IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A No. 1895/Kol/2017
Assessment Year : 2013-14

Shri Vinod Agarwal Kolkata [PAN : ACRPA 8096 M] (Appellant)	-vs.-	Pr.C.I.T.Central, Kolkata-2, Kolkata (Respondent)

I.T.A No. 1896/Kol/2017
Assessment Year : 2013-14

Shri Shyam Sundar Agarwal Kolkata [PAN : ACYPA 7814 N] (Appellant)	-vs.-	Pr.C.I.T.Central, Kolkata-2, Kolkata (Respondent)

I.T.A No. 1897/Kol/2017
Assessment Year : 2013-14

Shri Ram Naresh Agarwal Kolkata [PAN : ACYPA 1903 G] (Appellant)	-vs.-	Pr.C.I.T.Central, Kolkata-2, Kolkata (Respondent)

I.T.A No. 1898/Kol/2017
Assessment Year : 2013-14

Shri Pawan Kumar Agarwal Kolkata [PAN : ACTPA 2421 L] (Appellant)	-vs.-	Pr.C.I.T.Central, Kolkata-2, Kolkata (Respondent)

For the Appellant : Shri S.K.Tulsiyan, Advocate
For the Respondent : Md. Usman, CIT(DR)

Date of Hearing : 18.12.2017.
Date of Pronouncement : 03.01.2018.

ORDER

Per N.V.Vasudevan, JM

These are appeals by four different Assessees against four different orders all dated 21.03.2017 of Pr.C.I.T.- Central-2, Kolkata relating to A.Y.2013-14.

2. The issue involved in all these appeals is identical and arises out of the same facts and circumstances. These appeals were heard together. We deem it convenient to pass a common order.

3. There is a delay of 93 days in filing these appeals. It has been explained in an affidavit filed by the four assesses in these appeals that their tax matters were being looked after by one Shri Mukesh Khaitan, ACA. For A.Y.2013-14 assessment orders were passed on 30.03.2015 in the case of all the assesses. Subsequently on 16.09.2016 all the assesses received a show cause notice u/s 263 of the Income Tax Act, 1961 (Act) from the respondent. The assessees had given the same to Shri Mukesh Khaitan, ACA, who in turn handed over the brief to another Chartered Accountant for representing the case before the Principal C.I.T. The impugned order was passed on 21.03.2017 directing the AO to make a de novo assessment on the issue set out in the impugned order u/s 263 of the Act. The said order was received by the assessees on 24.03.2017. The assessees had handed over the order for necessary suggestions to Shri Mukesh Khaitan, ACA for further course of action. It appears that Shri Mukesh Khaitan did not seek any legal opinion for filing the appeal against the orders u/s 263 dated 21.03.2017. In the meantime the assessees received a notice from the AO u/s 142(1) of the Act dated 30.03.2017 for framing de novo assessments pursuant to the impugned order u/s 263 of the Act dated 21.03.2017. Thereafter the assessees themselves contacted a senior lawyer, who opined that order of Pr.CIT passed u/s 263of the Act dated 21.03.2017 was an appealable order before the Tribunal and an appeal should be filed. In the meantime

there occurred a delay of 93 days in filing the appeals before the Tribunal. The assessees have stated in the affidavit that they were not aware of the intricacies in the income tax matter and relied on the suggestions and advice from Shri Mukesh Khaitan, ACA. Since he did not give proper advice at the right time and since the assessees filed the present appeals on taking an opinion from a senior lawyer, the delay in filing the appeals is not deliberate and was due to unavoidable reasons. It has been mentioned that there is no malafide intention behind not filing the appeals within the prescribed time. It has also been mentioned that the assessees will be put to serious stress if the delay is not condoned.

4. The ld. Counsel for the assessee reiterated the facts as contained in the affidavit filed by the assessee and further placed reliance on the decision of the Hon'ble Supreme Court in the case of Collector, Land Acquisition, Anantnag and Anr. Vs Mst. Katiji & Ors.in CA No.460 of 1987 judgment dated 19.02.1987. In the aforesaid decision the Hon'ble Court took the following view in the context of condonation of delay in filing the appeals :

> *"The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-*
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> *1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
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> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
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> *3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

5. Further reliance was placed on the decision of Mumbai Bench of ITAT in the case of Earthmetal Electricals (P)Ltd. Vs ITO (2005) 4 SOT 484 (Mum). In the aforesaid case there was a delay of 70 days in filing the appeal by the assessee. The assesee had explained the reasons for the delay as owing to the action of the Chartered Accountant in misplacing the assessee's appeal papers. The appeal was filed by the assessee after getting a letter from the Tax Recovery Officer. The explanation for the delay in filing the appeal as to the act of the Chartered Accountant misplacing the appeal papers was held to be a sufficient cause for the delay in filing the appeal.

