegation by the A/O that the expenses on account of the purchase of the organic manure and the services rendered in connection with the application of the said manure in the tea gardens of the appellant company were not incurred for the purpose of the business of the appellant company. Therefore, the genuineness of the payment cannot be doubted merely because of the depositions given by the sub-contractors that they had not supplied the organic manure or had rendered any service in connection with the application thereof in the different tea estates of the appellant company. In the absence of fraud the question whether a transaction had the effect of reducing the appellant's taxable income are all irrelevant in determining whether the expenditure relating to that transaction should be allowed under section 37 of the Act. This view has been taken by the Jurisdictional Guwahati High Court in the case of Narsinghdas Agrawal Properties Pvt. Ltd. Vs. Commissioner of Income-tax, Assam reported in 127 ITR 221.

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(7.20) Moreover, it may be relevant here to state that the accounts of the appellant company are audited by a reputed firm of Chartered Accountants. There is no adverse remark by the statutory auditors regarding the expenditures incurred by the appellant company on account of supply of organic manure and services rendered in connection with the application of the said manure in the tea estates of the appellant company. In the absence of any such finding by the statutory auditor it is unjustified on the part of the A/O to come to a conclusion that the transaction is bogus and a colourable one and that the expenditure was not genuine. The Delhi High Court in Additional Commissioner of Income-tax, Delhi Vs. Jay Engineering Works Ltd. reported in 133 ITR 389 observed that it is quite competent for the Income-tax authorities not only to accept the auditor's report but also to draw proper inference from the same. The Delhi High Court further held that the Income-tax authorities can come to a conclusion that since the auditors were required by the statute to find out if the deductions claimed by the assessee in their balance sheet and profit and loss account were supported by relevant entries in their books of account the auditors must have done so and must have found that the account books supported the claim for deduction.

(7.21) The A/R has further submitted that the deposition given by the sub-contractors u/s.131 of the Income-tax Act does not at all justify the conclusion of the A/O that the transactions of purchase of organic manure and payment of application charges was a colourable device to defraud the revenue significantly, the depositions are found to contain some common features, such as, the deponents concerned were approached by some unknown person of persons who proposed to do some contract work in their name. The witness did not know the nature of the contract work executed by the unknown person in his name or the name of the party for whom the contract work was executed. Some deponents, however, stated that such name lending was sought for in the execution of cowdung supply work. It was further stated that in consideration of lending their name as sub-contractors all the deponents concerned received Rs.2000/- or Rs.2,500/- each from the unknown person or persons. The statement of the deponents in fact proves beyond doubt that the contract work of supply of organic manure to the tea estates of the appellant and application of the said manure had been done if not by the deponent but by somebody on behalf of GEPL.

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(7.22) The statement of two deponents, namely, Sri Laddu Gopal Agarwala & Mahesh Kr. Agarwala is more revealing. Both the deponents initially denied to have executed any contract work in the name of the firms, owned by them, namely, Hanuman Electrical and Chemical Works and Gadadhar Engg.& Builders for and on behalf of GEPL or for that matter any other company . . . . But in the Income-tax return filed by them for the assessment year 1996-97 receipt from supply work and services amounting to Rs.7,57,260/- and Rs.9,55,560/- was shown by them respectively and when the A/O brought these facts to their notice the common plea of both the deponents was that they had signed these statement of accounts and balance sheet filed along with the return of income for the assessment year 1996-97 on the advice of their respective brothers without going through the facts contained in the statement. The very fact that the statement of income and nt the balance sheet enclosed with the return of income filed by Sri Laddoo Gopal Agarwala and Mahesh Kr. Agarwalla for the assessment year 1996-97 disclosed receipt of Rs.7,57,260/- and Rs.9,55,660/- on account of supply work and services to GEPL is ample evidence and proof of the fact that the supply of the organic manure and the services in connection with the application of the manure in the different gardens of the appellant was actually undertaken by these sub-contractors for and on behalf of GEPL.

(7.23) The A/O sent summons under section 131 to two other sub-contractors of GEPL namely Dabdhan Salas Pvt.Ltd. and Brijdhara Tex Trade Pvt. Ltd. asking the sub-contractors to produce books of accounts relating to the contract/sub-contract work executed bythem under GEPL during the financial year 1995-96 . It has been alleged by the A/O that despite the summons under section 131 the said two sub-contractors, simply sent letters dated 19/3/1999. According to the A/O, since the said sub-contractors had not produced the books of account, other documents, evidence and bank accounts relating to the sub-contract work stated to have been executed by them under GEPL in response to the summons u/s. 131, the authenticity of the sub-contractors carrying out the sub-contract work under GEPL could not be proved. This contention of the A/O is unwarranted, unfounded, illegal and cannot be sustained. It may be worthwhile stating here that in the letters dated 19th March, 1999 given bye the above two sub-contractors in response to the summons issued u/s. 131, both the above sub-contractors have categorically confirmed that they had undertaken the work of supply of organic manure and rendered services in connection with the application of the said manure in the tea estates of the appellant company in Assam. The said

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sub-contractors further indicated the amount received by them from GEPL as consideration for the supply and the services stated above and also categorically confirmed that they had received the consideration by account payee cheques. Mere failure to produce books of accounts, bank statement etc. by the sub-contractors did not call for disallowance of the expenditure. The A/O could very well compell the parties summoned to produce the books of accounts and bank statement.

(7.24) A further important point to note here is that both the sub-contractors also confirmed that GEPL before making the payment to the sub-contractors had deducted tax at the applicable rates. The categorical confirmation by the sub-contractors referred to above that they undertook the supply of the organic manure and rendered services in connection with the application of the said manure in the tea estates of the appellant company establishes beyond doubt that GEPL had actually carried out the work of supply of organic manure and its application in the tea gardens of the appellant. Consequently, there can be no doubt that the expenditure incurred by the appellant towards the supply of the manure and the services in connection with the application of the said manure and the services in connection with the application of the said manure in its tea estate was as genuine expenditure incurred wholly and exclusively for the purpose of business of the appellant.

(7.25) The A/R has further submitted that in course of the assessment for the assessment year 1997-98 in order to further verify the genuineness of payments made by the appellant to GEPL as well as to verify the genuineness of supply of cement and organic manure made by GEPL to the appellant and services rendered by the company in application of organic manure in the tea estates of the appellant, the A/O requested the A/R of the appellant to produce managing director of GEPL for examination u/s.131. Accordingly, Mr.Beni Gopal Jaju, Director [redacted] GEPL went all the way from Calcutta and made himself available on 13/3/2000 for examination u/s. 131 and his statement was recorded.

(7.26) Mr.Jaju stated that the company was incorporated on 15/10/1981. The company interalia carried on business of execution of contract works. Mr.Jaju also stated that GEPL executed contract works of the appellant company and furnished the details of various works done for the appellant company. Mr.Jaju further stated that under the contract with the appellant, GEPL arranged for application of organic manure mixture comprising of Neem oil cake, Mustard oil cake and cowdung in the tea estates of the appellant. Mr. Jaju further stated

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that GEPL executed the contract work through various sub-contractors and furnished the names and address of the said sub-contractors.

(7.27) In order to verify the genuineness of the deposition of Mr. Jaju telegrams were sent by the A/O to the sub-contractors at the address furnished by Mr.Jaju requiring them to appear on 27/3/2000 with Bank statement,Vouchers and agreement,if any,with GEPL for execution of the contract works on their behalf. But it is alleged that there was no compliance by the sub-contractors.

(7.28) It is worthwhile to mention here that some of the sub-contractors summoned u/s.131 by the A/O in course of the assessment for the year 1996-97 appeared before the A/O and their deposition was recorded. The contents of the depositions have been discussed in the preceeding paragraphs.

(7.29) The A/R has further submitted that the adverse inference drawn by the A/O based on and from the alleged depositions obtained from six sub-contractors on oath under section 131 as also from the fact of alleged non-compliance to summons under section 131 by two other sub-contractors and disallowance of the payment of Rs.1,30,41,600/- on account of the supply of organic manure and services in connection with the application of such manure in the tea estates of the appellant company is wholly unwarranted. It is now a well settled principle of law that if the assessee has recieved certain money the burden lies on him to prove the source and the nature of the particular receipt. But once the assessee fulfils its obligations,it is not for the assessee to establish and prove the source of the source. This view has been upheld by the jurisdictional Guwahati High Court in the case of Nabadwip Chandra Vs. Commissioner of Income-tax,Assam reported in 44 ITR 591 (Assam). This view is also supported by the Patna High Court in the case of Saraogi Credit Corporation Vs. Commissioner of Income-tax reported in 103 ITR 344. The same view has been echoed by the Madras High Court in the case of S.Hastimal Vs. Commissioner of Income-tax,Madras reported in 49 ITR 273. In this case the Madras High Court concurred with the principle that the assessee can be called upon to explain the origin and the source of a capital contribution but cannot be asked to explain the origin of origin and the source of source as well. This view also finds support from the principles laid down in another decision of the jurisdictional Hon'ble Guwahati High Court in the case of Tolaram Daga Vs. Commissioner of Income-tax reported in 59 ITR 632.

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(7.30) In the case under consideration the expenditure was incurred for the purchase of organic manure and payment of the charges for the application of the said manure in the tea estates of the appellant company. The appellant on its part has contended that the work of supply of the organic manure and the services rendered in connection with the application of the said manure in the tea estates of the appellant company was undertaken by GEPL and the payment for such supply and services was made to GEPL through account payee cheques. GEPL on its part confirmed the fact that it had supplied the organic manure and rendered services in connection with the application of the manure to the appellant in its tea estates and in consideration of the supplies made and services rendered received Rs.1,30,41,600/- from the appellant company in account payee cheques. The above facts have not been challenged or disputed by the A/O. That being the case, the A/O is wholly unjustified in disallowing the payment of Rs.1,30,41,600/- made to GEPL for the simple reason that the appellant company could not prove and establish the fact that the sub-contractors of GEPL had actually rendered services to GEPL to enable GEPL to fulfil its obligations to the appellant company. The action of the A/O in disallowing Rs.1,30,41,600/- is illegal and wholly contrary to the well settled principles of law laid down by various High Court referred to hereinbefore including the jurisdictional Guwahati High Court in the following decisions -

Nabadwip Chandra Ray Vs. CIT, Assam (44 ITR 591 Assam)
Sarogi Credit Corporation Vs. CIT (103 ITR 344, Patna)
S.Kastimal Vs. CIT, Madras (49 ITR 273)
Tolaram Daga Vs. CIT, 59 ITR 632 (Assam)

(7.31) Moreover, from the submissions made above it will be evident that instead of the adverse inference drawn by the A/O, the depositions given by nearly all the sub-contractors and the letters written by two sub-contractors in response to summons issued under section 131 of the Act, clearly establishes the fact that the organic manure was actually supplied to the appellant and services were actually rendered in connection with the application of the said manure in the tea estates of the appellant in Assam. There is also no finding that the money received by GEPL from the appellant co. flowed back to the appellant company. It is also not the case of the A/O that the expenditure was not incurred for the purpose of business of the appellant. That being so, the disallowance of the expenditure of Rs.1,30,41,600/- should be deleted since the expenditure was incurred wholly and exclusively for the purpose of the

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purpose of the appellant.

(7.32) It was pleaded that in view of the facts stated above and the submissions made, the CIT(A) will kindly appreciate that the inference drawn by the A/O that the entire transaction relating to the supply of organic manure and services rendered in connection with the application thereof is a colourable device and the expenditure of Rs.1,30,41,600/- was not genuine is wholly unwarranted, unjustified, unfounded and untenable. The disallowance has been made on the basis of mere surmise and conjecture and on a total misappreciation of facts and misinterpretation of law of evidence.

(7.33) It is further submitted that similar expenditure amounting to Rs.1,02,75,000/- and Rs.1,17,80,000/- was disallowed in the assessment years 1996-97 and 1997-98. But the CIT(A) after examining the matter in detail held that the disallowance was not justified and deleted the entire disallowance. It is, therefore, urged that the disallowance may kindly be deleted.

(7.34) I have gone through the assessment order and submissions made by the appellant. There is no dispute that the money was paid by the appellant company to M/s. Gladioli Estate Pvt. Ltd. for the supply of the organic manure and that the services rendered in connection with the application of the manure in the tea gardens of the appellant company were not incurred for the purpose of the business of the appellant. Therefore in my view, the genuineness of the payment cannot be doubted merely because the sub-contractors who were engaged by Gladioli Estate Pvt. Ltd. stated in their deposition that they had not supplied the manure or had rendered any services in connection with the application thereof in the different tea estates of the appellant.

(7.35) There is no finding of the A/O that the expenditure claimed was hit by the provision of section 40A(2). This is the only section under the Act under which reasonableness of the expenditure can be disputed and that too if the payment are to the parties specified in section 40A (2)(b) of the Act. The reasonables of the expenditure could be gone into only for the purpose of determining whether the in fact the amount was actually spent. The factum of the payment by the appellant to Gladioli Estate Pvt. Ltd. is not disputed. The appellant company produced evidences before the A/O regarding payment made to M/s. Gladioli Estate Pvt. Ltd. The fact of supply of organic manure to the appellant company and receipt of the consideration has similarly been confirmed by Gladioli Estates Pvt. Ltd. and also by its Director Shri S.G.

Jaju in his deposition u/s. 131.

(7.36) Therefore,in the absence of fraud the question whether a transaction had the effect of reducing the appellant's taxable income are all irrelegant in determining whether the expenditure relating to that transaction should be allowed u/s.37 of the Act. This view has been taken by the Guwahati High Court in the case of Narsinghdas Surajmal Properties Pvt. Ltd. Vs. CIT,reported in 127 ITR 221. In this case there is no allegation by the A/O that the payment to GAFL was a fraudulent transaction. In the absence of such allegation by the A/O,the expenditure of Rs.1,30,41,600/- cannot be disallowed on the ground that the appellant had failed to prove the genuineness of the expenditure. Considering all the facts of the case,I am of the opinion that the expenditure of Rs.1,30,41,600/- was incurred wholly and exclusively for the purpose of business of the appellant. Hence,the disallowance of Rs.1,30,41,600/- is deleted. (RELIEF Rs.1,30,41,600/-)

(8) GROUND NO. 5 is directed against the disallowance of Rs.18,79,711/- out of payment of subscription of Rs.53,34,276/-

(8.1) The A/R has submitted that details of payment of subscription of Rs.53,34,276/- was furnished by the appellant in course of assessment. TheA/O picked up subscription paid to the local clubs,puja committees,sports club,orgganizers of flower show and Bihu & other local festivals and disallowed such payments aggregating to Rs.18,79,711/-. A copy of the details of subscription of Rs.53,34,276/- has been furnished at pages 40 - 45 of the paper book.

(8.2) The A/R has further submitted that it was explained in course of assessment that the expenditure was incurred in course of ~~maxxxx~~ carrying on of the business and, therefore,deduction of the amount was admissible as per provisions of law. The expenditure has,however,been disallowed by the A/O on the ground that this was not incurred wholly and exclusively for the purpose of the appellant's business.

(8.3) It was also submitted that the appellant carried on business in remote areas under inhospitable conditions where ordinary facilities of recreation are not available. Cultural and social activities of the organizations which are patronised,provided necessary recreation facilities to the employees.The expenditure was incurred also as a matter of commercial expediency in order to facilitate the carrying on of the business. Thus there was a close nexus between the expenditure and the business. The A/R has contended that it is a settled law that payments made voluntarily are not to be disallowed only on

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account of their voluntary character. So long as there is a reasonable nexus between the expenditure and business, the expenditure will be regarded as having been incurred for the purposes of business and in this connection the decision of the Supreme Court in the case of Sassoon J.David &Co. Vs. CIT, 118 ITR 261 is relied upon.

(8.4) It was further contended that it has been judicially held that so long as there is no improper and oblique purpose and the aim and object of incurring the expenditure is only to promote the business of the assessee the expenditure incurred in this connection are deductible irrespective of their result and the decision of the Calcutta High Court in the case of British Electrical Pumps Pvt. Ltd. Vs. CIT, 105 ITR 620 is referred to. Reliance was also placed on the decision of the ITAT, Guwahati Bench in ITA No. 96/GAU/89 dated 20/12/1991 in the case of Malbhog Barua Estate Pvt. Ltd. where it has been held that subscription paid for commercial reasons are allowable revenue expenditure.

(8.5) It was further submitted that similar disallowance was made in the assessment of the appellant in the preceading year. All such disallowances have been deleted in appeal by the CIT(A).

(8.6) It was, therefore, urged that considering the facts of the case and the submissions made, the disallowance may kindly be deleted.

(8.7) I have considered the submissions of the appellant. I do not see any merit in the ground for the disallowance I have also perused the details of subscription paid. The expenditure was no doubt incurred in the course of carrying on of the business for the welfare of the employees and as a matter of commercial expediency. I am, therefore, of the view that the disallowance of the expenditure was uncalled for and as such it is deleted in full. (RELIEF Rs.18 79 711/-)

(9) GROUND NO. 6 relates to the disallowance on estimate of Rs.1,41,54,000/- out of transport expenses (Garden) amounting to Rs.3,54,12,000/-.

(9.1) The A/R has submitted that the appellant incurred an expenditure of Rs.3,54,12,000/- on lorry hire charges for intra-garden transport. In the course of the assessment, Gardenwise details of lorry hire charges paid were submitted. Lorry hire charges were paid to M/s.Coastal Roadways and M/s.Continental Road Carriers Pvt. Ltd. and copies of bills received from the transporter companies were also furnished. Contd.....33/-

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(9.2) It was further submitted that the A/O wrote letter to the transport companies concerned requiring them to furnish details for cross verification with the particulars furnished by the appellant. The details called for were duly furnished by the transport companies and in the words of the A/O himself these were thoroughly scrutinised and apparently no discrepancy could be noticed. But still the disallowance of Rs.1,41,64,800/- had been simply on the ground that the expenditure incurred was considered by the A/O as excessive and unreasonable.