6. The ld. DR opposed the prayer of the assesee for condonation of delay. It was submitted by him that the reasons given in the affidavit for condonation of delay will not constitute a reasonable and sufficient cause for the delay in filing the appeal belatedly.

7. We have given a very careful consideration to the rival submissions. In our view the reasons given in the affidavit for condonation of delay are convincing and these reasons would constitute reasonable and sufficient cause for the delay in filing these appeals. The appeals have been filed by the assessees on 24.08.2017. The orders u/s

263 of the Act were passed on 21.03.2017 and received by the assessee on 28.03.2017. On 30.03.2017 a notice u/s 142 (1) of the Act was issued by the AO pursuant to the directions contained in the impugned orders passed u/s 263 of the Act to do a denovo assessments. The assessments pursuant to the directions u/s 263 of the Act were concluded by the AO on 07.08.2017. On 14.08.2017 the assessees received the said assessment orders and thereafter contacted a senior advocate and according to his opinion the appeals have been fled. The sequence of events clearly demonstrates that the assessees were pursuing the proceedings before the AO pursuant to the orders u/s 263 of the Act and only on receipt of the assessment orders dated 07.08.2017 they contacted the senior advocate and based on his opinion filed the present appeals. In our view there is no deliberateness or negligence or malafides on the part of the assessees. In these circumstances we are of the view that the delay in filing these appeals deserve to be condoned and the same is hereby condoned.

8. The Assessees in all these four appeals are individuals. There was a search and seizure operation carried out by the revenue under the provision of section 132 of the Act on 10.05.2012 against the assessees and various business concerns of Srijan Group at various premises at Kolkata. Srijan Group is mainly engaged in real estate, construction and real estate marketing. All the Assessees in these appeals were also searched on 10.05.2012.

9. For AY 2013-14, the Asssessees filed their returns of Income in which each of the Assessees had shown a sum of Rs.4,84,89,051/- as share of profits received from the Partnership firm M/s.Avantika Advisory Services LLP. They claimed the said receipt as exempt u/s.10(2A) of the Act. Section 10 of the Act deals with incomes which is not included in the total income. Subsection (2A) to section 10 of the Act reads as follows:

> *" in the case of a person being a partner of a firm which is separately assessed as such, his share in the total income of the firm.*

Explanation.: For the purposes of this clause, the share of a partner in the total income of a firm separately assessed as such shall, notwithstanding anything contained in any other law, be an amount which bears to the total income of the firm the same proportion as the amount of his share in the profits of the firm in accordance with the partnership deed bears to such profits;"

10. In the course of assessment proceedings for AY 2013-14, the AO, in the case of Shri Vinod Agarwal, issued a notice u/s 142(1) of the Act dated 15.01.2015calling upon the assessee to furnish certain details. This notice was in relation to A.Y.2007-08 to 2013-14. Another notice u/s 142(1) of the Act dated 23.01.2015 was issued by the AO with reference to A.Y.2013-14 in which the AO specifically called from the Assessee the following information :-

"In case of any short of income/receipt from a partnership firm – please furnish a copy of set of accounts of the said firm, its PAN, evidence of filing its return of income for the relevant year and a certified copy of partnership deed."

11. In reply to the aforesaid notice the assessee gave several details. The facts with regard to the assessee becoming a partner of the partnership firm M/s. Avantika Advisory Services LLP was also given by the Assessee. M/s. Avantika Advisory Services LLP was a limited liability partnership(LLP). It had four partners namely Active Nirman Pvt. Ltd, Finestar Consultancy Pvt. Ltd., Sumangal Vintrade Pvt. Ltd and Timely Commercial Pvt. Ltd. The partnership carried on the business of consultancy services dealing in shares, securities, commodities, currencies etc. and also dealing in property and real estate. By a supplementary LLP agreement dated 01.01.2013 the 4 assessees in these appeals were inducted as incoming or new partners in M/s. Avantika Advisory Services LLP. Prior to the aforesaid partnership deed the existing partners were sharing in profits and loss at 1/4th each. As per the supplementary LLP agreement dated 01.01.2013 the profit sharing ratio was as follows :-

"3. PARTNERS'CONTRIBUTION AND PROFIT SHARING BETWEEN THE PARTNERS

The contribution in the LLP shall be Rs.10,00,000/- (Rupees Ten Lacs only) and it may be brought in by the Partners as cash/moneys 'worth of any property, rights or services agreed to between the LLP and any Partner in proportion as mutually agreed unanimously by the partners. The contribution may be increased or reduced at any time and from time to time in the same way. The partners of the LLP are entitled to share profit and losses in proportion mentioned herein below or any other proportion as mutually decided by the Partners from time to time.

Name of Partners	% of share of Profit/(Loss)
Active Nirman Pvt.Ltd.	1%
Finestar Consultancy Pvt.Ltd.	1%
Sumangal Vingtrade Pvt.Ltd.	1%
Timely Commerical Pvt.Ltd.	1%
Shyam sunder Agarwal	24%
Ram Naresh Agarwal	24%
Vinod Kumar Agarwal	24%
Pawan Kumar Agarwal	24%

12. It is further provided in clause-5 of the deed of supplementary Partnership LLP agreement that loss upto 31.2.2012will be borne only by the existing partners and the new partners shall not be liable for such loss. Clause-5 referred to the above reads as follows :

"5. INTERIM ACCOUNTS

The Existing Partners shall finalize Accounts from the beginning of the financial year to 31st December, 2012 i.e. 9 months from 01.04.2012 to 31.12.2012. The loss upto 31.12.2012 should be debited in the Accounts of the Existing Partners. The new partners shall not be responsible for any Loss and Liability upto 31.12.2012. "

13. There was a loss of Rs.20,17,79,738/- upto 31.12.2013 in the business of M/s. Avantika Advisory Services LLP. The same was distributed amongst the existing partners alone since the new partners were not responsible for those losses as per clause-5 of the supplementary LLP agreement dated 01.01.2013. For the period between 01.01.2013 to 31.03.2013 there was a profit of Rs.20,20,37,712/-. The same was distributed as per clause-3 of the partnership agreement in the ratio of 24% each

in favour of the new partners .i.e. Assessees in thee appeals and 1% each in the account of the existing partners.

14. As far as the partnership firm M/s. Avantika Advisory Services LLP is concerned for the previous year relevant to A.Y.2013-14 it filed the return of income declaring the total income of Rs.3,88,780/-. As we have already seen that the firm incurred a loss of Rs.20,17,79,738/- between 01.04.2012 and 31.12.2013 and earned a profit of Rs.20,20,37,712/-. The gross income as per the profit & Loss Account for the whole period (previous year) from 1.4.2012 to 31.3.2013 was Rs.3,88,982/- and this was declared in the return of income filed by M/S.Avantika Advisory Services LLP. As far as the partner's capital account is concerned the loss of Rs.20,17.79,738/- was debited in the capital account of the existing partners because as per clause-5 of the supplementary LLP agreement dated 01.01.2013 they alone are responsible for this loss. As far as the profit from 01.01.2013 to 31.03.2013 is concerned that was distributed and credited in the partners's capital Account (existing partners as well as new/incoming Partners) as per the profit sharing ratio mentioned in clause-3 in the supplementary LLP agreement dated 01.01.2013. The share of each of the new partners in the profits so credited in their capital account was a sum of Rs.4,84,89,051/-. This was claimed by each of the new partners who are the 4 Assessees in these appeals as exempt u/s.10(2A) of the Act.

15. In reply to the notice u/s 142(1) of the Act dated 23.01.2015, the assessees gave all the aforesaid details to the AO and claimed that the sum of Rs.4,84,89,051/- share of profits received from the firm which is exempt u/s 10(2A) of the Act. The AO passed an order u/s 143(3) of the Act dated 30.3.2015 in the case of all the assessees.

16. The AO passed order of assessments dated 30.03.2015 in the case of all the assessees. In this order there is no reference to the claim of the assessees for exemption

u/s 10(2A) of the Act. There is however a reference in these orders to the notice u/s 142(1) of the Act dated 21.03.2015 issued by the AO and a reference to the receipt of replies to the queries raised in the notice. There is an observation in the orders of assessment "reply has been submitted, perused and placed on record." The AO has also observed that in response to Shri Mukesh Khaitan, AR of the assessee appeared from time to time and made submissions which has been discussed, examined and placed on record. The AO accepted the claim of the Assessees for exemption u/s 10(2A) of the Act as he did not make any addition of this sum in the order of assessment.