(9.3) The A/R has contended that it has been judicially held that jurisdiction of the Income-tax authorities to disallow an expenditure will arise only when the payment is not real or is not incurred in the course of the business or is not laid out wholly and exclusively for the purpose of business. But once it is found that an expenditure has really been incurred wholly and exclusively for the purpose of business,it is not for the revenue to go into the question of reasonableness while considering the question of allowance. The taxing authority cannot substitute its own view of how the assessee's business affairs should be managed. Reasonableness of the expenditure has to be adjudged from the point of view of the business man and not of the revenue. The revenue cannot claim to put itself in the arm chair of a business man or in the position of Board of Directors and assume the role of ascertaining how much is a reasonable expenditure. In this connection the decisions of the Supreme Court in the case of CIT Vs. Walchand & Co. Pvt. Ltd. ,65 ITR 381,J.K. Woolen & Manufacturers ,72 ITR 612,Bengal Enamel Works Ltd. Vs. CIT,77 ITR 119 and decision of the Madras High Court in the case of CIT Vs. Vijaya Lakshmi Mills Ltd.,94 ITR 173 are referred to.

(9.4) The A/R has further contended that expenditure incurred by the appellant was cross checked by the A/O by making reference to the payees and ,as such, the question of any doubt about the genuineness of the expenditure did not arise. The A/O also admits the necessity of the expenses of transport within the gardens for running and maintaining the garden. In the circumstances,the disallowance of a portion of the expenditure on the grounds of reasonableness is wholly unjustified and untenable.

(9.5) It was,therefore,urged that the disallowance may kindly be deleted.

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(9.6) I have considered the facts of the case, the grounds of disallowance and the submission of the A/R. I am of the view that the disallowance is without any basis and has wrongly been made.

(9.7) In respect of the claim for the expenditure the A/O is found to have observed as under :-

" Considering the area of garden (9,20,561 hectares) and the crop of the area (1,92,71,610 Kgs.)the amount of transport charges within the seventeen tea gardens of the assessee company seems to be on the higher side. The assessee company definitely have to incur the expenses on transport while running the garden but the quantum of expenditure incurred exceeded the normal quantum. "

" Considering the facts and circumstances of the case,I find fair and reasonable to allow 60% of the expenditure on transport expenses (garden) as wholly and exclusively for the purpose of running and maintaining the garden and rest of the expenses has been disallowed which comes to Rs.1,41,64,800/-."

(9.8) The A/O has frankly admitted that for the type of business carried on by the appellant incurring of expenses on intra-garden transport was definitely required. The genuineness of the expenditure was also verified by him by making reference to transport companyes which provided the transport service. It has been judicially held that once it is found that an expenditure is real and has been incurred wholly and exclusively for the purpose of business the taxing authority cannot go into the question of reasonableness while considering the question of allowance of the expenditure. Even otherwise,considering the fact that the appellant owned as many as 17 tea estates and the total area of the garden measured 920561 hectares,the transport expenses cannot be said to be unreasonably high. I,therefore,delete the disallowance of Rs.1,41,64,800/- out of garden transport expenses.(RELIEF - Rs.1,41,64,800/-)

(10) GROUND NO. 7 relates to the disallowance of a sum of Rs.2,00,000/- out of "Management Staff Other Welfare" expenses.

(10.1) The A/R has submitted that in the course of the assessment it was explained that the appellant incurred an expenditure of Rs.13,58,290/- on account of "Management Staff Other Welfare" The expenditure included fees of Rs.4 Lakh paid to the International Management Institute,New Delhi,for training of two students,Sri K.Saxena and A. Saikia,who were sons of Garden Managers of the appellant company.The expenditure has been disallowed for alleged failure to furnish further details and explain the claim for deduction.

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(10.2) The A/R has submitted that the disallowance has been made for no cogent reason. The nature of the expenditure, the persons for the welfare of whom the expenditure was incurred were duly explained in course of the assessment. The A/O did not call for any further particulars regarding the expenditure and, as such, the appellant did not have any occasion to furnish such further particulars.

(10.3) The A/R has further submitted that in the context of the current socio economic thinking the success of any business enterprise, to a substantial extent, is dependent on the willing performance of their task by the employees. No business can ~~xxxxxx~~ prosper unless the employees engaged in it are satisfied and contended and they feel a sense of involvement and identification, and considered from this point of view the expenditure incurred for the education of the children of the management staff was truly in the nature of business expenditure. In this connection, the decision of the Supreme Court in the case of Shahzada Nand & Sons Vs. CIT, 108 ITR 358 was relied upon.

(10.4) It was, therefore, urged that the disallowance of Rs.4 Lakh out of "Management Staff Other Welfare" expenses may kindly be deleted.

(10.5) I have considered the facts of the case, the ground of disallowance and the submission of the A/R I do not find any merit in the ground of disallowance.

(10.6) The claim for the expenditure has been disallowed for failure to furnish necessary details and to explain the claim for the deduction. The appellant explained in course of the assessment that the expenditure of Rs.4,00,000/- was incurred in payment of fees to the International Management Institute, New Delhi, for training of sons of two Garden Managers of the appellant company. The Hon'ble Supreme Court in the land mark decision in the case of Shahzada Nand & Sons Vs. CIT, 108 ITR 358 has held that in the context of the current socio economic thinking no business can proper unless the employees engaged in it are satisfied and contended and they feel a sense of involvement and identification, and considered from this point of view the expenditure incurred for the education of the children of the management staff was truly in the nature of business expenditure allowable as staff welfare expenses.

(10.7) The disallowance of Rs.4,00,000/- is accordingly deleted. (RELIEF Rs.4,00,000/-)

(11) GROUND NO.8 relates to a further disallowance of Rs.5,00,000/- from out of "Management Staff Other Welfare" expenses.

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(11.1) The A/R has submitted that the amount was paid as contribution to the International Management Institute, New Delhi, which is an institution duly approved u/s. 35(1)(iii) by the prescribed authority. Copy of notification regarding the approval of the institution has been furnished at pages 46 - 48 of the paper book. As such, contribution of Rs.5,00,000/- was deductible u/s.35(1)(iii). According to the A/R, the A/O has misconstrued the claim as u/s.35CC and since this section was not in existence in the relevant assessment year the claim for deduction of the amount has been disallowed. It is, therefore, urged that disallowance of the claim for deduction of Rs.5,00,000/- may kindly be deleted.

(11.2) I have considered the facts of the case and the submission of the A/R. The claim has apparently been disallowed due to some misunderstanding. I, therefore, delete the disallowance of Rs.5,00,000/-.(RELIEF Rs.5,00,000/-)

(12) GROUND NO. 9 relates to the disallowance of compensation of Rs.2,54,895/- paid to the farmers for surrendering the land belonging to the appellant which was unauthorisedly occupied by them.

(12.1) The A/R has submitted that in the course of the assessment the appellant had explained that certain portion of land of the tea estates of the appellant were usurped by some people and were used by them for growing paddy. The appellant got the land vacated by payment of Rs.2,54,895/- to the unauthorised occupiers. The names of the persons to whom the payment was made and the amount paid to each were also furnished. The relevant details have been submitted at page 49 of the paper book.

(12.2) The A/R has further submitted that expenses incurred by an assessee for the maintenance, preservation or protection of its own business assets is revenue expenditure.

(12.3) It is, therefore, urged that the disallowance may kindly be deleted.

(12.4) I have considered the facts of the case and the submission of the appellant. I am of the view that the disallowance is without any merit. The nature of the expenditure was duly explained. Further, in Bikaner Gypsums Ltd. Vs. CIT 187 ITR 39 the Hon'ble Supreme Court has held that where the assessee has an existing right to carry on a business, any expenditure made by it during the course of business for the purpose of removal of any restriction or obstruction or disability would be on xxxxxx revenue account. The payments made may result in acquiring benefits to the business, but that by itself would not

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make it capital. Similarly, in the case of Southern V. Borax Consolidated Ltd, 10 ITR Supp.1 it has been held that the expenditure incurred by a company in defending its title to immovable properties owned by it, when the title was assailed, brought no new asset, the company continued to hold the same property as before and no more. The expenses incurred was revenue in nature. There is all the difference in the world between defending one's assets against the claim of somebody who has no real claim against them and the acquiring of a new asset or adding to an existing asset.

(12.5) The disallowance of deduction of Rs.2,54,895/- is, therefore, deleted. (RELIEF Rs.2,54,895/-)

(13) GROUND NO. 10 relates to disallowance of Rs.1,00,000/- paid for welfare of the employees. The expenditure has been disallowed by the A/O for alleged failure to furnish the details of the expenditure and to explain the reason for incurring the expenditure.

(13.1) The A/R has submitted that it was explained in the course of the assessment that the payment of Rs.1,00,000/- was made to Ms.P.Sultana in connection with organisation of a cultural function for the recreation of the employees. Photo copy of the payment voucher was also furnished.

(13.2) The A/R has further submitted that the appellant carries on business in remote areas where ordinary facilities of recreation which absolutely necessary for maintenance of physical and mental health of the employees are not available. In the circumstances, cultural and social activities are organised from time to time for the recreation of the employees and their family members. It was also contended that the expenditure incurred for organisation of recreation facilities is incidental to the carrying on of the business and the A/O was not justified in disallowing the expenditure. The A/R has further contended that the allegation of not furnishing the details of the expenditure and not explaining the reasons for incurring the expenditure was not correct since in the heading of the relevant paragraph of the assessment order the A/O has himself stated - " cultural function expenses paid to Ms.P. Sultana". Having said as above, the A/O could not have any misgiving about the nature of the expenditure.

(13.3) It was urged that considering the submissions made as above the disallowance of welfare expenses of Rs.1,00,000/- may kindly be deleted.

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(13.4) I have considered the facts of the case, the grounds of disallowance and the submissions of the A/R. I am of the view that the disallowance of the expenditure is without any basis. The appellant explained that the expenditure was incurred for organising cultural function for recreation of the employees working in the tea estates. The particulars of the person who organised the cultural function was furnished. Evidence of the expenditure incurred was also produced. It is common knowledge that the tea estates are situated at far way places where ordinary facilities of recreation are not available. The expenditure incurred for providing recreation facilities to the employees in the tea estates was clearly incurred wholly and exclusively for the purpose of carrying on of the business. The disallowance of the expenditure was, therefore, wholly unwarranted. Accordingly the disallowance of Rs.1,00,000/- is deleted. (RELIEF - Rs.1,00,000/-)

(14) GROUND NO. 11 relates to the disallowance of Rs.31,080/- on estimate out of cost of purchase of green leaf. The disallowance has been made on the ground that the price paid was excessive.

(14.1) The A/R has submitted that the appellant purchased 504899 kgs. of green leaf. The purchases were made from different sources at different prices. The details of the purchase containing the names of the seller, the tea estate from which the purchase was made, the quantity purchased and the rate per kg. was furnished in course of the assessment. A copy of the said details have been furnished at page 51 of the paper book.

(14.2) The A/R has further submitted that the purchase price varied between Rs.6.60 per kg. to Rs.12 per kg. In response to a specific query of the A/O in this regard the appellant by its letter dated 31/1/2001 explained the circumstances under which some purchases were made at Rs.12 per kg. while some other purchases were made at a much lower price. A copy of the letter has been submitted at pages 52 - 57 of the paper book. In its letter, the appellant had explained that the rate of green leaf depended upon various factors, such as, quality, availability, cost factor etc. It was further explained that the purchases for which price of Rs.12 per kg. was paid were made entirely from group company gardens. The price of Rs.12 represented cost of production per kg. of green leaf of the group company gardens and in support of the contention details of working of the cost of production of green leaf of the group company gardens was also furnished. It was further

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submitted that except 6216 kgs. of green leaf purchased from one M/s.S.K. Garodia at a price of Rs.11.95 per kgs.,all other purchases were made from outside the group companies at a price varying between Rs.6.50 per kg. to Rs.7.70 per kg. The A/O considered the price paid for purchase from M/s S.K. Garodia as excessive and disallowed on estimate Rs.5 per kg. or Rs.31,080/-.

(14.3) The A/R has submitted that the price of green leaf is not fixed. It depends upon cost factor,quality, availability,proximity of the source,exigency etc. A producer with low overhead cost is able to sell at a price much lower than the price charged by a producer having high overhead cost. Further green leaf is a highly perishable comodity and at times may have to be disposed of at a price which is not remunerative. Further, the cost of production of green leaf of the appellant's own group of companies was Rs.12 per kg. and the appellant itself sold green leaf at a price of Rs.12 per kg. It was contended that the A/O was not therefore justified in holding price of Rs.11.95 per kg.paid for purchase of a small quantity of green leaf as excessive and making disallowance on estimate. The appellant has further submitted that total consumption of green leaf of the appellant during the year was 68205544 kgs.and the green leaf of 6216 kgs. purchased at allegedly higher price accounted for an insignificant proportion of the total green leaf consumption.

(14.4) The A/R has submitted that in view of the facts and the circumstances,it will be kindly appreciated that the disallowance of Rs.31,080/- was wholly uncalled for. It was,therefore,urged that the disallowance may kindly be deleted

(14.5) After careful consideration of the matter, I am of the view that the disallowance of Rs.31,080/- out of cost of purchase of green leaf was not justified. Considering the fact that the cost of production of green leaf of the appellant and other companies of the group itself was Rs.12 per kg. and purchases from group companies were made at Rs.12 per kg. ,a price of Rs.11.95 paid for purchased from M/s.S.K.Garodia could not be said to be excessive. It is also claimed that the appellant itself sold green leaf at Rs.12 per kg. The transaction was also not hit by section 40A(2) since the seller was not a person specified in section 40A(2)(b). Moreover,the total quantity purchased from M/s.S.K. Garodia accounted for an insignificant proportion of the total consumption of green leaf.

(14.6) I,therefore,delete the disallowance of Rs.31,080/-.(RELIEF Rs.31,080/-)

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(15) GROUND NO. 12 is directed against the disallowance of the claim for deduction of Rs.7,50,000/- paid to Royal Calcutta Golf Club (RCGC). The A/R has submitted that it was explained in course of assessment that the amount represented capitation fee paid for Asian Cup Tournament organised by the RCGC and a copy of the letter dated 7/2/2001 of RCGC acknowledging receipt of the payment was furnished. The disallowance has been made on the ground that the expenditure had no relevance to the business of the appellant and the year to which the expenditure related was not available.

(15.1) The A/R has submitted that the capitation fee was paid for advertisement of the business of the appellant and also inorder to enable the employees of the appellant company to participate in the Golf tournament organised by the RCGC. The tournament gave a lot of publicity to the appellant's business and provided to its employees the opportunity of participating in the game. The expenditure incurred on advertising and provision of recreation facilities to the employees is incidental to the carrying on the business and deduction of such expenditure is admissible under the law. The decisions of the Delhi High Court in the case of Additional CIT Vs. Delhi Cloth & General Mills Co. Ltd. reported in 146 ITR 220 & 223 were relied upon in support of the contention.

(15.2) The A/R has further submitted that the doubt expressed by the A/O with regard to the year of holding of the tournament is completely misplaced, and this was evident from the following observations of the A/O. At one point of time, it has been stated by the A/O that -

> " On verification and declaration, it is found that this is a capitation fee for Asian Cup Tournament held in the above mentioned year."

In the same breath, it is stated that -

> " But no year is mentioned anywhere"

(15.3) The A/R has submitted that the tournament was held in the assessment year 1998-99 and this was clearly mentioned in the letter of the RCGC referred to above and furnished in course of the assessment. A copy of the letter is furnished at page 58 of the paper book.

(15.4) It was submitted that from the submissions made it will be kindly appreciated that the expenditure was incurred for the purpose of business and related to the assessment year under consideration. It was, therefore, urged that the disallowance may kindly be deleted.

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(15.5) I have considered the facts of the case and the submissions of the appellant. The disallowance has been made on two grounds, namely -

a) the year to which the expenditure related was not available and

b) the expenditure had no relevance to the business of the appellant.

As regards the year of incurring the expenditure, the finding of the A/O is apparently contradictory. The A/R has furnished a copy of the letter dated 7/2/2001 of Royal Calcutta Golf Club acknowledging receipt of capitation fee of Rs.7,50,000/- The letter clearly states that the capitation fee was paid in connection with Golf tournament organised by Royal Calcutta Golf Club in the previous year relevant to the assessment year 1998-99. The expenditure was, therefore, allowable in the assessment year 1998-99. The Golf tournament organised by Royal Calcutta Golf Club gave a lot of publicity to the appellant's business and in the light of the decision of the Delhi High Court in the case of Addl.CIT Vs. Delhi Cloth Mills Co. Ltd. reported in 144 ITR 280 & 283 the expenditure incurred in payment of the capitation fee was allowable as advertisement expenditure u/s.37. The Golf tournament also provided to the employees of the appellant company, the opportunity of participating in the game and was also in the nature of staff welfare expenses. The disallowance of Rs.7,50,000/- is, therefore, deleted. (RELIEF Rs.7,50,000/-)

(16) GROUND NO.13(a)(b) pertain to the disallowance of the appellant's claim for deduction of cost of fencing as revenue expenditure or alternatively to allow depreciation at the rate of 100% on the cost of fencing.

)16.1) The A/R has submitted that the appellant incurred an expenditure of Rs.30 31 326/- on fencing of the tea estate. The amount was capitalised in the balance sheet. The appellant however, claimed the expenditure of Rs.30 31 326/- as revenue expenditure and in support of the claim reliance was placed on the decision in the case of CIT Vs. Belgachi Tea Co. Ltd., 99 ITR 99 (Cal). However, instead of deducting Rs.30 31 226/- in the computation of income, depreciation thereon was claimed at the rate of 100%. The claim of the appellant was disallowed in the assessment. The expenditure was treated as capital in nature and depreciation at the rate of 10% was allowed thereon. In making such disallowance, it has been observed by the A/O that the expenditure was incurred mainly in the estates where there was no new extension planting during the relevant year and in the absence of evidence to show that the expenditure was incurred for repairs or replacement of existing fencing

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and not for new fencing for extension planting the expenditure was treated as incurred for new fencing erected for extension planting and, therefore, as capital in nature.

(16.2) The A/R has submitted that the expenditure was incurred not only on fencing of tea estates where there was extension of planting but in other tea estates as well. The expenditure of Rs.30 31 226/- was incurred on fencing of 17 estates belonging to the appellant. Estatewise details of the expenditure was filed in course of assessment and these details have been furnished at page 59 of the paper book.

(16.3) The A/R has further submitted that the fencing put up are temporary structures of wood, bamboo, or concrete poles and barbed wire. Construction of permanent structures, such as, brick walls is not considered economical. The brick walls are damaged by wild animals and heavy rains or washed away by flash flood which is common in the areas in which the tea estates of the appellant are situated. Instead, temporary fencing is found cheaper though it did not last long. No enduring benefit is derived from the expenditure incurred.

(16.4) It was further contended that for purposes of determination of the character of an expenditure, that is to say, whether capital or revenue, the purpose for which the expenditure was incurred was material. The whole purpose of fencing was to protect the tea bush and leaves from depredation by cattle and wild animals. As such, the expenditure incurred in fencing whether for repair or replacement or for new fencing was revenue in nature. In this connection, the decision of the Calcutta High Court in the case of CIT Vs. Belgachi Tea Co.Ltd. (99 ITR 99) was referred to.

(16.5) The A/R has further submitted that under similar circumstances fencing expenses was disallowed as capital expenditure in the preceding assessment years in the case of the appellant but the disallowance was not approved by the CIT(A) and the appellant's claim for deduction of fencing cost as revenue expenditure has been allowed.

(16.6) In view of the foregoing submissions, it was urged that the disallowance of cost of fencing of Rs.30 31 226/- may kindly be deleted.

(16.7) The A/R has further submitted that in the event of claim for deduction of fencing cost of Rs.30 31226/- is allowed as revenue expenditure, the ground relating to the claim for depreciation of 100% of the cost of fencing may kindly be treated as not pressed.

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(16.8) I have considered the submissions of the A/R and the observations of the A/O. Having regard to the nature of the construction and the decision of the Calcutta High Court in the case of CIT Vs. Belgachi Tea Co. Ltd., 99 ITR 1) 99, I hold the expenditure incurred on fencing asrevenue expenditure. The A/O is accordingly directed to allow the claim for deduction of Rs.30 31 226/- as revenue expenditure in the computation of income.

(16.9) In view of the fact, I have allowed the claim for deduction of cost of fencing as revenue expenditure, I do not consider it necessary to adjudicate the alternative ground relating to claim for depreciation on cost of fencing at the rate of 100%. (DIRECTION)

(17) GROUND NO. 14 relates to a further disallowance/addition of contribution to PF amounting to Rs.2,36,304/- u/s.43B and 36(1)(va).

(17.1) The A/R has submitted that the appellant itself added back in the computation of income, PF contribution of an amount of Rs.1,78,362/- u/s.43B and Rs.3,21,424/- u/s.36(1)(va) which was deposited after the end of the accounting year. The A/O has added back a further amount of Rs.2,36,304/- which was deposited after due dates as defined in Explanation to section 36(1)(va).

(17.2) It was submitted that in the course of the assessment the appellant made detailed submission and furnished statements containing details of the contributions which were not deposited in time and the dates of actual deposits of the amount along with Auditor's Certificate vide letter dated 13/12/2000 ,copies of which have been furnished at pages 60 - 65 of the paper book.

(17.3) It was contended by the A/R that it has been held by different Benches of the ITAT that even if the contribution to PF ,Gratuity Fund etc. has not been deposited within the due dates no disallowances either under section 43B or u/s.2(24)(x) read with section 36(1)(va) could be made if such deposits were made within the accounting year and decisions of the Tribunal in the case of Fluid Air (India) Ltd. Vs. DCIT, 63 ITD 182 (Mum), Hansair Plywood Works Ltd. Vs. DCIT, 54 ITD 394 (Bang) and Radiators & Pressings Ltd. Vs. DCIT, 59 ITD 515 (Mad) were referred to.

(17.4) It was submitted that considering in the light of the above decisions the further disallowance of Rs.2,36,304/- was not justified.

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(17.5) I have considered the facts of the case and perused the decisions of the ITAT cited by the A/R.The Mumbai Bench of the ITAT has held in the case of Fluid Air(India) Ltd. Vs. DCIT reported in 63 ITD 182 that -

> " If a strict interpretation of sec.43B and section 2(24)(x) read with sec. 36(1)(va) is taken then it would certainly lead to injustice and absurd result which was never the intention of the legislature... Thus ,the provisions of sec.43B,2(24)(x) read with sec.36(1)(va) ,so far as they are concerned with the time for making payment,should be interpreted liberally keeping in view the principle of equity and legislative intent behind enacting such prohibitory provisions so that the injustice and the absurdity could be avoided."

Observing as above,the Hon'ble Tribunal held that where payments have been made within the year itself no disallowance either under section 43B or sec.2(24)(x) read with sec.36(1)(va) could be made.

(17.6) However,from the details furnished at pages 60 - 65 of the paper book,I find that deposit of the impugned contribution was made after the close of the accounting year. The further disallowance of Rs.2,36,304/- has,therefore, rightly been made and is confirmed. (CONFIRMED)

(18) GROUND NO. 15 relates to the disallowance of Rs.4,35,457/- out of domestic travel expenses incurred by the appellant.The expenditure was incurred on food and lodging of the wives of the employees of the appellant accompanying their husband. The disallowance has been made on the ground that the expenditure was not incurred for the purpose of business.

(18.1) The A/R has submitted that now a days travel,whether domestic or foreign,has become extremely necessary for the purpose of the assessee's business and it has also become necessary for their wives to travel with them as their accompaniment. This kind of expendi ure would necessarily act as incentive for the other employees to work with zeal,devotion and dedication,which in the ultimate analysis,result in higher profitability. The A/R has further submitted that any expenditure incurred with a view to keep the employees satisfied and to induce them to give their best is an expenditure incurred for the purpose of the business. This view is confirmed by the ITAT, Delhi,in adjudicating the case of ITO Vs. J.K. Synthetics Ltd., (18 ITD 490) in favour of the assessee. In that case,the Tribunal confirmed the view taken by the CIT(Appeals) who observed " following the rule laid down by the Supreme Court in the case of Shazada-Ganga Mand & Sons Vs. CIT ,108 ITR 358 the expenditure incurred by the company on the wife of its loyal employee to enable her to accompany him on foreign tour in order that the tour of the employees was successful,could only be regarded as an expenditure incurred both by way of rewarding the loyal employee

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and thereby creating goodwill among the employees and to encourage them to work with greater loyalty and devotion. In the case of the appellant company, such expenses are normally incurred for the purpose as mentioned in the referred case. The said expenses of Rs.4,35,457/- is, therefore, allowable under section 37(1) of the Act.

(18.2) The A/R has further submitted that even otherwise, if the appellant has provided a facility to the executives to take their wives while on tour, it is as a matter of staff welfare which has been considered as a purpose wholly and exclusively for the business and relied on the decision of the Supreme Court in the case of Shahzada Nand & Sons, 108 ITR 358 in this connection.

(18.3) The A/R has further submitted that the appellant is engaged in the business of growing and manufacturing of tea. The gardens were located in remote areas of Assam where the law and order situation for the last several years has reached alarming proportions. The State has become a theatre of extortions, kidnapping and mindless killings. Even the Ministry of Home Affairs, Government of India, in their publication " Bleeding Assam" also recognise the grim situation prevailing in the State. An extract of the pamphlets and newspaper clippings have been submitted at pages 75 - 80 of the paper book in support of the contention. Under the circumstances leaving wives alone in the tea estates during the absence of their husband is not save and in order to ensure security of the members of the family of the tea garden officials and inspite confidence among them the appellant has permitted the employees of the tea estates to bring also with them their wives while going out of the tea estates on tour.

(18.4) The A/R has further submitted that expenses incurred on travel of wives of Directors have been held by the Tribunal in the appellant's own case as being for the purpose of the business and the decision of the Tribunal has been upheld by the jurisdictional High Court in its decision reported in 234 ITR 130. The expenditure incurred on travel of wives of Directors has also been held as admissible expenditure by the Hon'ble Madras High Court in the case of CIT Vs.Sundaram Clayton reported in 240 ITR 271.

(18.5) It was further submitted that expenditure incurred on travel of wives of the employees was similarly disallowed in the assessment year 1997-98. But the disallowance has been deleted by the CIT(A).

(18.6) In view of the submissions made as above it is urged that the disallowance made of Rs.4,35,457/- may kindly be deleted.

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(18.7) I have considered the facts of the case and submission of the A/R. I have also perused the decision of the cases relied upon by the A/R. I agree with the contention of the A/R that the expenditure on travel of the wives of the employees accompanying their husband was incurred wholly and exclusively for the purposes of the business. The expenditure certainly created a huge amount of goodwill amont the employees and encouraged the beneficiaries to work with greater loyalty and devotion and acted as an incentive to others to work with more devotion and dedication. The allowing of wives to accompany their husband was also commercially expedient under the prevailing law and order situation in Assam particularly in the areas in which the gardens were situated. Even otherwise, the expenditure was for the welfare of the employees and viewed in the context of current socio-economic thinking which believes that a business or undertaking is the product of combined efforts of the employer and the employees is, therefore, allowable as business expenditure u/s.37.

(18.8) The disallowance of Rs4,35,457/- is deleted. (RELIEF Rs.4,35,457/-)

(19) GROUND NO. 16 pertains to the disallowance of air travel expenses of Rs.3,00,000/- estimated to have been incurred on travel of wives of Senior Executives accompanying their husband while on tour.

(19.1) The A/R has submitted that the air travel expenses of the wives were incurred under the circumstances explained in the submission made in respect of ground number 15. It was further submitted that it will be appreciated that the expenditure was incurred wholly and exclusively for the purpose of business and was, therefore, admissible u/s.37(1).

(19.2) It is, therefore, urged that the disallowance may kindly be deleted.

(19.3) This ground is co-related to ground number 15. This ground is directed against the disallowance of cost of air tickets of wives of employees accompanying their husband on tour and ground number 15 was directed against disallowance of their food and lodging expenses while on tour. While dealing with ground number 15, I have examined the matter in detail and have held that the expenditure on food and lodging of wives while on tour with their husband was business expenditure allowable u/s.37. The same considerations apply to this ground and following the findings in ground no. 15, I hold that the expenditure incurred on purchases of air tickets of the wives of the executives was incidental to the carrying on of the business. The disallowance is accordingly deleted.(RELIEF Rs.3,00,000/-)

(20) GROUND NO. 17(a) relates to the disallowance of the appellant's claim for depreciation on Vibro Fluid Bed Dryer (VFBD) at the rate of 100% and allowing of depreciation at the normal rate of 25%.

(20.1) The A/R has submitted that Vibro Fluid Bed Dryer machinery was an energy saving device as envisaged in entries III(3)(iii)A/C of Appendix-I of the Income-tax Rules, 1962 and accordingly depreciation was claimed at the rate of 100% but depreciation was allowed at the normal rate of 25%.

(20.2) It was further submitted that VFBD was specifically designed for recycling waste heat and consequently the consumption of energy of the machinery per unit of the product was much less than in a conventional drying machine Accordingly, the machine was claimed as an energy saving device as envisaged in entries III(3)iii A/C of Appendix-I of the Income-tax Rules, 1962 and depreciation was claimed at the rate of 100%.

(20.3) The dryer works on the principle of Vibro Fluidisation. Wet fermented leaf is fed through a feed system into the drying chamber and is carried on a perforated tray. Hot air is passed from underneath the perforated tray. The tea bed is thus effectively fluidised (air borne) by a combination of hot air and vibration. Tea is dried as it passed along perforated tray and come out from the other end.

(20.4) The saving in energy is effected in two ways. Due to fluidisation, wet tea is made to float in hot air whereby each particle of tea comes in intimate contact with hot air and higher thermal efficiency is achieved. This results in 40% saving in fuel cost in comparison to the conventional type of moving tray dryer.

(20.5) The air coming out of the dryer contains heat. Saving of energy of another 10% is effected by recycling a part of such waste and used hot air. This is achieved by carrying out the drying operation in two sections of the chamber, one having a high temperature of 96 degree centigrade. Wet tea entering the 1st section losses most of the moisture and hot air coming out of this section is therefore very himid and cannot be used for drying. This air is vented out in the atmosphere. The tea entering the second section is partly dried and the air coming out of this section is more or less dry and hot and can be recirculated. This used and waste but dry air coming out of the second section is made to pass through a cyclone separator for removing the dust and fibres. Clean dry air coming out of the cyclone is recycled and used for further drying and a further saving in consumption of energy is thus achieved.

(20.6) The A/R has submitted that the Calcutta Bench of the ITAT,in the case of Warren Tea Co., ITA NO. 193(Cal) of 90 and Assam Brook Ltd. ITA NO.370 of 90,has held VFBD as an energy saving device eligible for depreciation at the rate of 100%.

(20.7) It was further submitted that the appellant's claim for 100% depreciation on WVBD was disallowed in the assessment of the appellant for earlier years and depreciation was allowed at normal rate. However,the CIT(A) after examining in detail the technicalities and performance of VFBD was pleased to hold the machinery as an energy saving device within the meaning of entries III(3)(iii)A/C of the depreciation table of the Income-tax Rules and allowed the appellant's claim of 100% depreciation on the machinery. Itis, therefore,urged that claim for depreciation at the rate of 100% may kindly be allowed in respect of VFBD.

(20.8) I have considered the submission of the A/R. This issue came up for consideration in the appellant's own case for many preceeding years and I have held VFBD as an energy saving device as envisaged in entries III(3)(iii)A/C of the depreciation table and allowed claim for 100% depreciation. TheCalcutta Bench of ITAT also has held VFBD as an energy saving device eligible for 100% depreciation in the case of Warren Tea Co. ITA NO.193(Cal) of 90 and Assam Brook Ltd.,ITA No. 370 of 90. Accordingly,claim for depreciation of 100% on VFBD is allowed. (DIRECTION)

(21) GROUND NO. 17(b) pertains to the disallowance of the claim for depreciation on the Assam Valley School building which was partly owned by the appellant.

(21.1) The A/R has submitted that the appellant and other companies of the group established Assam Valley School in the North Bank of river Brahmaputra. The school was established for the education of the children of the employees of the appellant company and general public. the school was modelled on the public school like Doon School or Mayo College. The appellant claimed depreciation in respect of its share of cost of the building. The claim for the depreciation has been disallowed by the A/O without assigning anyreason. Similar claim for depreciation was disallowed in the assessment year 1997-98 and the disallowance was made on the ground that the appellant was not sole owner of the building but was only proportionate owner of the asset.

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(21.2) It was submitted that provisions of section 32(1) was amended with effect from 1/4/1997 by Finance Act (2) of 1996. According to the amended provision deduction of depreciation was available in respect ~~also~~ of assets partly owned by the assessee. The amendment was made in order to get over the effect of the decision of the Hon'ble Supreme Court in the case of Bamacharan Das Gupta Vs. CIT,166 ITR 783. It was held by the Hon'ble Supreme Court that under the pre-existing provisions of section 32(1) depreciation could not be allowed in respect of fractional ownership of an asset. But currently, a large number of big projects are being undertaken in which the assets are financed by a number of companies and, therefore, each of the participating companies owns a fraction of the asset. The asset is subject to wear and tear on use. The provisions of section 32(1) was, therefore, amended making specific provision for allowing of depreciation to fractional owners of assets. The amended provision was apparently overlooked by the A/O.

(21.3) The A/R has further submitted that Assam being a disturbed state constantly under threat of militant activity, children of the employees working in the tea estates feel insecure in attending local school. Besides, the academic standard of the local school were not upto the standard. In such a situation the appellant company and other companies of the group felt the need to establish a school of high academic standard and providing for adequate security to the students. The establishment of such school assured the employees of the tea estates appropriate education as also safety of their children and freed from the anxiety of bringing up of the children, the employees are able to devote themselves wholeheartedly for the prosperity of the business. It was also felt that the establishment of the school will also open up opportunity of quality education to the children of the general public of the region. It will be appreciated that in the present day of socio-economic scenario a ~~company's~~ company's functioning is not restricted to mere earning of profit. Every business has some social obligation to fulfil. By undertaking establishment of the school the appellant has been able to install a sense of belonging in the employees and also to draw support from the society at large. The building of Assam Valley school was, therefore, an asset which was used in the business carried on by the appellant. The A/O was, therefore, not justified in disallowing the claim for depreciation.

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(21.4) It was further submitted that the claim for depreciation of the school building was disallowed in the assessment for the preceding year. But the disallowance has been deleted by the CIT(A).

(21.5) It is, therefore, urged that the A/O may be directed to allow appropriate depreciation on the WDV of the school building.

(21.6) I have considered the facts of the case and the submissions of the A/R. As a result of amendment of section 32(1) introduced by Finance Act (2) of 1996 depreciation is available on partly owned asset w.e.from 1/4/1997. The claim for depreciation on the school building has, therefore, been wrongly disallowed by the A/O on the ground that the appellant was not the sole owner of the building. Further, considering the object of acquiring the asset and its user, I am of the view that the school building was an asset used in the business carried on by the appellant.

(21.7) Accordingly, ~~xxxxxxxxxx~~ I direct the A/O to allow depreciation on the appellant's share of cost of the Assam Valley School building. (DIRECTION)

(22) GROUND NO. 18 relates to disallowance of sponsorship expenses of Rs.1,00,000/- paid to Doon School Old Boys' Society. The disallowance has been made on the ground that the payment did not relate to the relevant assessment year but to the year 1995.

(22.1) The A/R has submitted that the expenditure represented cost of an insertion given in "Chandbagh" a publication brought out by Doon School Old Boys' Society. The expenses was incurred for publicity of the appellant's business. The payment was supported by bill which was furnished in course of the assessment.