17. The CIT-Central-2, Kolkata, in exercise of his powers u/s 263 of the Act, was of the view that the aforesaid orders of the AO were erroneous and prejudicial to the interest of the revenue. He accordingly issued a show cause notice u/s 263 of the Act dated 16.09.2016. The principal contention of the Pr.CIT in the show cause notice was as follows :-

> "On analysis of assessment records, it is observed that the assessee became partner of Avantika Advisory Services LLP (PAN:AASFA3815F) on 01.01.2013 vide supplemental LLP agreement dated 01.01.2013. As per the supplemental, LLP agreement (clause 3), the partners of the LLP were entitled to share of Profit and Losses in definite proportions and assessee's share of Profit and Loss was 24%. As per the terms of the supplemental LLP agreement it was clearly provided that new partners will not be responsible for any loss and liability upto 31.12.2012. Thereafter for the period 01.01.2013 to 31.03.2013, Avantika Advisory Services LLP reported a profit of Rs. 20,20,37,712/- which was distributed among all the partners in the ratio defined in the supplemental LLP agreement whereby the assessee's share of profit was Rs. 4,84,89,051/-. The assessee claimed exemption of Rs. 4,86,42,696/ - u/s 10(2A) which includes share of profit of Rs. 4,84,89,051/- from Avantika Advisory Services LLP for A.Y. 2013-14 and it was subsequently allowed at the time of assessment.
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> But as per the provisions of section 10(2A) of the Act, the assessee is entitled for exemption of Rs.93,355/- being 24% of Rs. 3,88,982/- Rs. 3,88,982/- is profit before tax of Avantika Advisory Services LLP for A. Y. 2013-14. Therefore allowing exemption of Rs. 4,84,89,051/- resulted in underassessment of income by Rs. 4,83,95,696/- IRs. 4.84,89,051/- - Rs.93.355/-.

In view of the above, the assessment completed on 30.03.2015 may be erroneous in so far as it is prejudicial to the interest of the revenue.

I am, therefore directed to, request you to show cause, as to why the Assessment Order passed on 30.03.2015 u/s. 143(3) by the' DCIT Central Circle 4(3), Kolkata should not be treated as erroneous in so far as it is prejudicial to the interest of the revenue as per the provision of sec.263 of the Income Tax Act. "

18. In reply to the aforesaid show cause notice the assessee submitted that Sec.10(2A) of the Act clearly specifies that the total income of the firm needs to be distributed among the partners strictly and in conformity with the profit sharing ratio as defined in the partnership deed/LLP deed. The object of sub-section (2A) of Section 10 is to avoid double taxation vis-a-vis, the profits of the firm, which is distributed in the hands of the partners. It does not mean that income which is taxed in the hands of the firm is taxable in the hands of the partners and on the same principle, when the income is not taxed in the hands of the firm, it becomes taxable in the hands of the partner. The Assessee brought to the notice of the CIT, a judgment of the Karnataka High Court dated 07-02-2014 in the case of Vidya Investment and Trading Company Pvt Ltd vs UDI (2014)[WP.No.18813/2013 (T-IT) reported in (2014) 43 taxmann.com 1 (Karn) wherein it was held that the share of a partner in the profits of the firm is exempt u/s l0(2A) of the Act and such exemption is not restricted to amounts which is taxable in the hands of the partnership firm's hands but also includes exempt income in the hands of the firm. The Assessees also drew attention of the CIT to circular No.8/2014 dated 31-03-2014 issued by the CBDT on the provisions of section 10(2A) of the Act which clarified that 'total income' of the firm for sub section (2A) of section 10 of the Act, as interpreted contextually, includes income which is exempt or deductible under various provisions of the Act. In particular attention was drawn to the following part of the Circular which reads as follows:

"It is, therefore, further clarified that the income of a firm is to be taxed in the hands of the firm only and the same can under no circumstances be taxed in the hands of its partners. **Accordingly, the entire profit credited to the partners'**

accounts in the firm would be exempt from tax in the hands of such partners, even if the income chargeable to tax becomes NIL in the hands of the firm on account of any exemption or deduction as per the provisions of the Act."

It was submitted that the above clarification in the Circular implies that the share of profit in the hands of the partners is independent of the profits of the firm which is finally distributed among the partners. Even if the income of the firm chargeable to tax becomes NIL on account of exemption/deduction, it does not mean that the income before claiming exemption will be taxed in the hands of the partners. It was pointed out that the income of the Avantika Advisory Services LLP before Tax was Rs.3,88,982/- and after proving for tax expense of Rs.l,3l,006/-, the Profit after Tax comes to Rs.2,57,976/- which was apportioned among the partners as per the predetermined sharing ratio. The profit for the period amounting to Rs.2,57,976/- consists of two components viz

a. Losses for the period 01-04-2012 to 31-12-2012 amounting to Rs.20,17,79,738/-, and
b. Profits for the period 01-01-2013 to 31-03-2013 amounting to Rs.20,20,37,712/-
Rs, 2,57,976/-

It was argued that as per the terms of the supplementary LLP agreement dated 01-01-2013, losses for the period 01-04-2012 to 31-12-2012 amounting to Rs.20,17,79,738/- was distributed to the existing partners of the LLP as per the predetermined ratio and the profits for the period 01-01-2013 to 31-03-2013 amounting to Rs.20,20,37,712 was distributed to all the partners as per the new ratio defined in the supplementary LLP agreement dated 1.1.2013. It was argued that the Act does not mandate that income of the firm as on the last date of the financial year needs to be distributed among the partners. The losses/profits of the firm needs to be apportioned in consonance with the terms of the partnership deed/LLP deed. The parties are free to agree to any terms between them and effect will have to be given to the terms of the partnership deed. It was submitted that there was no error in the order of the AO allowing exemption

u/s.10(2A) of the Act as claimed by the Assessee and therefore, the proceeding u1s.263 of the Act, may kindly be dropped.

19. The Pr.CIT however did not deal with the above submissions in the impugned order. He proceeded on a totally different basis in holding that the order of the AO was erroneous and prejudicial to the interest of the revenue by holding that the AO before concluding the assessment did not make any enquiries on the all the above aspects of exemption u/s.10(2A) of the Act and he set aside the order of the AO and directed the AO to make proper enquires on the above aspect. The following were the conclusions of the Pr. CIT :-

> "The submissions made by the assessee were perused. After considering the relevant facts of the case and materials available on record. the assessment order u/s 143(3) dated 30.03.2015 is found to be erroneous in so far as prejudicial to the interest of revenue for the reason that the applicability or section 10(2A) with respect to the exemption or Rs. 48642696/- u/s 10(2A) claimed by the assessee which included share of profit of Rs. 48489051/- from Avantika Advisory Services LLP for AY 2013-14 was not examined by the AO at the time of assessment. Record reveals that M/s. Avantika Advisory Services, LLP filed its return of income for the AY 2013-14 on 25.07.2013 declaring total income of Rs. 388780/- and tax paid thereon is Rs. 131010/-. That means an income of Rs. 388780/- only of the said LLP has suffered tax and Asessees share (24%) on such tax suffered income is only Rs.93307/-.
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> Therefore the assessment made is lacking such examination/verification which is necessary to assess true income of the assessee and such omission to make necessary enquiry has made the order erroneous in so far as prejudicial to the interest of revenue, A revision proceedings can only be initiated if both the conditions specified in sec. 263 of the Act is satisfied. viz. the assessment order was erroneous and it was prejudicial to the interest of the revenue,
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> Consequently. in exercise of the jurisdiction conferred by section 263 of the Act. the said order of assessment dated 30.03.2015 for A. Y, 2013-14 is set aside on the above mentioned specific point with a direction to the A.O. to make necessary examination on the above issues and directed to pass a fresh assessment order and re-compute the assessee's income after making proper enquiries on the foregoing issues, after offering reasonable opportunity to the assessee of being heard."

20. Aggrieved by the aforesaid order of the Pr.CIT, the Assessee is in appeal before the Tribunal.

21. We have heard the rival contentions. The ld. Counsel for the assessee submitted Sec.l0(2A) under the chapter governing exemptions, stood introduced by way of the Finance Act, 1993 wherein the said Explanatory Notes (in the form of Circular No.636/1992) explained the provisions in the following words:

> "48.2 The share of the partner in the income of the firm will not be included in computing his total income [section 10(2A)]. However, interest, salary, bonus, commission or any other remuneration allowed by the firm to a partner will be liable to be taxed as business income in the partner's hand, [section 2(24)(ve) and section 28(v)]. An Explanation has been added to the newly inserted clause (2A) of section 10 to make it clear that the remuneration or interest which is disallowed in the hands of the firm will not suffer taxation in the hands of the partner. In case any remuneration paid to a partner is disallowed in the hands of the firm or the amount is varied in subsequent proceedings, the partner's assessment can be rectified [section 155(1A)]."