(22.2) The A/R has further submitted that the advertisement was published in the year 1995 but it was explained in course of the hearing that the relevant bill was received in May, 1997 and as such, liability for the expenditure arose in the relevant previous year. The payment of the bill was also made during the previous year relevant to the assessment year 1998-99. The expenditure was, therefore, allowable in this year. A copy of the relevant bill and payment voucher have been furnished at pages 81 - 83 of the paper book in support of the contention.

(22.3) It is, therefore, urged that the disallowance may be deleted.

(22.4) Considering the submissions of the A/R and the documents produced, I am of the view that the

disallowance has been made due to misappreciation of the facts. The expenditure was incurred for advertisement of appellant's business and the liability arose during the relevant assessment year. The disallowance is accordingly, deleted. (RELIEF Rs.1,00,000/-)

(23) GROUND NO.19 relates to disallowance of claim for deduction of Rs.7 56 124/- aspuja expenses. The disallowance has been made on the ground that it was not in the nature of business expenditure.

(23.1) The A/R has submitted that the expenditure was incurred on offering puja to Lord Venkateshar of Tirupati. It was contended that the expenditure was allowable as advertisement expenses.

(23.2) After careful consideration of the facts of the case and submissions of the A/R, I am of the view that the expenditure has rightly been disallowed as not being for the purposes of business. Dewali and Muharat expenses which are incurred by Hindu Traders in a customary way are to be treated as expenditure laid out wholly and exclusively for the purpose of appellant's business since such expenditure was in the nature of advertisement. The expenditure in question was, however, incurred for personal or religious consideration and is not allowable as business expenditure. The disallowance is accordingly confirmed. (CONFIRMED)

(24) In the result, the appeal partly succeeds.

Sd/-(H. BHULLAR)
Commissioner of Income-tax (Appeals)
GUWAHATI

C.I.T. N E R

By order...

pkk

STENOGRAPHER
C. I. T. (Appeals)
GUWAHATI

Attested
Advocate

आयकर आयुक्त (अपील)/आयकर उपायुक्त (अपील) के कार्यालय में
In the Office of the Commissioner of Income-Tax (Appeals)/
~~Deputy Commissioner of Income-Tax(Appeals)~~

GUWAHATI

आदेश की तारीख/Date of order 22/1/2002

अपील संख्या/Appeal Number **Guwa-35/2001-02**

Instituted on 15/5/2001 from the order of the DCIT,Special Range-II,Guwahati (J.C. Pegu)

1.	अपील दायर करने की तारीख/Date of Institution of appeal.	
2.	अधिकारी का नाम और पदनाम जिसने निर्धारण आदेश जारी किया। Name & Designation of the officer who made the assessment order	
3.	निर्धारण वर्ष/Assessment year	1998-99
4.	अपीलार्थी का नाम/Name of Appellant	Williamson Financial Services L Khanapara,Six Mile,G.S. Road, Guwahati
5.	निर्धारित आय/Income assessed	Rs.(-) Rs.73,14,772/- LTCG Rs.5,65,44,848/-
6.	माँगा गया कर/शास्ति/जुर्माना/ब्याज/Tax/Penalty/Fine/Interest demanded	Rs.1,75,82,033/-
7.	धारा जिसके अधीन आदेश जिसके विरुद्ध अपील की गई है, पास किया गया था। Section under which the order appealed against was made.	143(3)

सुनवाई की तारीख
Date of hearing ..... 19/6/2001 & 20/6/2001

अपीलार्थी की ओर से उपस्थित
Present for the Appellant ..... Shri M. Sharan,A/R

विभाग की ओर से उपस्थित
Present for the Department .....

अपील आदेश और विनिश्चय के आधार
APPELLATE ORDER AND GROUND OF DECISION

This appeal is directed against the order of t A/O (Assessing Officer) passed u/s. 143(3) of the Income-tax Act 1961. Since a number of grounds involving major additions/disallo are involved in the present appeal,the discussion regarding the grounds is made groundwise and serially. Contd.....2/-(PT.O.

234/GIFS/Cal/97—15,00,000 Offices—March 99—MGIPPChdg

Attested
Advocate.

(2) GROUND NO.1(a) to (g) is directed against th disallowance of the house maintenance expenses of Rs.67,905/- and Rs.4,06,388/-.

(2.1) The A/R has submitted that during the relevant previous year, the appellant incurred expenses of Rs.67,905/- to maintain its properties at 1/5, Rowland Road and Baganbari Unit No. E-15 at Raichak. In the course of assessment proceedings, details of the said expenditure with documentary evidences as required by the A/O were filed by the appellant vide its letter dated 1st March 2001 and 27th March, 2001 respectively.

(2.2) The A/O however, disallowed the maintenance expenses of Rs.67,905/- on the ground that the purpose of the properties could not be explained by the appellant.

(2.3) The A/R has submitted that the building at 1/5, Rowland Road is used to accommodate employees of the appellant. Th building at Raichak is used for the purposes of office conferences, seminars, monthly meetings etc. Both the aforesaid properties were wholly and exclusively used for business purpose and therefore sho have been allowed as a deduction in the computation of the assesse Income. The A/R has also submitted that in all the earlier years a expenses including depreciation were allowed by the A/O with regar to the aforesaid properties. Therefore, the action of the A/O is contradictory to his own orders passed in earlier years and that t without having anything on record to support him in this action.

(2.4) My attention was drawn to the decision of the Supreme Court wherein in the case of Dhakeshwari Cotton Mills Limi Vs. CIT, 26 ITR 775, 782 (SC) it has been held that in making the assessment under sub-section (3) of Section 23 of the Act (of the 1922 Act, corresponding to section 143(3) of the 1961 Act) the inco Tax Officer is not entitled to make a pure guess and make an assessment without any reference to any evidence or any evidence o any material at all. There must be something more than bare suspic to support the assessment order. This judicial principle has been followed by the Supreme Court in several of its subsequent decisio viz. in Dhirajlal Giridharilal Vs. CIT, 26 ITR 736 (SC), CIT Vs. Daulatram Rawatmull, 87 ITR 349 (SC), Umar Selay Mohamed Vs. CIT, 37 ITR 151 (SC) and Lalchand Bhagat Ambica Ram Vs. CIT, 37 ITR 151 (

Contd.....3/-

(2.5) The A/R has furtner submitted that during the relevant previous year, the appellant incurred expenditnre on account of 'House Maintenance' amounting to Rs.4,06,388/-. On specific query raised by the A/O in t e course of assessment proceedings, details of such expenses was filed by the appellant vide letter dated Ist March, 2001. The said details contained maintenance expenditure on account of employees, Raichak and Rowland Road properties mentioned above and petty miscellaneous expenses. It was explained to the A/O that expen ses on house maintenance with relation to any employee arose from out of the terms of appointment with the respective employee.

(2.6) The A/O however, without raising any further query, disallowed the entire expenditure of Rs.4,06,388/- on the ground that in the absence of a service agreement with the employees the claim of the appellant cannot be accepted.

(2.7) It was submitted by the A/R that the allegation of the A/O is contrary to the facts of the case. The maintenance expenditure incurred with respect to the employees arose out of the terms of appointment with the employees. Copies of the agreements entered into with the employees were produced before the A/O . It was submitted that the expenditure of Rs.4,06,388/- incurred by the appellant was wholly and exclusively for the purpose of the business of the appellant. The A/R has relied on 26 ITR 775,782 (SC).

(2.8) Without prejudice to submission made above, it was further submitted that the A/O's grievance was only against the maintenance expenditure incurred on account of the employees of the appellant. From the details available with the A/O, he should have been seen that the same amounted to Rs.3,19,581/- out of Rs.4,06,388/- ,a fact which has also been admitted in the impugned order. In any event, if any disallowance is to be made at all, the same should have been restricted to Rs.3,19,581/-.

(2.9) The A/R has submitted that the aforesaid amount of Rs.4,06,388/- incurred on account of house maintenance included the house maintenance expenses of Rs.67,905/- incurred on account of properties at 1/3, Rowland Road and Baganbari Unit No.E-15 at Raichak mentioned above and which has been separately disallowed by the A/O. The entire disallowance of Rs.4,06,399/- therefore amounted to double disallowance to the extent of Rs.67,905/-.

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Attested

(2.10) I have considered the submission of the A/R and documents filed. From the earlier assessment years records it has been observed that the expenses has been allowed as business expenditure. The A/O has not given the reasons for his change of opinion in this assessment year. In my view, the expendes were incurred by the appellant wholly and exclusively for the purpose of his business. I direct the A/O to delete the addition of Rs.67,905/- and 4,06,399/-. (RELIEF Rs.4,74,304/-)

(3.11) GROUND NO.2(a) - (c) is directed against the disallowance of Vehicle repair charges of Rs.1,92,259/-.

(3.1) During the relevant previous year the appellant debited its profit and loss account with a sum of Rs.1,92,259/- representing vehicle repair expenses incurred by the appellant under the broad head miscellaneous expenses. On specific query details of vehicle repair charges were submitted vide appellant's letter dated 1st March,2001. The said expenditu was actually incurred by the employees of the appellant and later the same was reimbursed to the employees. The said reimbursement was made based on terms of appointment with the employees. It was submitted to the A/O that the vehicle repair charges incurred by the appellant was wholly and exclusively for the purpose of the appellant's business and therefore, shoul be allowed as a deduction for the assessment year under consideration.

(3.2) The A/O however, without requiring any furth details/evidence, disallowed the vehicle repair charges of Rs.1,92,259/- on the ground that the said expenciture was not supported by agreements with employees nor any document of repairing the vehicle is available with the appella-nt.

(3.3) The A/R has submitted that the allegations of the A/O are factually incorrect. The reimbursement of vehic repair expenses to the employees are made by the appellant bas on agreements with them. Further, the vehicle repair expenses a supported by bills/vouchers etc. The A/O, after receiving the details vide letter dated 1st March,2001 did not raise any que on the issue or did not asked for any furtner documents. The A further submitted that the expanditure incurred on account of vehicle repairs is totally backed up with evidences and is incurred wholly and exclusively for the purpose of the busines of the appellant.

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(3.3) I have considered the submission of the A/R with supporting documents and I am convinced that the expenses were incurred for the purpose of business. The A/O is directed to delete the addition of Rs.1,92,259/-(DIRECTION)

(3.4) GROUND NO.3(a) - (b) is directed against the disallowance of municipal-tax of Rs.5,142/-.

(3.5) The A/O has disallowed an amount of Rs.5,142/- representing municipal tax of the property situated at 1/5, Rowland Road on the ground that as this property was not used for the purpose of the appellant's business therefore,the expenditure incurred by the appellant was non-trading expenses.

(3.6) The A/R has submitted that the municipal tax of Rs.5,142/- was paid on account of the property which is one of the assets of the company and therefore was incurred wholly and exclusively for the purpose of the appellant's business and not a non-trading expenses as held byy the A/O. He also referred to the submissions made in Ground No.1(a) to (g).

(3.7) I have considered the A/R and direct the A/O to delete the addition of Rs.5,142/-.(DIRECTION)

(4) GROUND NO.4(a) - (c) is directed against the disallowance of rent Rs.1,54,000/-.

(4.1) The A/R has submitted that during the relevant previous year the appellant paid rent to the following persons for using their accommodation for the purpose of appellant's business -

Mrs.K. Basu	Rs. 64,000/-
Mrs.S. Guin	Rs. 90,000/-
	Rs.1,54,000/-

The appellant rented accommodation from the aforesaid persons for use by the employees of the appellant in connection with the business of the appellant company.

(4.2) On specific query raised by the A/O,details were filed by the appellant in the course of the assessment proceedings. The A/O without raising any further query or requiring any further details disallowed the amount of Rs.1,54,00 on account of rent payment to wives of employees on the following alleged grounds -

(a) There must be agreement for payment of rent
(b) As the house is rented,payment of other expenses such as house maintenance expenses is not necessary to be paid to the employees.

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(4.3) The A/R has further submitted that the A/O is factually incorrect. The payment of rent of Rs.1,54,500/- is supported by agreements entered into with the land lady and the appellant company. As the A/O showed no reservation as to the issue in hand in the course of assessment proceedings, neither the agreements were required by the A/O, the agreements were not filed with the A/O, Copies of the said agreements are being filed. As regarding the other allegation of the A/O mentioned vide clause (b) above, it was submitted that whether accommodation taken on rent would be maintained by the appellant or the land lady, a fact which can only be determined as per the terms of the aforesaid agreements.

(4.4) It was also submitted that the expenditure being incurred for renting accomodation to be used by the employees of the appellant company for the purpose of the business of the appellant was expended wholly and exclusively for the purpose of the business of the appellant and should have been allowed as a revenue expenditure. It may also be pertinent to note that the accommodation provided to the employees is treated as perquisites in the hands of the employees as per Rule 3 of the Income-tax Rules, 1962.

(4.5) My attention was drawn to the decision of Supreme Court in the case of Ganga Saran & Sons (p) Ltd. Vs.ITO 130 ITR 1 (SC) wherein it has been held that the allowability of an expenditure which is incurred wholly and exclusively for the purpose of the business of the appellant does not depend on the relationship of the assessee with the payee.

(4.6) In the instant case the rent paid for the house used by the employees of the company was for business expenditure and should have been allowed as a revenue expenditur

(4.7) Considering the arguments of the A/R, I find direct the A/O to delete the addition of Rs.1,54,000/-(DIRECTIO

(5) GROUND NO.5(a) - (c) is directed against the disallowance of car hire charges of Rs.7,29,590/-.

(5.1) The A/R has submitted that the appellant had debited its profit and loss account with an amount of Rs.7,55,523/- representing car hire expenses incurred by the appellant. On specific query raised by the A/O, details as requ by the A/O were filed in the course of assessment proceedings substantiating such claim made by the appellant. The A/O withc

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Attested

Advocate

expressing any grievance as to the issue in dispute after submission of details by the appellant neither required any further details/evidences disallowed an amount of Rs.7,29,590/- on the ground that said car hire expenses were not supported by service agreements. It was submitted that the allegation made by the A/O is not factually correct and the car hire charges are not reimbursed to the appellant but are paid directly to the hirer.

(5.2) The appellant hired cars for use by the employees of the appellant in connection with the business of the appellant company. The said expenditure of Rs.7,29,590/- on account of car hire expenses is supported by agreements entered into between the hirer and the appellant. Copies of such agreements have also been filed with the Income-tax Department at the time of assessment of earlier years as required by the A/O. As the copies of agreements were not required by the A/O, the same were not filed in the course of assessment proceedings. It was further submitted that the vehicle hired were utilised for the appellant's company's business. It may be pertinent to note that the A/O had not disputed the fact that the vehicles hired were used for the purpose of company's business and therefore it is submitted that any expenditure of a revenue nature incurred by the appellant wholly and exclusively for the purpose of company's business is allowable in full in computing the profits and gains of business and profession. The vehicle hire charges paid is a business expenditure of the appellant and same should have been allowed by the A/O u/s.37(1) of the Act.

(5.3) I have considered the submissions of the A/R and following my own decision in appeal no. Guwa-35/99-2000 dated 29/11/1999 for the assessment year 1996-97 and in appeal no. Guwa-50/2000-01 dated 28/9/2000 for the assessment year 1997-98, I direct the A/O to delete the addition of Rs.7,29,590/-

(DIRECTION)

(6) GROUND NOS.6(a) - (c) is directed against the disallowance of wages paid to the dribers of the employees Rs.1,18,600/-.

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(6.1) The A/R has submitted that the appellant reimbursed its employees an amount of Rs.1,18,600/- on account of payment of salary to their respective drivers. The drivers were not employed by the appellant but was employed by the employees to run the cars used for the purpose of the appellant's business. On specific query raised by the A/O, the appellant filed the relevant details in the course of assessment proceedings. The A/O, without raising any further query disallowed the said amount on the alleged ground that as the wages were not paid to the drivers directly but were reimbursed to the employees and as there are no service agreements he cannot accept the claim of the appellant.

(6.2) It was further submitted that the details as required by the A/O were submitted in the course of assessment proceedings and no further query was raised nor any details were required by the A/O, It was submitted that as the drivers were employed by the employees of the appellant the expenditure incurred were reimbursed to the employees. There was no direct connection with the drivers and the appellant. The connection was established through the employees and therefore, the drivers wages were reimbursed to the employees and the question of directly making the payments to the drivers does not arise at all. It should be noted that the drivers were driving the cars hired by the appellant which were used by the employees for the purposes of business but was not directly employed by the appellant company. Reliance was placed on Dhakeshwari Cotton Mills Limited Vs. CIT, 26 ITR 775, 782-(S.C)

(6.3) In view of the aforesaid submission, I direct the A/O to delete the disallowance of Rs.1,18,600/-, representing drivers wages reimbursed to employees.(DIRECTION)

(7) GROUND NO. 7(a) & (b) is directed against the disallowance of entertainment expenses Rs. 94,068/-.

(7.1) The A/R has submitted that the appellant incurred a sum of Rs.94,068/- on entertainment expenses during the relevant previous year. The expenditure was incurred to provide food, tea, coffee, mineral water etc. to customers. This expenditure is incurred to provide hospitality to the customers. The expenditures are met by the employees at the time of payment and later reimbursed to them by the appellant. On specific query in the course of assessment proceedings, details as required by the A/O were filed.

(7.2) The A/O however, without raising any further query, disallowed the entertainment expenditure on the alleged ground that no documentary evidence including service conditions supporting such payment could be produced by the appellant.