He submitted that the above Circular, reiterates the settled judicial principle (being that for the purposes of a taxing statute, the Firm is to be considered as having a separate juristic entity distinct from its partners) and that the Partners are not liable to tax in respect of the share of income of the firm. He also made a reference to Circular No.8/2014, dt.31.03.2014 issued with respect to the interpretation of provisions of Section 10(2A). The relevant portion of the said circular has already been set out in the earlier part of this order and is not being repeated. It was submitted that it is not the requirement for applicability of Sec.l0(2A) or its Explanation that the share of profits in the hands of the partner that is exempt is the net profit that stand taxed at the end of the financial year. Our attention was drawn to the decision of the Hon'ble Karnataka High Court in the case of Vidya Investment & trading Co. (P.)Ltd.(supra) wherein it was held:

> "23. An explanation is appended to a section to bring out the true meaning of the words contained in the section. It is a part and parcel of the enactment. While

> construing an explanation, one has to see whether it is in line with the main section, so as to promote the object of that section. Sometimes, an explanation is added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it. An explanation, normally, should be read so as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an explanation may have been added in a declaratory form to retrospectively clarify a doubtful point in law and by way of abundant caution."

It was submitted that exemption can only be claimed on the profits of the firm, and since the assesses who were new partners were not to bear any responsibility on the losses so incurred by the Firm amounting to Rs.20,l7,79,738/- (that was solely borne by existing partners), while claiming exemption under Sec. 10(2A), as shown from the Explanation, it is the positive profit of the firm i.e. 24% of Rs.20,20,377,12 (being of Rs.48489051/-) that shall rightly be eligible for exemption - as against computing profit sharing percentage from the gross profit shown at the end of the F.Y. (that comprises of both profit and loss). It was submitted that the claim of the Assessees is in accordance with law and only after considering his total gross income from various sources including his share in the profits of the firm (which are to be excluded from the gross income vide Sec.l0(2A) that the taxable income has been arrived at, showing that there exists no underassessment of income as suggested by the Pr.CIT

22. It was further submitted that the view taken by the AO was a possible view and just because the Pr.CIT has a different view, jurisdiction u/s 263 of the Act cannot be invoked. In this regard our attention was drawn to the decision of the Hon'ble Supreme Court in the case of Malabar Industries vs CIT 243 ITR 23 (SC). Our attention was also drawn to the decision of the Hon'ble Delhi High Court in the case of CIT. Delhi IV v. International Travel House, [2010] 194 taxman 324 wherein the Hon'ble Delhi High Court on exercise of powers u/s.263 of the Act held as follows:

"13. It has to be kept in mind that while exercising power under section 263 of the Act, the Commissioner has to be satisfied that the order is prejudicial to the interest of the revenue and there are materials available on record which require the Commissioner to satisfy him in a prima facie manner that the order is not only prejudicial to the interest of the revenue but also erroneous in nature. In the absence of any of the factors being satisfied, he does not assume jurisdiction to initiate a suo motu power of revision. The exercise of such a power is dependent on the conditions precedent being satisfied. The Commissioner does not have unfettered power to initiate proceeding by revision, re-examining the matter and directing fresh on his own whim for change or having a different view. He has been conferred with a quasi-judicial power and the same is hedged with limitation and, therefore, it has to be exercised within the parameters of the provision. When the Commissioner is himself not able to form an opinion, he cannot direct another inquiry by the Assessing Officer under section 263 of the Act.

In this context, we may refer to the decision in Gabriel India Ltd. 's case (supra) wherein the Commissioner, after scrutiny of the order of the Income-tax Officer, found that the order did not disclose application of mind and despite examining the matter at length and hearing the assessee could not come to a definite conclusion that the expenditure was not revenue expenditure but expenditure of capital nature. He referred the matter back to the Income-tax Officer to examine the same and to decide afresh. The said action of the Commissioner was not approved by the Tribunal. In that background, the High Court of Bombay expressed the view as follows:

> *"From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income- tax Officer is "erroneous insofar as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-section (l). The consideration of the Commissioner as to whether an order is erroneous insofar as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings,*

that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity."

23. The ld. DR submitted that the AO has not applied his mind to the issue whether the Assessee would be entitled to exemption u/s.10(2A) of the Act on the sum of Rs.4,84,89,051 being 24% of the share of profits of the firm for the period from 1.1.2013 to 31.3.2013 of Rs.20,20,37,712 which is the share of profits credited in his capital account with the firm or the sum of Rs.93,355 being 24% of the total income of the firm declared in the return of income by the firm. He pointed out that there is nothing on record to show that the AO was even conscious of this issue when he completed the Assessment. He brought our attention to the fact that the facts per se reflected rather unusual happenings, viz., the firm earning a loss of Rs.20 corres in the first three quarters and making a profit of Rs.20 crores in the last quarter, when new persons are inducted. These circumstances ought to have prompted him to make proper and adequate enquiries. It was submitted by him that the AO is both an investigator and adjudicator. He drew our attention to para 5 of the the order of assessment in the case of the Assessees and submitted that the AO has observed:

> "Reply has been submitted, perused and placed on records. In response, Sri Mukesh Khaitan, ACA, authorized representative of the Assessee appeared from time to time and made submission which has been discussed, examined and placed on records."

According to him the above observations in the order of Assessment cannot substitute a proper and valid enquiry by the AO. On the question of eligibility of the assessee to exempt u/s10(2A) of the Act a sum of Rs.4,84,89,051/- the ld. Counsel submitted that the CBDT Circular No.8/2014 has been cited by the assessee totally out of context. In this regard he drew our attention to the fact that the said circular was issued in the context of deduction in Chapter-VIA to a partnership firm and exemption in Chapter-III to the income of a partnership firm. The Partnership firm could receive certain exempt

income and these are not shown as part of total income in the return of income filed by the firm. However these incomes are distributed to the partners as their share of profits of the firm. Merely because such exempt income is not part of the total income declared by the firm, an exempt income cannot be cannot be taxed in the hands of the partners. This was the purport of the Circular No.8/2014. He also pointed out that the Hon'ble Karnataka High Court in the case of Vidya Investments (supra) also dealt with the case only of exempt u/s 10(34)of the Act and in that context the Hon'ble Karnataka High Court held that exempt income cannot be taxed in the hands of the partners. He laid emphasis on the fact that section 10(2A) of the Act clearly makes a reference only to total income of the firm (in the main section as well as Explanation to section 10(2A) of the Act). He also submitted that the purpose of section 10(2A) of the Act is that the same income should not be taxed twice. It was submitted by him that in the case of the Assessees, the sum claimed as exempt u/s 10(2A) of the Act was not taxed in the hands of the firm and therefore cannot escape taxation in the hands of the Assessees. He therefore prayed that the impugned orders should be upheld.

24. We have given a very careful consideration to the rival submissions. The issue for consideration is as to whether the Assessee would be entitled to exemption u/s.10(2A) of the Act on the sum of Rs.4,84,89,051 being 24% of the share of profits of the firm for the period from 1.1.2013 to 31.3.2013 of Rs.20,20,37,712 which is the share of profits credited in his capital account with the firm or the sum of Rs.93,355 being 24% of the total income of the firm declared in the return of income by the firm for the relevant AY 2013-14. Section 10 of the Act deals with incomes which is not included in the total income. Subsection (2A) to section 10 of the Act reads as follows:

> *" in the case of a person being a partner of a firm which is separately assessed as such, his share in the total income of the firm.*
>
> *Explanation.: For the purposes of this clause, the share of a partner in the total income of a firm separately assessed as such shall, notwithstanding anything*

contained in any other law, be an amount which bears to the total income of the firm the same proportion as the amount of his share in the profits of the firm in accordance with the partnership deed bears to such profits;"

What is exempt u/s.10(2A) of the Act in the hands of the Partner of a Partnership firm is "his share in the total income of the firm". Explanation to Sec.10(2A) of the Act makes it clear that the share referred to in the Section is share in "total income". Total income has been defined in Sec.2(45) of the Act, as follows:

(45) "total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act

Chapter-II of the Act, from section 4 to 9 deal with Basis of Charge. Chapter-III of the Act, deals with income which do not form part of total income and are contained in Sect. 10 to 13-B of the Act. Chapter IV deals with the computation of total income. Firstly income is categorized under various heads of income. This is laid down in Section 14 of the Act, which lays down that save as otherwise provided by this Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income – Salaries, income from house property, profits and gains of business or profession, capital gains, income from other sources. Chapter V then brings income of other persons, which are to be included in the total income of an Assessee and this is contained in section 60 to 65 of the Act. Chapter-VI (containing sec. 66 to 80) then lays down provisions regarding aggregation of income and set off or carry forward of loss. Section 66 reads as under:-

"Total income – in computing the total income of an assessee, there shall be included all income on which no income-tax is payable under Chapter VII."