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(7.3) The A/R has submitted that the A/O's allegations are factually incorrect. After submitting the required details, no documentary evidence was required by the A/O, neither he expressed any reservation regarding the disputed issue in the course of assessment proceedings. It was submitted that the A/O failed to appreciate the nature of the expenditure. The expenditure incurred was not for the entertainment of employees but expended by the employees to entertain the customers for the purpose of business and later reimbersed to the employees by the company. It was further submitted that the service terms of appointment of an employee will not contain such term and therefore, the question of producing any agreement does not arise at all. It is submitted that the provision for food, tea, coffee, mineral water etc. to the customers was in the nature of ordinary courtesy or bare necessity and the expenditure incurred for the same are wholly and exclusively for the purpose of the business of the appellant. Reference has been drawn to the decision of the Gujrat High Court decision rendered in CIT Vs. Patel Bross & Co. Ltd., 106 ITR 424 (Guj) wherein it has been held that if the provision of food or drinks to a client, constituent or customer is in the nature of a bare necessity, or by way of ordinary courtsey or custom of trade and business, it will not amount to entertainment. The Supreme Court in the case of CIT Vs. Patel Bros And Co. Ltd. 215 ITR 165 SC affirmed the aforesaid decision of the Gujrat High Court and held that providing ordinary meals and refreshments to outstation customers according to customary hospitality amounts to essential business expenditure incurred due to commercial expediency and does not come within the meaning of entertainment expenditure.

(7.4) I have considered the submission and the decisions relied upon by the A/R and find force in arguments made before us. I direct the A/O to delete the addition of Rs.94,068/-. (DIRECTION)

(8) GROUND NO.8(a) to (c) is directed against the disallowance of share of common expenses of Rs.12,00,000/-.

(8.1) The A/R has submitted that the appellant used the various infrastructure facilities of Williamson Magor & Co. Ltd. which included the following : -

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(a) Floor space of approximately 300 sq.ft. with full furnishing like carpet, curtains, chairs, tables, almirahs etc. with air-conditioning facility and lift.
(b) Use of telephone, telex and fax facilities
(c) Electricity and water supply
(d) Use of pool car and common transport
(e) Looking after all accounting and administrative matters including legal and other services.
(f) Security and watch and ward facility
(g) Day to day accounting jobs, secretarial work and other clerical jobs were performed by the staff of Williamson Magor Ltd.

For using the aforesaid facilities and also other facilities, the appellant had to share a part of the cost incurred by Williamson Magor & Co. Ltd. which amounted to Rs.36,00,000/- (the said cost was only 2.77% of the expenses of Williamson Magor & Co. Ltd.

(8.2) On a query raised by the A/O, the break up of expenditure of Rs.36,00,000/- was filed in the course of assessment proceedings. The A/O by wrongly assuming the aforesaid percentage to be 27.79% instead of 2.77% had disallowed an adhoc sum of Rs.13,00,000/-. The A/O based on his presumed rate of 27.79% further commented that the method applied to determine the cost was not scientific. The said disallowance of the A/O is based on surmise, conjecture and presumption rather than on any material on record. The A/O's allegation are based on the presumed higher rate of 27.79% of expenses of Williamson Magor & Co. Ltd. instead of only 2.77% of expenses of Williamson Magor & Co. Ltd.

(8.3) It was further submitted that the A/O has not disputed the fact that the expenditures were not actually incurred by the appellant. His only objection is that the method applied to determine the cost was not scientific and has not given any cogent reason as to why the method applied to determine the cost was not scientific. Further the A/O presumed the rate to be 27.79% of total expenditure of Williamson Magor Ltd. instead of the actual rate of 2.77%. As the A/O assumed the rate to be 25.011% higher than the actual rate, he was under the impression that the method adopted was not scientific. The expenditure has been incurred in terms of resolution passed by the Board of Directors and valid agreement entered into with the said company. Copy of the Board Resolution was enclosed.

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Attested
Advocate.

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(8.4) My attention was drawn to the decision of the Supreme Court in the case of Dhakeshwari Cotton Mills Limited Vs. CIT,26 ITR 775,783 (SC),it has been held that "in making the assessment under sub-section (3) of section 23 of the Act (of the 1922 Act,corresponding to section 143(3) of the Act 1961 Act) the Income-tax Officer is not entitled to make a pure guess and make an assessment without any reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment order". This judicial principle has been followed by the Supreme Court in several of its subsequent decisions, viz. Dhirajlal Giridharilal Vs. CIT (26 ITR 736 (SC),CIT Vs. Daulatram Rawatmull (87 ITR 349 (SC),Omar Salay Mohammed Vs. CIT,37 ITR 151 (SC) and Lalchand Bhagat Ambica Ram Vs. CIT, 37 ITR 151 (SC).

(8.5) I have verified the details and the documents produced before me,which were also filed before the A/O during the assessment proceedings and I am of the opinion that the expenses were incurred for the purpose of business. The amount of Rs.36,00,000/- has been assessed as business income in the hands of Williamson Magor & Co. Ltd I,therefore, direct the A/O to delete the addition of Rs.12,00,000/-

(DIRECTION)

(9) GROUND NO. 9 is directed against the Double disallowance of provision of Rs.88,68,460/-.

(9.1) The A/R has submitted that in the computation annexed to the return of income filed by the appellant for the assessment year under consideration,the appellant had added back provision for diminution in the value of current investments and provision for non-performing assets amounting to Rs.88,68,460/-. The A/O inadvertently,without realising that the said provisions of Rs.88,68,460/- had been added back in the return by the appellant itself has again added back the said provisions amounting to Rs.88,68,460/- in determining the assessed income in the impugned order. The said addition resulted in a double disallowance of Rs 88,68,460/ A copy of the computation annexed with the return was filed.

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(9.2) On going through the documents filed before me, I have observed that the appellant had added back the amount of Rs.38,68,460/- in the computation of income, therefore, the disallowance of Rs.38,68,460/- made by the A/O is double disallowance. I direct the A/O to delete the addition of Rs.89,68,460/-. (DIRECTION)

(10) GROUND NO. 10 is directed against the disallowance of the interest on borrowings of Rs.19,39,568/-.

(10.1) The A/R has submitted that the appellant had received interest at the rate of 12% per annum amounting to Rs.39,60,000/- from the following concerns -

Niagra Investment Co.Ltd.	Rs.21,43,205/-
Birat Investments Ltd.	Rs.16,07,671/-
Micco Corporation Ltd.	Rs. 2,07,123/-
	Rs.39,60,000/-

the A/O on the alleged ground that the appellant had borrowed money at a higher interest rate than the rate at which the appellant gave out loans to the aforesaid concerns, disallowed proportionate interest expenditure on borrowings to the extent of Rs.19,39,568/- to bring parity in rate.

(10.2) The A/R has further submitted that the appellant is engaged in the business inter alia of providing financial services of various types including leasing, financing and investment business. The loans which were given to the aforesaid concerns were in the course of appellant's business as the appellant is engaged in the business of financing. It is now well settled law that interest on moneys borrowed for the purposes of business is to be allowed as a deduction under section 36(1)(iii) of the Income-tax Act, 1961 irrespective of whether the borrowing is on account of capital expenditure or for revenue expenditure. It is not the requirement of the provision to show whether the user of borrowed fund actually resulted in income or not. To allow the deduction under section 36(1)(iii) of the Act to the assessee, what is necessary to examine is whether the assessee has used the borrowed capital for the purpose of business. In the instant case, the appellant being engaged in the business of financing gave the loan in the course of its business to the aforesaid concerns and therefore there was no reason for the A/O to disallow an estimated amount of Rs.19,39,568/- out of the total interest expenditure claimed by the appellant under section 36(1)(iii) of the Act.

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(10.3) It was further submitted that the A/O's contention is erroneous as to bring parity in interest rates it is absurd to disallow as actual interest expenditure incurred by the appellant which was claimed under section 36(1)(iii) of the Act. My attention was drawn to the decision of the Madras High Court rendered in the case of CIT Vs. Pudukottai Company (P) Ltd.,64 ITR 728,729 (Mad) wherein it has been held that the reason given by the Income-tax Officer for disallowing this amount was that the interest charged on the lending was at a lower rate than that on the borrowing and that the lending was in favour of persons who were intimately connected with the assessee. This cannot be a ground for disallowing the interest. Once it is found that the capital was borrowed for the purpose of the business, the assessee is entitled to deduct the interest paid for that borrowed capital. It may also be mentioned that the Income-tax Officer himself accepted that the capital was borrowed for the purpose of the business because he has permitted a deduction of 4.92 percent, though the borrowing was on 6.01 percent. The scaling down of the interest is not permitted when once the Income-tax Officer accepts that the capital was borrowed for the purpose of the business.

(10.4) In the instant case also, the A/O himself as accepted that the capital was borrowed for the purpose of business because he has permitted a deduction of 18 percent though the borrowing was on 19/21/22/23 percent. As held by the Madras High Court in the aforesaid case that the scaling down of the interest is not permitted when once the Income-tax Officer accepts that the capital was borrowed for the purpose of the business.

(10.5) Further the Bombay High Court in the case of as Calico Dyeing & Printing Works Vs. CIT,54 ITR 263 (Bom) and the Karnataka High Court in the case of CIT Vs. Insotex (P) Ltd., s 50 ITR 193 (Kar) have held for giving the benefit of section ed 36(1)(iii) of the Act to the assessee, what is necessary to examine is whether the assessee has used the borrowed capital for the purpose of business.

(10.6) It was also submitted that the appellant had given the loans to the aforesaid companies out of the self generated funds or undistributed surplus available with the appellant at the time of giving the loans. The appellant has a common pool of funds where receipts of various sources including the borrowings are deposited and the loans in question had been given by the appellant to the aforesaid companies out of such merged accounts comprised of such borrowings. In other words, the profits generated by the appellant over the years and as

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reflected in the general reserve and profit and loss account of the balance sheet, were also embedded in the said common pool of funds. It is not possible in such a situation to segregate and relate on a one to one basis, a particular payment from a common pool of funds, which included inter alia loans given, loans taken, interest earned, interest paid and other misc. income etc. of the appellant. It is now well settled law that when the deposits from various sources are put in an over draft account in a bank or any other common pool of funds, no attempt should be made to relate or match the payments made out of the accounts with the deposit or borrowings, since it is not possible to co-relate a particular receipt with a particular expenditure. This principle clearly postulates that if a question arises as to whether a particular payment made from the deposits account was out of the borrowings or out of the accumulated profits embedded in the receipts and other incomes deposited therein, it cannot be said that the payment was made out of the borrowings. On the contrary, the presumption should be that the payment was made out of the profits generated over the years and embedded in the common pool of funds. It is also a settled law that in the event of doubt regarding the source of a particular payment from a common pool of funds in which receipts from various sources are deposited, the assessee is entitled to adopt the source most beneficial to it. Therefore, if it can be shown and proved that the appellant had at its disposal, sufficient surplus funds or undistributed profits to fund the impugned loans, then it is to be held that the loans were given out of the accumulated profits embedded in the common pool of funds and not out of the borrowed funds. The appellant's contention finds support from the followin decisions : - CIT Vs. India Carbon Ltd., 247 ITR 510 (Gau). The facts of the case is that the assessee in the relevant accounting year advanced loans to two of its subsidiary companies and claime that the loans were advanced for the purpose of its business. Th A/O found that the loans were directly advanced out of cash credit account and one out of a current account with the bank and the source of money in the current account was deposits from the public on which interest was paid by the assessee. The A/O therefore, concluded that there was direct nexus between the borrowings on which interest was paid and loans advanced to the subsidiary companies on which no interest was charged and disallowed the claim of interest. On appeal, the CIT(Appeals) deleted the disallowance of interest. On appeal by the departme

Contd.....15/-

Asstt. Commr. of Income-tax (Appeals) Srinagar. G. S. Road

Attested
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Advocate

(10.7) before the Tribunal,it was held that there was no nexus between the funds withdrawn from the cash credit and current account and funds advanced as loans to the subsidiary companies and also that the assessee had sufficient funds (* The appellate authority pointed out that the A/O failed to take into account the share capital of the company, depreciation reserve,other reserve and profit generated during the previous year.....*) at its disposal and dismissed the appeal of the department and upheld the order of the CIT(Appeals) On reference the Gauhati High Court rejected the application under section 256(2) filed by the department.

(10.8) It was also contended by the A/R that in the instant case no nexus between the funds withdrawn from the merged account and funds advanced as loans to the said three companies could be established by the A/O and the appellant also had sufficient undistributed profits embedded in the receipts deposited in the merged account.

(10.9) The same ratio was applied by the Calcutta High Court in the following decisions -

Woolcombers of India Ltd. Vs. CIT
134 ITR 219 (Cal)

Reckitt & Colman of India Limited Vs. CIT
135 ITR 698(Cal)

Indian Explosives Limited Vs. CIT
147 ITR 392 (Cal)

Alkali & Chemical Corporation of India Ltd.
Vs. CIT, 161 ITR 820 (Cal)

British Paints (India) Limited Vs. CIT
190 ITR 196 (Cal)

(10.10) I have gone through the submission and documents placed before me. From page 10,Schedule 7 of the printed accounts it is clear that the appellant had n opening balanme of Reserve and surplus of Rs.1,26,44,39,439/- i.e., balance as on 1/4/1997. The said Reserve and surplus comprises of General Reserve of Rs.63,24,00,000/- . Share premium of Rs.11,80,44,960/-,Reserve fund of Rs.31,26,200/- etc. The amount of loan given to the aforesaid three parties was Rs.6 crores only, the fact which has not been disputed by the A/O. On perusal of the aforesaid comparison (i.e.,loans of Rs.6 crores against General Reserve of Rs.63,24,00,000/-, that too opening balance of General reserve),it would be crystal clear that the undistributed profits ,which were available with the appellant at the time of giving the loans to the said three companies far exceeded the amounts of loans which were actually given. Therefore in view of the ratio of the decision of the jurisdictional High Court and the Calcutta High Court,it should necessarily be presumed that the loans in question had been given out of the earned

surplus of the appellant lying embedded in the common pool of funds and not out of the borrowings in the common pool of funds. The A/O is, therefore, directed to allow the interest expenditure of Rs.19,39,568/-. (DIRECTION)

(11) GROUND NOs.11(a) to(i) is directed against the addition of the income under the head capital gains.

(11.1) The A/R had submitted that the appellant had sold its property consisting of land and building situated at 52/5A and 52/6A, Ballygunge Circular Road, Kolkata-700 019 to M/s.Eveready Industries India Limited for a total consideration of Rs.8 crores. The cost of the said property was Rs.97,50,000/- As the assets were long term capital assets, the appellant accordingly, after taking the benefit of indexation as per second proviso to section 48 of the Act computed the long term capital gains amounting to Rs.4,77,27,500/- and offered the same to tax.

(11.2) The A/O however, did not accept the amount of long term capital ~~xxxx~~ gains determined by the appellant in its return, instead bifurcated the sale consideration on adhoc basis and separated the land and buildings for the purpose of determining the income under the head capital gains. The A/O bifurcated the sales on an adhoc basis and took the cost of land and building at the written down value in the books of accounts Based on the above adhoc book figure the A/O determined income from sale of land under the head long term capital gains and sale of building under the head short term capital gains. In particular the following income under the capital gains is determined by the A/O.

Long term capital gains on sale of land	Rs.5,65,44,848/-
Short term capital gains on sale of building	Rs.1,97,30,211/-

(11.3) The A/R has contended that the total procedure adopted by the A/O to determine capital gains from sale of land and building is against the provision of law. While determining the aforesaid capital gains, the A/O bifurcated the total consideration of Rs.8 crores on 60:20 ratio (estimated ratio) and attributed Rs.2 crores to sale of building and Rs.6 crores to sale of land. This was not required as both land and building were long term capital assets and income from them should have been taxed under the head long term capital gains. It may be noted that no depreciation was ever claimed by the appellant on the said building and neither the building formed part of block of assets on which depreciation has been claimed Therefore, there was no reason for the A/O to bifurcate the sale consideration on adhoc basis between land and building separately as both land and

Attested

(18)

building were long term capital assets. The A/O erred in computing short term capital gains on building separately presumably by invoking section 50 of the Act. Section 50 of the Act read as under -

" 50. Notwithstanding anything contained in clause (42A) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of section 48 and 49 shall be subject to the following modifications : -

(i) where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of assets during the previous year, exceeds the aggregate of the following amounts, namely :-

(i) expenditure incurred wholly and exclusively in connection with such transfer or transfers ;

(ii) the written down value of the block of assets at the beginning of the previous year; and

(iii) the actual cost of any asset falling within the block of assets acquired during the previous year,

such excess shall be deemed to be the capital gains arising from the transfer of short term capital assets ....."

(11.4) To fall within the purview of section 50 of the Act, the capital asset must be an asset forming part of a block of assets in respect of which depreciation has been allowed under the Act. In the instant case as stated above that the building did not form part of a block in respect of which depreciation has been claimed, neither any depreciation was ever claimed on the said building. Therefore, there was no question of invoking the provisions of section 50 of the Act and thereby determining an income under the head short term capital gains with all adhoc/book figures. As stated above, the total cost of the land and the building was Rs.97,50,000/-. It was further submitted that the A/O should have allowed indexation benefit on the cost of Rs.97,50,000/- as claimed by the appellant instead of Rs.2,46,000/- which is the written down value of land in the books of accounts of the appellant. To reiterate in a nut shell, the appellant sold the land and building which are long term capital assets and as no depreciation was ever claimed on the building i.e., it was never formed part of a block on which depreciation has beam claime claimed and no depreciation was separately ever claimed by the appellant, income on sale of the said land and building will have to be taxed under the head

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capital gains (DIRECTION)

(12) GROUND NO. 12 is directed against the short allowance of depreciation.

(12.1) The A/R has submitted that the A/O had erroneously granted depreciation of Rs.33,14,444/- instead of Rs.37,63,299/- as claimed by the appellant in its return of income. The A/O has commented in the assessment order that he has granted the depreciation as claimed by the appellant but had actually allowed depreciation short of Rs.4,48,855/- from what has been claimed by the appellant. The reasons given by the A/O for not granting the said depreciation is that based on earlier year's order the block plant and machinery does not exist as the same were already sold and therefore no depreciation is to be granted on the plant and machinery. The comment of the A/O is contrary to the facts of the instant case of the ~~CIT(Appeals)~~ appellant. Reference is drawn to the order dated 28th September, 2000 passed by the CIT(A) for assessment year 1997-98. At page 27 of the said order, in appeal no.Guwa-50/2000-2001 that there was a closing written down value (WDV) of Rs.1,57,53,727/- (2,10,04,969/- minus 52,51,242/-) for the block plant and machinery for assessment year 1997-98. Therefore, the question of opening WDV of plant and machinery becoming NIL does not arise at all.

(12.2) It was further submitted that the A/O should have taken the closing WDV of different block assets for assessment year 1997-98 as opening WDV for the same block from the assessed records to arrive at the depreciation figure. On the basis of assessed records, depreciation allowable for the assessment year 1998-99 would have been following - (Reference is drawn to page 27 of the CIT(A) order dated 28/9/2000).

Plant & Machinery	Rs.	Rs.
Opening WDV	1,57,53,727/-	(Closing of A.Y.97-98)
Add-Additions upto 30-9-97	2,38,214/-	
	1,59,91,941/-	
Less-Sales	6,56,300/-	
	1,53,35,641/-	
Depreciation at the rate of 25%		38,33,910/-

Contd.....20/-

(20)

Motor cars -

Opening WDV	17949100/-	(Closing of A.Y.97-98)	S/ITNS
Less- Sales	478685/-		
	I7470415/-		
Add - Additions from 1-10-97	739702/-		
	I8210117/-		
Depreciation @ 20% on Rs.1,74,70,415/-	34,94,083/-		
Depreciation at the rate of 10% on Rs.7,39,702/-	73,970/-	35,68,053/-	

Furniture & Fixture -

Opening WDV	68,00,713/-	(Closing of A.Y.97-98)	
Add-Additions	NIL		
	68,00,713/-		
Less- Sales	NIL		
	68,00,713/-		
Depreciation @ 10%		6,80,071/-	
Therefore total depreciation -		80,82,034/-	

The above depreciation figure of Rs.80,82,034/- have been arrived at based on assessed figure (closing WDV) of assessment year 1997-98. A copy of the said order of the CIT(A) was enclosed.

(12.3) The A/R has contended that there is no dispute raised by the A/O regarding additions, sales, depreciation rate, the only dispute is with regard to opening WDV of the block of plant and machinery. From the said order of the CIT(A) it is crystal clear that the A/O's comments are factually incorrect. The A/R has quoted the relevant portion of the C.B.D.T., has issued a circular dated 11th April, 1955, being Circular No. 14(XL-35) of 1955. The relevant portion of this circular is stated as follows-

1. .....
2. .....
3. Officers of the Department must not take advantage of the 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 initiative in guiding a tax payer 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 rest 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.

4. .....
5. .....

Contd.....21/-

6. The intentionof this Circular is not that tax due should not be charged or that any favour should be shown to anybody in the matter of assessment, or that where investigations are called for,they should not be made. Whatever be the legitimate tax,it must be assessed and must be collected. The purpose of this circular is merely to emphasis that we should not take advantage of an assessee's ignorance to collect more tax out of him than is legitimately due from him."

(12.4) He also pointed out that cognizance of the said circular has been taken by the Bombay High Court in the case of Dattatrya Gopal Shette Vs. CIT,150 ITR 460 (Bom). The Kerala High Court in Parekh Brothers Vs. CIT,150 ITR 105,118 (ker) taking cognizance of the said circular held that officers of the Department must not take advantage of the ignorance of an assessee as to his rights,it is Department's duty to assist a taxpayer in every way particularly in the matter of claiming and securing relief and the Circulars issued by the CBDT are binding on the department.

(12.5) I have considered the submissions of the A/R and verified the assessment records. It is now well settled that a Circular of the CBDT which confers some benefit on the assessee is binding on all officers concerned with the execution of the Income-tax Act and they must carry out their duties in the light of the circular.

(12.6) In the present case,following the aforesaid circular,therefore,it was in the first place,the duty of the A/O to have granted depreciation of Rs.80,82,034/- as per the assessment records. Though a lower amount was claimed by the appellant,as Rs.80,82,034/- is the correct figure of depreciation for the previous year relevant to assessment year in consideration as per the assessment records,the A/O should have granted the correct amount of depreciation in order to correctly assess the tax liability."

(12.7) The Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT,229 ITR 383,386 (SC),where the main principle enunciated is that the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law,so long as the relevant facts are on record in respect of an item wrongly dealt,the same can always be corrected to come to the correct tax liability.

Contd.....22/-

(12.8) In view of the aforesaid, the A/O is directed to grant the further depreciation of Rs.47,67,590/- i.e., (80,82,034/- minus Rs.33,14,444/-) as per his assessment records.

(DIRECTION)

(13) GROUND NO.13(a) & (b) is directed against the set-off of loss.

(13.1) The A/R has submitted that the A/O did not set-off loss arising under the head business with long term capital gains arising under the head capital gains. The said action of the A/O is directly in contravention to section 71(2) of the Act and circular no. 721 dated 13/9/1995 issued by the CBDT.

(13.2) I have considered the submission and gone through the provisions of section 71(2) which provides that the loss of any head income, other than "Capital gains" may be set off against income under the head Capital Gains. The A/O is directed to follow the provisions of section 71(2) of the Income-tax Act,1961. (DIRECTION)

(14) GROUND NO. 14 is directed against tax deducted at source of Rs.90,000/-.

(14.1) The A/R has submitted that the appellant claimed credit for tax deducted at source (TDS) of Rs.17,28,756/- in its return of income. The TDS certificates in original were annexed with the return of income. The A/O without assigning any reason granted credit for TDS amounting to Rs.16,38,756/- resulting to short credit of Rs 90,000/-.

(14.2) The A/O is directed to grant credit of TDS of Rs.90,000/- after verification. (DIRECTION)

(15) GROUND NOs.15(a) & (b) is directed against the charging of interest under section 234A and 234B of the Act.

(15.1) The A/R has submitted that the A/O has computed interest under section 234A and 234B of the Act based on the total income determined vide order under section 143(3) of the Act which is clearly in violation of the principles enunciated by the Supreme Court rendered in the case of Commissioner of Income-tax and Others Vs. Ranchi Club Limited reported in 247 ITR 209 (SC), wherein the Supreme Court confirmed the decision of the Patna High Court which had interalia held the interest under section 234B of the Act was leviable on returned income only and not the income as determined by the assessing authority. The said decision of the Supreme Court has been followed by the Patna High Court in the case of Smt.Tej Kumari and Others Vs.Commissioner of Income-tax & Others ,247 ITR 211 (Patna)(FB) wherein it has been held when once civil appeal is dismissed [illegible]

Advocate.

(supra)) after hearing the parties by the Supreme Court holding that the appeal has no merit, then such order becomes one which attracts article (4) of the Constitutions, which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. The A/O has erred in levying interest under section 234A and 234B of the Act.

(15.2) The A/R also pointed out that the retrospective amendment made to section 234A and 234B in the Finance Bill, 2001 (which has now been passed by the Parliament) does not effect the law declared by the Supreme Court.

(15.3) I have considered the submission of the A/R. Section 234B provides that interest is payable by an assessee who has paid advance tax but it is less than 90% of the assessed income on the amount of assessed tax minus the advance-tax paid. Section 234C provides that if the assessee fails to pay the instalments of advance-tax as per the provisions of sub-clause (1) of the section. In view of my decisions and observations, the A/O is directed to charge interest only in case if the advance tax including TDS fails to fulfill the provisions of section 234B and 234C. (DIRECTION)

(16) GROUND NO. 16 is general in nature which requires no discussion.

(17) In the result, the appeal partly succeeds.

Sd/-(H. SHULLAI)
Commissioner of Income-tax (Appeals)
Guwahati

pkk

Memo No. .....
Copy forwarded ..... by order etc.

STENOGRAPHER
C. I. T. (Appeals)
GUWAHATI

The Telegraph November 8, 2002

ANNEXURE 7

Recommendations on direct taxes by the Kelkar task force

Towards transparency

BIBEK DEBROY

Kelkar-I and Kelkar-II have been discussed in newspapers. Kelkar-I is the consultation paper prepared by the Vijay Kelkar task force on direct taxes. Kelkar-II is the similar paper for indirect taxes. Kelkar-I has four broad strands — simplification of procedures through a national tax information network, farm income taxation through an Article 252 resolution of the Constitution, slashing of rates and exemption removal for personal income taxation and similar provisions for corporate taxes. There is nothing more to say on these excellent suggestions. Instead, I will focus on some other interesting aspects of Kelkar-I that newspapers haven't adequately reported. And I will do this through quotes from the consultation paper, since explanations are generally unnecessary.

"The Task Force recognises the proximate role of PAN in building up an effective taxpayer information system. Given the ongoing and new initiatives by the Ministry of Home Affairs for issuing a Citizen Identification Number and by the Ministry of Labour for issuing a Social Security Number, the Task Force feels that the use of PAN can effectively integrate, on the lines of the US Social Security Number system, multiple tasks of tax and commercial enforcement, targeting government subvention, improving governance and enhance national security, both at the Central and State level. We recommend that: 1) The PAN should be extended to cover all citizens and therefore serve as a Citizen Identification number. This will obviate the need for the Home and Labour Ministries to issue new numbers. 2) Given the manifold increase in the coverage of PAN, the responsibility for issuing should be transferred to an independent agency outside the income tax department. However, the income tax department should have online access to the database for tax enforcement like any other agency."

"In line with our view that the tax department should concentrate on its core functions, the department should be allowed to outsource data entry work and clear the backlog of returns (which number 2.5 crores) by end-February 2003." Is this an estimate for February 2003? In any case, I hadn't realized the figure was so large.

The author is director, Rajiv Gandhi Institute for Contemporary Studies, New Delhi.

"At present, taxes are collected through approximately 10,500 bank branches. Since the proposed procedure requires banks to receive online payment, those banks that do not have adequate infrastructure for establishing online connectivity will be debarred from collecting taxes. Accordingly, the Government, in consultation with the Reserve Bank of India, should also consider paying higher charges for services rendered by banks." Fine. These 10,500 bank branches are public sector banks and that is a problem I always face. I can't pay taxes through my bank. So does this mean that the insistence on public sector banks will go? Perhaps there is such an implicit suggestion. But I wish the Task Force had made this explicit.

"The present requirement of obtaining a tax clearance certificate before leaving the country must be abolished. Nevertheless, in order to protect against a consequent loss of revenues, the income tax department may be allowed to notify the immigration/customs authorities to prevent any particular person from leaving the country if such person is considered to be an offender. As a result, the process of tax clearance (prior to travelling abroad) will require to be fulfilled as an exception as against the current practice of obliging everyone to comply with the procedure."

"The Task Force also noted that the standards of accountability at the field formation level were considerably diluted since, inter alia, the performance targets, particularly those related to revenue collection, were unrealistic and thrust upon them. The field formations were either resigned to the failure of the targets or resorted to questionable practices to meet revenue targets divorced from underlying economic trends. The Task Force was informed that very often officers were (informally) directed to hold back refunds to boost revenue collection. Accordingly, it is strongly recommended that the revenue targets should be based on underlying economic trends." We always knew this. But as far as I am aware, this is the first time that a government-appointed Committee or Task Force has acknowledged it.

"Income tax department, in public perception, is identified with 'raids'. That is its identity. That is its most visible enforcement activity. Raid is conducted with the help and in the presence of police force. The search and seizure activity is immediately reported. In the press, highlighting 'big names' and big amounts of undisclosed income. It also provides publicity to the concerned officer. The objective of the search is to ascertain facts and collect evidence of concealed income and to give a message that tax evasion will not go undetected or unpunished. But, in the course of the search as they are conducted, the main objective of the search team is to obtain a declaration of undisclosed income from the person searched. It confirms success of the raid. Further investigations are slowed down or abandoned. Often such declarations are obtained under pressure. They are retracted in subsequent proceedings. After the raid, the officers of the investigation in charge of the raid, call to their office the persons searched to understand from them the seized accounts and documents. They record further statements. Mostly, the objective of this exercise is to obtain declaration of undisclosed income. The officer, in charge of the raid, prepares a report on seized material in about 60 days, giving their own appraisal of the search and seizure, without any accountability for what he says or omits to say in the report.... The assessment is one sided, high pitched, completed in a hurry when it is getting barred by limitation, ignoring the contentions of the assessee.... In a search case there is no 'real' investigation. As a result, the assessment does not stand the test of judicial scrutiny in appeals. There is nominal revenue gain from the searched case.

"Search and seizure work provides high visibility with the sense of being in power"

"Overall, the contribution of searched cases to total revenue collection is less than 1%.... Today, in the income tax department the most sought after posting for most of the officers in any grade is to the search and seizure wing. The officers employ all stratagem to obtain posting to search and seizure wing. The reason is not that the search and seizure work provides high visibility with the sense of being in power, without accountability for acts or omissions but the main reason is that it is profitable. The department gives handsome rewards to members of search team based on seizures and revenue realisations." Any comment is unnecessary.

"Under the Income Tax Law in India, the tax base of a taxpayer is effected by the residential status enjoyed by him. A taxpayer could have one of the following three residential status:- Resident: A taxpayer is treated as a resident if he is: (a) Resident in India for 182 days or more during the financial year; (b) In India for a period of 60 days or more during the financial year and resident in India for at least 365 days in aggregate during the preceding four financial years.

"Resident but Not Ordinarily Resident: A taxpayer is treated as resident but not ordinarily resident if he is: (a) Resident in India for less then 9 years out of the preceding 10 financial years or (b) Resident in India for a period of periods amounting in all to less then 730 days during the preceding 7 financial years. Non Resident: A taxpayer is treated as non resident if he is neither a resident or resident but not ordinarily resident. Residents are subject to tax on their worldwide income. Persons who are resident but not ordinarily resident are taxed only on Indian-sourced income. Non-residents are taxed only on Indian-sourced income and on income received, accruing or arising in India.

"Persons who are resident but not ordinarily resident, enjoy exemption in respect of their foreign sourced income, even though in qualitative terms they are no different from residents. To the extent that most double taxation avoidance agreements provide for taxation of interest income in the country of residence, persons who are residents but not ordinarily residents enjoy exemption from foreign tax by claiming to be residents in India for the purpose of a treaty. Thanks to this peculiar category, therefore, a large number of such taxpayers end up paying no tax on their foreign sourced income, either in India or in any other part of the world.

"Further, most countries across the world provide for only two status: Residents and Non-Residents. Accordingly, the Task Force recommends that residents but not ordinarily residents must be subjected to tax on their global/ worldwide income at par with residents. To do so, this unusual category of resident but not ordinarily resident taxpayers must be deleted. If this is indeed done, hell will break loose in some segments of the corporate world.

"In conclusion, the Task Force is convinced that if its recommendations are adopted in toto, our tax system will become more transparent." True. The problem is with the toto part.

Attested
Advocate

ANNEXURE 8

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APRIL 2001- DECEMBER 2001

Disposal of Appeals

Company	144
Search and Seizure	54
Block Assessments	8
Old	287
Total	**577**

High Demand Appeals

1-10 Lacs	270
10-25	31
25-100	7
Above 100	9
Total	**317**

Results in Appeals

Partly Allowed	254
Allowed	85
Setaside	2
Enhanced	12
Dismissed	214
Annulled	10
Total	**577**

Current Appeals (filed after 31-03-2001)

April 2001	-
May	12
June	9
July	23
August	34
September	-
October	8
November	25
December	20
Total	**131**

Attested
Advocate

(125)

19 MAY

Guwahati Bench

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

GUWAHATI BENCH ::: GUWAHATI.

Union of India & ors - Respondents
through:-
Anup Kumar Chandhari
19.5.03

In the matter of -

O.A.No. 388/2002

Dr. J.K. Goyal

..... Applicant.

- Vs -

Union of India & Ors.

..... Respondents.

AND

In the matter of -

Additional Statement for and on behalf of the Respondents in connection with the above noted OA.

The respondents beg to file the following document which may be treated as part of the Written Statement filed by the respondents :

" A copy of the Corrigendum dated 27.02.2003 issued by the Board under F.No. C-14011/5/2002-V&L is annexed herewith and marked as ANNEXURE- RC-1 " .

Verification .....

(126)

2

V E R I F I C A T I O N

I, Goulen Hangshing, working as Additional Commissioner of Income-tax(Vigilance), Guwahati do hereby solemnly affirm and state as follows:-

1. That, I am competent to file this verification on behalf of the respondents as authorised and I swear the same. I am also fully acquainted with the facts and circumstances of the case.

2. That, the statement made in this verification and in paragraphs 1 of the accompanying written statement of defence are true to my knowledge, those made in paragraphs X are being matters of records of the case are true to my information derived therefrom which I believe to be true and the rest are my humble submissions before this Hon'ble Tribunal.

I sign this verification on this thirteenth day of May, 2003 at Guwahati.

मुख्य आयकर आयुक्त का कार्यालय, Chief Commissioner of Income-tax, O/O the CIT, Ghy, गुवाहाटी

DEPONENT

(127)

3 "ANNEXURE-RC-1"

F.No.C-14011/5/2002-V&L
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

New Delhi, the 27th February, 2003.

Corrigendum

I am directed to refer to Memorandum of even number dated 28.10.2002 initiating disciplinary proceedings against Shri J.K.Goyal, CCIT (under suspension) under Rule 14 of the CCS(CCA) Rules, 1965. The following words may be added after para 6 and before the signature of the Under Secretary to the Govt. of India :-

" By Order and in the Name of the President"

Sd/-
(V.K. Singh)
Under Secretary to the Govt. of India.

Shri J.K. Goyal,
Chief Commissioner of Income Tax,
Guwahati.
(Through DIT(Vigilance), Kolkata)

Copy to :

1. DIT(Vigilance), Kolkata alongwith the copy meant for Shri J.K. Goyal, CCIT, Guwahati.
2. DGIT(Vigilance), New Delhi.
3. US(AD-VI)/US(AD-VI-A)/DT(Per.), CBDT, North Block.
4. Secretary, CVC, New Delhi.
5. office copy.

(V.K.Singh)
Under Secretary to the Govt. of India.

Attested

To,

Mr. S. Sarma/B.K. Das
Advocate
C.A.T.
Guwahati

Ref. : O.A. No. 388/02
Dr. J.K. Goyal
-Vs-
Union of India & Ors.

Sir,

Please find herewith a copy of the ~~written~~ additional statement filed in Court on behalf of the Respondents.

Kindly acknowledge receipt.

Yours faithfully,

(A.K. Chaudhuri)
Addl.C.G.S.C.

Received copy
Usha Das.
Advocate 19/5/03.

-ooo-

Filed by:
The Applicant
through:
Jaideep Purkayastha
Advocate
26.2.2007

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH.

O.A. 388/2002

Dr. J.K. Goyal
.....APPLICANT.

Vs.

Union of India & Ors.
.....RESPONDENTS.

ADDITIONAL STATEMENT OF FACTS BY THE APPLICANT.

I, Dr. J.K.Goyal, aged about 62 years retired Chief Commissioner of Income Tax, son of Shri M.L. Goyal, permanent resident of E-1/2 IAS Officer's Colony, Devendra Nagar Road, Raipur, Chattisgarh, do hereby solemnly affirm and state as follows:-

1. That the O.A. No. 388/2002 was disposed of by the Hon'ble Tribunal by its order dated 30th May, 2003 directing the respondents to complete the disciplinary proceeding within three months from the date of the receipt of order.

Copy of the order of the Hon'ble Tribunal dated 30.5.03 passed in OA No. 388/02 is annexed herewith and marked as **ANNEXURE-A/11**.

2. That since in the original application the applicant had assailed the very maintainability of the memorandum of charges dated 28.10.2002 and the initiation of disciplinary

merit because of the failure of respondents to place records of the case, therefore in the interest of justice the case should be remitted to the Hon'ble Tribunal for rehearing and final disposal on merit by properly examining and appreciating the relevant records on being placed by the official respondents.

Copy of the order dated 10.11.06 passed by the Hon'ble High Court in W.P.(C) No. 5747/03 is annexed herewith and marked as **ANNEXURE-A/12**.

7. That in consequence of the order of the Hon'ble High Court dated 10.11.06 passed in W.P.(C) No.5747/03, the applicant has now come before this Hon'ble Tribunal for the ends of justice so that the O.A. No.388/02 can be disposed of on merits. It is pertinent to mention that some of the documents were annexed with the writ petition before the Hon'ble High Court which were not annexed with the original O.A. No. 388/02, moreover during the pendency of the OA and after disposal of the same there were certain developments which should be brought on record before the Hon'ble Tribunal. Hence, in order to bring on record all those relevant facts and documents before the Hon'ble Tribunal the instant additional statement of facts is being filed in the original application.

8. That during the pendency of the original application, the applicant filed written statement of defence dated 10.2.03 against the memorandum of charges. In this written

proceeding, therefore the applicant was aggrieved by the direction of the Hon'ble Tribunal given in its order dated 30.5.2003. It may be appreciated that the Hon'ble Tribunal in its final order did not examine the maintainability of the memorandum of charges on the ground of failure of official respondents to produce the relevant case records even though they were directed to do so.

3. That therefore, being aggrieved by the final order of the Hon'ble Tribunal, passed in OA No.388/02, the applicant assailed the legality of the same in W.P.(C) No. 5747/03 before the Hon'ble Gauhati High Court.

4. That the Hon'ble High Court while admitting the writ petition passed the interim order dated 29.7.03, staying the disciplinary proceeding initiated by the memorandum of charges dated 28.10.02.

5. That during the pendency of the W.P.(C) No. 5747/03 the applicant retired on attaining the age of superannuation from the post Chief Commissioner of Income Tax. However, the retirement benefits of the applicant were withheld on the ground of pendency of disciplinary proceeding.

6. That the W.P.(C) No.5747/03 was disposed of by the Hon'ble High Court by its order dated 10.11.06, holding that since the original application was not disposed of on

statement of defence the applicant controverted the allegation made against him in the memorandum of charges. While controverting the allegation, that the applicant decided the appeal in question hastily in total non-application of mind within about a month of filing the appeal, the applicant gave examples of number of appellate orders pertaining to appeals in block assessment cases wherein the appellate orders were passed within one month of the filing of the appeals. It was contended by the applicant that there was nothing unusual in disposing of the appeal in question within about a month of the filing of the appeal. The applicant also referred to para 2 and 3 of Annexure-2 of memorandum of charges to demonstrate that atleast two opportunities were given to the assessing officer in the form of notices dated 16.7.2001, 17.7.2001 and it was because of this, the assessing officer sent a report dated 19.1.2001. It was also urged by the applicant that the concerned assessing officer never appeared before him in any of the appeal hearing and that the concerned assessing officer had this strange and unusual habit of not cooperating and of not appearing in course of hearing of the appeals.

Copy of the written statement of defence dated 10.2.2003 is annexed herewith and marked as **ANNEXURE-A/13**.

9. That by an order no. A-318/2006 dated 10.11.06 the sanction of the President was accorded for disbursement to

the applicant of the cash payment equivalent to leave salary for 300 days earned leave in terms of DOP & T O.M. No.14028/19/86-Estt.(L) dated 29.9.1986 and O.M. No.14028/7/97-Esst.-(L) dated 7.10.1997.

Copy of the order No. A-318/2006 dated 10.11.06 is annexed herewith and marked as **ANNEXURE-A/14**.

10. That the statements made in the additional statement of facts in para 2,3,4,5,7 are true to my knowledge and those made in para 1,6,8,9 being matter of records are true to my information derived therefrom, which I believe to be true and the rests are my humble submissions before this Hon'ble Tribunal.

And I sign this affidavit on the day of ,2007 at Guwahati.

J.K. Goyal

Deponent

ANNEXURE - A/11

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH

Original Application No.388 of 2002

Date of decision: This the 30th day of May 2003

The Hon'ble Mr Justice D.N. Chowdhury, Vice-Chairman

The Hon'ble Mr S.K. Hajra, Administrative Member

J.K. Goyal,
Resident of Fancy Bazar,
Guwahati. .....Applicant

By Advocates Mr B.K. Sharma, Mr P.K. Tiwari and Mr S. Sarma.

- versus -

1. The Union of India represented by the Secretary, Department of Revenue, Ministry of Finance, Government of India, New Delhi.
2. The Chairman, Central Board of Direct Taxes, Ministry of Finance, New Delhi.
3. The Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi. .....Respondents

By Advocate Mr A.K. Chaudhuri, Addl. C.G.S.C.

.....

O R D E R

CHOWDHURY. J. (V.C.)

The issue is as to the legality, validity and continuation of the impugned disciplinary proceeding initiated against the applicant under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (1965 Rules for short) in the following circumstances:

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(J. Purkayastha)
Advocate

-7-

The applicant while serving as Chief Commissioner, Income Tax, Guwahati, was served with a show cause memorandum calling upon him to explain in respect of his alleged conduct in discharging his duties as a CIT (Appeals). On the same date the applicant was placed under suspension in aid of Rule 10(2) of the 1965 Rules. The applicant, amongst others assailed the order of suspension dated 18.2.2002 before this Bench which is numbered and registered as O.A.No.76 of 2002. During the pendency of the aforementioned O.A. the impugned Memorandum dated 28.10.2002 was issued under the 1965 Rules in respect of the alleged misconduct mentioned in the articles of charge against the applicant which reads as follows:

> "That the saidSh J.K. Goyal while functioning as Commissioner of Income Tax (Appeal)-I Bhubaneswar, showed undue haste in passing appeal order in the case of block assessment of Sh Karuna Kar Mohanty and decided the appeal without exercising due diligence, so as to grant undue favours to the appellant to the detriment of the interest of Revenue. While doing so he
>
> (a) accepted the submissions/claims made by the appellant assessee without examining their veracity with the material facts on record, including search records and without making independent verifications or enquiries with the Assessing Officer.
>
> (b) failed to afford an opportunity to the Assessing Officer, against whose order the appeal was preferred, to be heard as prescribed under the Income Tax Act; and
>
> (c) showed lack of application of mind and predetermination of issues.
>
> By the aforesaid acts of omission and commission Sh J.K. Goyal failed to maintain absolute integrity and devotion to duty and exhibited conduct unbecoming of a Government servant. He thereby violated the Ruels 3(1)(i), 3(1)(ii) and 3(1)(iii) of the CCS (Conduct) Rules, 1964."

The Memorandum was accompanied with the statement of imputations, list of documents in support of the articles

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of charge etc. The legitimacy of the action of the respondents is assailed in this O.A. on the ground that the charges levelled against the applicant did not constitute misconduct.

2. In the O.A. the applicant contended that the respondent authority without due application of mind initiated the purported disciplinary proceeding with a view of harass and victimise him with malafide intention. It was contended that the applicant all throughout was exercising quasi judicial power in exercise of the power of Appellate Authority conferred upon him by statute under the Income Tax Act, 1961. A quasi judicial authority, it was contended, is not immune from mistak and error of law or fact and such mistakes or errors are subject to scrutiny by the higher authority.

3. The respondents contested the case and submitted their written statement denying and disputing the claim of the applicant.

4. We have heard the learned counsel for the parties at length. Mr P.K. Tiwari, learned counsel for the applicant, submitted that all throughout the applicant was not getting fair treatment from the respondents. He referred to the earlier departmental proceeding initiated in 1990 which dragged on for years together affecting his service career and finally concluded only at the interference of the Tribunal. Referring to the allegatios contained in the charge memo and the statement of imputations, the learned counsel submitted that the materials did not disclose any misconduct. The charges as alleged does not reflect on his reputation, integrity or good faith or devotion to duty. There was no whisper that the applicant was actuated by any corrupt motives. At the worst.....

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(J. Purkayastha)
Advocate

worst it could only be said that the views taken by the applicant as an Appellate Authority was not acceptable to the higher authority and against which, in fact appeal preferred before the Tribunal. In support of his contention, the learned counsel referred to the decision of the Bench in O.A.No.1/2000 and O.A.No.2/2000 disposed of on 28.2.2001. The learned counsel also referred to the decisions rendered by the Supreme Court in Zunjarrao Bhikaji Nagarkar Vs. Union of India and others, reported in (1999) 7 SCC 409 and P.C. Joshi Vs. State of U.P. and others, reported in (2001) 6 SCC 491. Countering the submission of Mr P.K. Tiwari, Mr A.K. Chaudhuri, learned Addl. C.G.S.C., appearing on behalf of the respondents, also referred to the statutory provisions enjoined in the Income Tax Act, 1961 as well as the Income Tax Rules made thereafter. The learned Addl. C.G.S.C. submitted that there are materials to show that in conducting his statutory obligations the officer failed to observe the essential duties. In reply, Mr P.K. Tiwari referred to the conduct of the Assessing Officer who deliberately absented himself while the appeal was posted for hearing. The learned counsel for the applicant referred to the statement of facts contained in the show cause memorandum as well as the adjudication order and stated that these notices as required under Section 250 of the Act read with the Rules were served upon the Assessing Officer and who in turn sent his comments which were duly considered by the Appellate Authority.

5. We have given our anxious consideration in the matter. No doubt, the applicant was discharging quasi judicial power. A quasi judicial act is an act which is

of.....

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Advocate

of judicial nature performed by one who is not acting as a judge. A quasi judicial action is "a term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature". Independent functioning of quasi judicial action is not to be whittled down. There is a meaning behind to protect such exercise from fear or pressure, but it will be trite to say that in all cases in the area of exercise of quasi judicial power no misconduct can be inferred in the exercise of quasi judicial power. If there is obvious gross dereliction in discharge of the duties or if one fails to act honestly or in good faith, in that event there will be no bar from invoking disciplinary jurisdiction. It all depends on facts and situations. We are, however, purposfully not going into the merits of the proceeding at this stage in view of the fact that the disciplinary proceeding is in underway and as a matter of fact the Inquiry Officer was also appointed.

6. We have given our utmost consideration on the issues raised by the parties. Mr P.K. Tiwari is, no doubt right in his submission that in the absence of heedless, indiscreet, irresponsible and dishonest motive in exercise of quasi judicial power no misconduct can be construed. To decide the legal issues raised before us it requires evaluation of the facts, scrutiny of the materials relied upon in framing the charges, the alleged

statement.....

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Advocate

statement of the Assessing Officer dated 20.12.2001 relating to ITNS 51 and the records of the Appellate Authority which are not before us. We were told that the enquiry proceeding is in fact underway and the Inquiry Officer was appointed long back. We, therefore, would like to accede to the stand taken by the Addl. C.G.S.C. We also noted the vehement criticism of Mr Tiwari as to the conduct of the respondents in not placing the records before the Bench at the time of hearing. We express our resentment on this matter. When the matter was slated for adjudication it was incumbent on the authority to place the full records of the department and render genuine assistance to the Court or Tribunal to dispense justice. However, considering all the factors mentiond above, we allow the department to complete the disciplinary proceeding. From the documents referred to the charge, the case is based on records, more particularly the records of the Appellate Authority. Four documents were cited. Mr Tiwari, referring to item 4 of the list of documents in support of the articles of charge contended that the statement dated 20.12.2001 purportedly made by the Assessing Officer in respect of ITNS 51 was not to be accepted since the same was taken as a device/an after-thought to fix the applicant after the event took place. We are not inclined to make any comments at this stage since we feel that the disciplinary proceeding needs to be allowed to be concluded within a time frame. It would be open to the applicant to raise all the issues those were raised here including as to the conduct and credibility of the version of the Assessing Officer.

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(J. Purkayastha)

Advocate

7. Considering the facts and circumstances, we feel that ends of justice would be met if a direction is issued to the respondents to complete the disciplinary proceeding with utmost expedition. Considering the fact situation and the nature of the enquiry we direct the authority to conclude the enquiry within three months from the date of receipt of the order. The parties are directed to take necessary steps for concluding the enquiry within the time frame.

8. With the above observation the application thus stands disposed of. There shall, however, be no order as to costs.

Sd/VICE-CHAIRMAN

Sd/ MEMBER (A)

nkm

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Section Officer (J)
C.A.T. GUWAHATI BANCH
Guwahati-5

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(J. Parthasarathy)
Advocate

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ANNEXURE - A/12

प्रतिलिपि के लिए आवेदन की तारीख Date of application for the copy	स्टाम्प और फोलिओ की अपेक्षित संख्या सूचित करने की नियत तारीख Date fixed for notifying the requisite number of stamps and folios.	अपेक्षित स्टाम्प और फोलिओ देने की तारीख Date of deliver, of the requisite stamps and folios.	तारीख, जबकि देने के लिए प्रतिलिपि तैयार थी Date on which the copy was ready for delivery.	आवेदक को प्रतिलिपि देने की तारीख Date of making over the copy to the applicant.
6/12/06	6/12/06	6/12/06	8/12/06	8/12/06

THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram & Arunachal Pradesh)

Writ Petition (C) NO. 5747 of 2003

Dr. J. K. Goyal, Chief Commissioner of Income Tax, Jalpaiguri, West Bengal.

..... ***Petitioner***

-Versus-

1. The Union of India, represented by the Secretary, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi.

2. The Chairman, Central Board of Direct Taxes, Ministry of Finance, North Block, New Delhi.

3. The Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi.

..... ***Respondents***

BEFORE
THE HON'BLE MR JUSTICE A.H. SAIKIA
THE HON'BLE MR JUSTICE B.D. AGARWAL

For the petitioner : Mr. P.K. Tiwari,
Mr. J. Purkayastha, Advocates.

For the respondents : Mr. G.P. Bhowmik, Advocate

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(J. Purkayastha)
Advocate

A.H Saikia, J.

The legality and validity of the order dated 30.05.2003 passed by the Central Administrative Tribunal, Guwahati Bench, (for short, 'the CAT') in Original Application (for short, 'O.A.') No.388/2002 has been assailed in this petition filed by the petitioner under Article 226 read with Article 227 of the Constitution of India.

2. Heard Mr. P.K. Tiwari, the learned counsel for the petitioner as well as Mr. G.P. Bhowmik, the learned counsel represented by the Union of India/respondents.

3. The impugned order has been challenged only on the sole count that though the petitioner approached the CAT questioning basically the validity and continuation of the impugned disciplinary proceeding initiated against him under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short, 'the Rules'), the CAT, instead of interfering with the disciplinary proceeding, directed the respondents to complete the disciplinary proceeding within a time frame of three months from the date of the receipt of the order in absence of availability of the relevant records whatsoever for the perusal of the CAT.

4. In view of the admitted position of non-production records, according to Mr. Tiwari, the CAT ought to have decided the matter on merits on the question of maintainability and also as regards continuation of the disciplinary proceedings instead of referring it to the authority concerned for completion of the disciplinary proceeding within the time schedule as noted above.

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(J. Purkayastha)
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5. We have meticulously perused the impugned judgment and order. In paragraph 6 of the impugned order, it was categorically observed as follows:

> *".....We also noted the vehement criticism of Mr. Tiwari as to the conduct of the respondents in not placing the records before the Bench at the time of hearing. We express our resentment on this matter. When the matter was slated for adjudication it was incumbent on the authority to place the full records of the department and render genuine assistance to the Court or Tribunal to dispense justice. However, considering all the factors mentioned above, we allow the department to complete the disciplinary proceeding. From the documents referred to the charge, the case is based on records, more particularly the records of the Appellate Authority.....".*

6. It transpires from the above view that the CAT was not able to proceed with the case on merit, admittedly, for want of the records, and as such when the petitioner challenged the continuation of the disciplinary proceeding thereof, in our considered view, the CAT ought not to have directed the authority concerned to proceed with the same ad it is, therefore, a fit case for remand.

7. At this stage, Mr. Bhowmik has contended that the entire records has presently been placed before the Income-tax Appellate Tribunal at Bhubaneswar for its perusal due to the pendency of the appeal and the cross-appeal preferred by the parties therein. It is fairly submitted by him that the same would be placed before the CAT as and when necessary and if directed by this Court on remittal of the matter to the CAT for disposal on merit.

8. Upon hearing the learned counsel for the parties and also taking on account the facts and circumstances of the case in its entirety, this Court is inclined, in the interest of justice, to remit the matter to

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(J. Pattkayastha)
Advocate

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the CAT for re-hearing and final disposal on merit by properly examining and appreciating the relevant records on being placed by the department/respondents. We order accordingly.

Since the parties are represented by their respective engaged counsel, they are directed to appear before Tribunal within two months from today. Meanwhile, the department/respondents are also directed to make arrangement for placement of the relevant records before the CAT without default.

9. Till such time that the CAT passes necessary orders on appearance of the parties as indicated above, the interim order passed by this Court on 29.07.2003 shall continue.

10. In view of the above, this writ petition stands disposed of..

Sd/- B. D. Agarwal
Judge

Sd/- A. H. Saikia
Judge

Sl. No. 65283
6.12.06

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Superintendent (Copying Section)
Gauhati High Court
Authorised U/S 76, Act 1, 1872

8/12/06

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Advocate

ANNEXURE - A/13

From

Dr. J.K.Goyal,
Chief Commissioner of Income Tax.
GUWAHATI.

Date : 10.02.2003

To

Shri V. K.Singh
Under Secretary,
Govt. Of India, Ministry of Finance
Department of Revenue,
North Block,
New Delhi.

This has reference to Memorandum F.No. C-14011/5/2002-V&L dt. 28.10.2002. At the outset it may be mentioned that the said Memorandum is not tenable in the eye of law in as much as that the same has not been signed "for and on behalf of the President of India".

2. As you are aware, the Memorandum was preceded by a show cause notice dt. 18.02.2002 which was issued with a predetermined mind and was accompanied by order of suspension of the same date.

2.1. Soon on receipt of the show cause notice, I requested for inspection/copies of the documents through letter dt. 01.03.2002. Though I was intimated to have the same at Kolkata vide letter dt. 21.03.02 of your office, yet despite my letters dt. 02.04.02, 20.05.02, 19.06.02, 19.07.02, 19.08.02, 17.09.02 and 16.10.02 the inspection/copies were not given and on the other hand a formal charge sheet has been issued..

2.2. Though I was again intimated to have the copies/inspection at Kolkata through your office letter dt. 26.12.02, yet when I wrote to D.I.(Vig.), Kolkata on 07.01.03, he refused to accept the letter. (ANNEXURE-1 colly)

2.3. The above sequel of events clearly indicates that I am being harassed with a predetermined and biased mind.

3. You would be kindly aware that where an officer is placed under suspension, disciplinary proceedings should be completed against him within 6 months - chargesheet issued wihin 3 months and the same finalised within next 3 months.

Cab Sectt DOP 39/59/70 Estt(A) dt. 9.2.71
DOP O.M. 39/33/72 dated 16.12.1972.

but in my case the chargesheet itself was issued after more than 8 months of the order of suspension for extraneous reasons.

4. At this juncture, it is also not out of place to refer to the fact of systematic persecution of mine for the last 15 years, starting with my supersession in April, 1988 DPC for the posts of Commissioner of Income Tax which compelled me to file an OA in May, 1988 before CAT who was pleased to quash the DPC proceedings to the disadvantage of some of the officers

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(J. Purkayastha)
Advocate

who have subsequently held the post of CVO of the Department and who acted to the prejudice of my interests. Otherwise, nothing explains the Inquiry Report dt. 17.05.1995 in persuance of a memorandum relating to alleged excessive use of official telephone being finalised in 2002 after prolonged legal battle and repeated directives/orders of the Court(s). It is pertinent that no chargesheet was issued to any of the officers on such a frivolous charge. (ANNEXURE -2)

4.1 When the Government was compelled to give me a promotion as CCIT in pursuance of above, they were irked by the directions dt. 20.12.01 of the ACC 'to fix responsibility for delay in finalisation of disciplinary case'. (ANNEXURE -3) Instead of fixing such responsibility, they decided to fix me up and the job was entrusted to Shri S.D.Kapila who was appointed as CVO only w.e.f. 25.01.02 and could not look into the alleged lapse before this date, but he did so under extra constitutional powers in league with the A.O. against whom there were serious charges of corruption and who served him in all possible manners during his (SD Kapila's) visit to Bhubaneswar and also in league with the infamous CCIT Bhubaneswar who was subjected to CBI searches more than once, and also placed under suspension a number of times. He also used to demand money from the officers. He gave adverse CRs to all CsIT because they did not oblige him by meeting his illegal demands.

4.2. The order of suspension was got approved by S.D.Kapila by the F.M. by misrepresenting to him about CAT's order in earlier D.E. for which a decision had already been taken by that time to drop the enquiry on recommendations of the UPSC, DOP etc..

4.3. Again the CVC was influenced into giving first stage approval for issuance of a charge sheet by misrepresenting to them that I had not given reply to the show cause notice, whereas the fact is that inspection/copies of documents was not given despite 8 request letters detailed above.

4.4. The CVC in their circular No. 8(1)(h)/98(1) dt. 18.11.1998 have laid down an outer time limit of 6 months for completing the enquiry under Rule 14. But the department does seem to be in no mood to adhere to such a time limit, as is evident from the fact that the D.I(Vig.), Kolkata, in whose custody the records are stated to be availabe, has not even accepted the request letter of mine dated 7.1.2003.

4.5. I also really wonder as to what explains the Government's decision to place me under suspension or appoint me as CCIT (OSD) when none of the officers against whom the CVC recommended major penalties to be levied/prosecutions to be launched, was ever meted out such treatment. Officers against whom there were serious allegations were also appointed as Board Members (ANNEXURES - 4 & 5).

5. It has been alleged that while deciding the Appeal, I acted in haste, showed lack of diligence and undue favour to the assessee, accepted the submissions blindly, showed lack of application of mind and predetermination of issues and did not allow an opportunity to the AO.

5.1. Paras 2 & 3 of Annexure-2 to memorandum clearly demonstrate that atleast two oportunities were given to the AO in the form of notices dated 16.7.2001 and 17.7.2001 and that is why the AO sent a report dated 19.7.2001(Para 9 of appellate order).

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(J. Purkayastha)
Advocate

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Once he was aware of the dates of hearing, the AO was duty bound to appear before me - his absence was deliberate for which he is trying to pass the blame on to me. He did not require any special invitaion for appearance once notices of hearing had been sent and were duly received by him. It is a matter of record that this AO in particular has never appeared before me in any of the appeal hearings including in respect of other assessees of this group where block assessments were made by him, and which were decided much later in December, 2001. Such a ground of lack of opportunity to the AO has not been even taken by the department in appeal before the ITAT for the obvious reason.

5.2. The appeal is stated to have been decided in haste - in other words, within about a month of filing thereof. I enclose herewith copies of the following appellate orders.

Name of Appellant	Date of filing / Date of disposal	Date of hearing	Whether AO present.
Siang Tea & Industries Pvt. Ltd.	21.5.2001/ 21.6.2001	21.6.2001	No.
Powmex Steels Ltd.	6.8.1999	29.7.1999	No.
Downtown Hospital	12.3.2001/ 30.4.2001	26.4.2001	No.
Gorge Williamson Ltd.	9.4.2001/ 30.5.2001	29.5.2001	No.
Williamson Financial Services	15.5.2001/ 22.6.201	20.6.2001	No.

(ANNEXURE-6 colly)

There are thousands of such appellate orders all over the country passed by different CsIT(A), but I am being singled out

Once the submissions of the appellant and of the AO have been obtained, the decision could be taken by me any time. The Citizen's Charter states department's commitment to expeditiously decide the appeals for which purpose an amendment to section 250 of the IT Act has also been made - Sec 250 (6A).

5.3. The appellate order is subject to further scrutiny by the ITAT and higher forums. It has not become final yet. Being a quasi-judicial order, it cannot be held that the same has resulted into favour to the assessee or into loss to the Revenue.

5.4. The submissions of the assessee were borne out from records that were made available by the AO. They were duly supported by an affidavit also which was not even considered by the AO. The contentions have been independently appreciated in the light of the affidavit, submissions of the AO., assessment order and material on record. It is, therefore, wrong to allege that lack of deligence has been exhibited or lack of application of mind. If the issues were predetermined as alleged, after hearing the appeal on 25.7.2001, the appellate order could have been passed on 26.7.2001 itself.

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(J. Purkayastha)
Advocate

6. It may be stated that the factual and the legal position was explained to the Hon'ble Chairman, CBDT when he was here during 18-23 April 2002, and he was fully convinced with my submissions.

7. In OA No. 76/2002, the order of suspension has been challenged whereas in OA No. 388/2002, the issuance of chargesheet. Both these OAs have been admitted u/s 19(3) of Central Adminitrative Tribunal Act. 1985. In reply to these OAs it has been stated in written statements filed by the department that the merits of appellate order are not in question in the chargesheet or otherwise. Therefore, reference to certain case laws in the chargesheet is irrelevant.

Be that as it may,

(a) there is a decision reported in 234 ITR 733 Gujrat to the effect that a notice u/s 143(2) must be issued for completing block assessment : the AO in this case having not done so, should he not be charged ?

(b) dismissal of SLP without a speaking order does not lay down any law as the correctness of the decision against which SLP is sought does not stand decided.

AIR 1961 SC 1457
AIR 1996 SC 2124
AIR 2000 SC 85
156 ITR 495 Gujrat
222 ITR 523 Allahabad
224 ITR 77 Patna
144 ITR 851 Allahabad FB
162 ITR 888 SC

(c) explanation having been given for discrepancy in figures of stock, no addition can be made on that account.

172 ITR 173 Allahabad

The AO did not find on physical search the assets stated to have been reported to the bank in proforma balance sheet (and not in the actual balance sheet).

(d) affidavit cannot be rejected without cross examination unless the facts on records demonstrate unequivocally to the contrary (in this case the AO did not even discuss affidavit or its contents).

30 ITR 181 SC
87 ITR 349 SC
158 ITR 215 Calcutta
149 ITR 172 Kerala
145 ITR 457 Allahabad

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8.1. Further it is wrong to assume that a junior officer is expected to do less work. It is a matter of record that an AAC/ DC(A) was required to dispose off 180 appeals in a month whereas a CIT(A) only 30-50 appeals. As an AAC, I disposed off 10,000 appeals per year but as CIT(A) only about 1,000.

8.2. It may be pertinent to refer to quality of block assessment orders as brought out succinctly in the Kelkar Report on Direct Taxes.

> " ..... the assessment is one sided, high pitched, completed in a hurry when it is getting barred by limitation ignoring the contentions of the assessee.....in a search case, there is no real investigation. As a result, the assesment does not stand the test of judicial scrutiny in appeals. There is nominal revenue gain from the searched case....."(ANNEXURE -7)

It appears that the observations are made keeping in mind the assessment in question.

8.3. There have been repeated requests/directions from the higher authorities to dispose off high demand appeals particularly when they are accompanied by request for stay of demand as in this case. There were repeated pointers to the higher authorities to the effect that the AOs do not appear at the appeal hearings.

8.4. The appeal in question was not the only one decided in a short time by me. (ANNEXURE- 8)

8.5. The AO after the search on 29.6.99 had completed assessment for some of the block years viz., 97-98 and 98-99 on 7.3.2000 and 11.1.2001 respectively u/s 143(3) by applying rate of 8% as prescribed u/s 44AD. He could not be allowed be go back on the same and apply the rate of 20.7% which is nowhere disclosed/adopted in respect of Civil Contractors, as the appellant is. (paras 13.4 & 10.1 of appellate order)

8.6. Under section 250(1), the AO is a necessary party to the appeal. If he was not noticed, he should have applied to the CIT(A) for recalling the appellate order which was exparte vis-a-vis him.

8.7. The appellant has, before the AO and other authorities, been alleging bias and harassment on the part of the AO and had even applied for transfer of case (para 2 of appellate order).

8.8. The AO in respect of contract receipts has blown both hot and cold by adopting the figures as shown by the appellant or as informed to him by department. He could either accept the figures declared by appellant or by department (para 4 of the appellate order).

8.9. The AO while working out addition of Rs. 3,42,68,696/- went by the figures of new assets as quoted by some one. He did not inform the assessee about this enquiry, nor did he find such new assets with the appellant during the course of search (paras 3, 14 of the appellate order).

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Advocate

8.10. After the search was over on 29.6.99, the appellant lodged an FIR with the police on 2.7.1999 to the effect that the books of accounts were missing. They were not found during search also. As such no adverse inference could be drawn from the fact of missing of these books of accounts (para 11.1 of appellate order)

8.11. The proforma balance sheets figures were not recorded in the books of accounts - the CA indicated that they were on estimates so also the assessee, and therefore, could not be relied upon.

8.12. When the AO could go through 96 grounds of appeal, records, assessment order in a period of two days, there is no reason that an officer of the rank of the CIT(A) could not decide the appeal within 32 days.

8.13. It was for the CIT(A) to decide as to whether any clarifications were required. The AO could not anticipate that the CIT(A) would do so.

8.14. The records made available by the AO to CIT(A) were duly and fully considered.

8.15. The appellate order, after it is signed on original copy by the CIT(A), is signed by PA on other copies and steps taken by office for delivery/service.

8.16. It is never mentioned in appeal proceedings that the appeal is "fully" heard. The AOs also do not mention that the hearings have taken place "fully".

9. It is a settled law that where a decision in appeal goes against the Government, the proper course is to go in for a review/appeal and in no circumstances can an appellate officer be subjected to disciplinary proceedings, otherwise that would demoralise the departmental officers in deciding appeals without fear or favour(176 ITR 375). Also "it is well said that a judge who has not committed an error is yet to be born" (AIR 1994 SC 1031).

10. It is requested that the above facts/legal position be placed before the Competent Authority so that the disciplinary proceedings are dropped expeditiously, the charge having been denied.

Enclo : As stated.

(Dr. J.K.Goyal)

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(J. Purkayastha)
Advocate

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ANNEXURE-A/14

F.No.A-35015/13/2004-Ad.VI(A)
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Direct Taxes)
*****

New Delhi, the 10th November, 2006.

Order No.A-318/2006

Sanction of the President is hereby accorded to the disbursement of the cash payment equivalent to leave salary for 300 days Earned Leave in terms of DOP &T O.M. No.14028/19/86-Estt.(L) dated 29.9.1986 and O.M. No. 14028/7/97-Estt.(L) dated 07.10.1997 in favour of Shri J.K. Goyal, CCIT, Raipur retired on 30.11.2004.

Aparna

(APARNA SHARMA)
Under Secretary to the Government of India

Copy forwarded to: -

1. Shri J.K. Goyal, CCIT (Retd.), Raipur.
2. CCIT, Raipur.
3. The ZAO (CBDT), Raipur.
4. Guard folder.

Aparna

(APARNA SHARMA
Under Secretary to the Government of India

Certified to be true copy
(J. Purkayastha)
Advocate

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

GUWAHATI BENCH AT GUWAHATI

O.A. NO. 388 OF 2002

Dr. J.K. Goyal

...Applicant

-Versus-

Union of India & Ors.

....Respondents

Filed by
NONGRUM
Advocate

Additional written statement on behalf of the Respondents above named-

ADDITIONAL WRITTEN STATEMENT OF THE RESPONDENTS

MOST RESPECTFULLY SHEWETH:

1. That with regard to the Additional statement made in paragraph 1 of the instant application the answering Respondents beg to offer no comments as the same are matters of record.

2. That with regard to the Additional statement made in paragraph 2 of the instant application the answering Respondents beg to state that the Hon'ble Tribunal in its final order did not examine the maintainability of the Memorandum of Charges solely on the ground of failure of official respondents to produce the relevant case records as it is evident from the order that the CAT had held that it was purposefully not going into the merits at that stage in view of the fact that

Contd...P/-

the disciplinary proceedings were under way and as a matter of fact the Inquiry Officer was also appointed.

3. That with regard to the Additional statement made in paragraph 3 of the instant application the answering Respondents beg to offer no comments as the same are matters of record.

4. That with regard to the Additional statement made in paragraph 4 of the instant application the answering Respondents beg to offer no comments as the same are matters of record.

5. That with regard to the Additional statement made in paragraph 5 of the instant application the answering Respondents beg to offer no comments as the same are matters of record.

6. That with regard to the Additional statement made in paragraph 6 of the instant application the answering Respondents beg to state that the Hon'ble Tribunal in its final order did not examine the maintainability of the Memorandum of Charges solely on the ground of failure of official respondents to produce the relevant case records as it is evident from the order that the CAT had held that it was purposefully not going into the merits at that stage in view of the fact that the disciplinary proceedings were under way and as a matter of fact the Inquiry Officer was also appointed.

7. That with regard to the Additional statement made in paragraph 7 of the instant application the answering Respondents beg to offer no comments as the same are matters of record.

Contd...P/-

NONGOTHONG JUNGFO

Asstt. Commissioner of Income-tax, VIG.
O/o the Chief Commissioner of Income-tax
Guwahati

8. That with regard to the Additional statement made in paragraph 8 of the instant application the answering Respondents beg to offer no comments as the same are matters of record.

9. That with regard to the Additional statement made in paragraph 9 of the instant application the answering Respondents beg to offer no comments as the same are matters of record.

NONGOTHUNG JUNGIO

Asstt. Commissioner of Income-tax, VIG.
O/o the Chief Commissioner of Income-tax
Guwahati.

VERIFICATION

I, NONGOTHUNG JUNGDO S/o ZANGENTHUNG JUNGDO aged about 31 years, R/o House no 18, Lakshmi Nagar, Jalukbari, Guwahati District Kamrup and competent officer of the answering respondents, do hereby verify that the statement made in paras 1 — 9 are true to my knowledge and those made in paras — being matters of record are true to my information derived therefrom which I believe to be true and the rests are my humble submission before this Hon'ble Tribunal. and I have not suppressed any material fact. And I sign this verification on this 25th day of February 2008 at Guwahati.

NONGOTHUNG JUNGDO

Signature

Asstt. Commissioner of Income-tax, HQ
O/o the Chief Commissioner of Income-tax
Guwahati.