The provisions of section 66 are not applicable to incomes which are absolutely exempt from tax as per Section 10, Section 11 etc., falling under Chapter III. This position is made clear by s. 66 itself as it speaks only of "incomes on which tax is not payable" and similar words are used in Chapter VII only thus leaving out by implication incomes which do not form part of total income at all as per Chapter III from the scope of s. 66. From the charging provisions of the Act, it is clear that both profit as well as loss which is negative profit must enter into computation, wherever it becomes material. The

charge is on total income of the Assessee. Sec. 2 (45) defines total income to mean total amount of income referred to in Sec.5, computed in the manner laid down in this Act. An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the "total amount of income, profits and gains." Secondly, it must be "computed in the manner laid down in the Act". The sum of Rs.3,88,982 is the total income of the firm computed in the manner laid down in the Act and only on this sum the share of profits of the Assessees in their profit sharing ratio as per the deed of partnership would be exempt u/s.10(2A) of the Act. This interpretation will be in tune with the purpose behind Sec.10(2A) of the Act viz., the same income should not be taxed twice once in the hands of the firm and again in the hands of the partners.

25. However in circular No.8/2014 dated 31-03-2014 issued by the CBDT on the provisions of section 10(2A) of the Act which clarified that 'total income' of the firm for sub section (2A) of section 10 of the Act, it has been claried that Sec.10(2A) of the Act as interpreted contextually, includes income which is exempt or deductible under various provisions of the Act. In particular it has been clarified by the CBDT in the said Circular that the income of a firm is to be taxed in the hands of the firm only and the same can under no circumstances be taxed in the hands of its partners. It has further been clarified in the said Circular that **the entire profit credited to the partners' accounts in the firm would be exempt from tax in the hands of such partners, even if the income chargeable to tax becomes NIL in the hands of the firm on account of any exemption or deduction as per the provisions of the Act.** If one goes by the CBDT Circular No.8/2014, the profit credited to the partner's account in the firm would be exempt from tax in the hands of partners, viz., the sum of Rs.4,84,89,051/- which is the profit credited to the partner's account in the firm in the present case. The above clarification in the Circular implies that the share of profit in the hands of the partners is independent of the profits of the firm which is finally distributed among the partners. Even if the income of the firm chargeable to tax becomes NIL on account of

exemption/deduction, it does not mean that the income before claiming exemption will be taxed in the hands of the partners.

26. Therefore there are two views possible on the issue as to whether the Assessee would be entitled to exemption u/s.10(2A) of the Act on the share of profits credited in the partner's capital account with the firm or the share of total income of the firm declared in the return of income by the firm. It may be true that the CBDT Circular No.8/2014 was issued in the context of deduction in Chapter-VIA to a partnership firm and exemption in Chapter-III to the income of a partnership firm but the Circular is applicable to all profits credited in the books of the firm in the capital account of the partners, even though they are not declared by the firm in their return of income.

27. As pointed out by the Supreme Court in *Malabar Industrial Co.'s case* (supra), the prerequisite to the exercise of jurisdiction by the Commissioner *suo motu* under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent—if the order of the Income-tax Officer is erroneous but is not prejudicial to the interests of Revenue or if it is not erroneous but is prejudicial to the interests of Revenue—recourse cannot be had to section 263(1) of the Act. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the Revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The phrase 'prejudicial to the interests of the Revenue' has to be

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

28. The Hon'ble Bombay High Court in the case of Gabriel India Ltd. (supra) has held that the power of suo motu revision under sub-s. (1) of s. 263 is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interest of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. An order cannot be termed as erroneous unless it is not in accordance with law. If an ITO acting in accordance with law makes certain assessment, the same cannot be branded as erroneous by the Commissioner simply because according to him the order should have been written more elaborately. This section does not visualise a case of substitution of judgment of the Commissioner for that of the ITO, who passed the order, unless the decision is held to be erroneous.

29. The AO has adopted one course permissible in law and therefore jurisdiction u/s.263 of the Act cannot be exercised merely because the CIT does not agree with the view of the AO.

30. We however find that in the show cause notice issued by the CIT u/s.263 of the Act, he termed the order of the AO as erroneous for the reason that the assessee is

entitled for exemption of Rs.93,355/- being 24% of Rs. 3,88,982/- which is the total income declared by the firm Avantika Advisory Services LLP for A. Y. 2013-14. Therefore allowing exemption of Rs. 4,84,89,051/- which is the share of profits of the partner credited in his capital account resulted in underassessment of income by Rs. 4,83,95,696/- (Rs. 4.84,89,051/- - Rs.93.355/-). In the impugned order the CIT did not consider the correctness or otherwise of the above issue but proceeded to exercise jurisdiction u/s.263 of the Act for the reason that the AO, while completing the Assessment did not make proper enquiry on the above issue before concluding the assessment and therefore the order of the AO was erroneous and prejudicial to the interest of the revenue for lack of or inadequate enquiry by the AO.

31. It has to be clarified that the hearing before CIT was fixed on 21.09.2016 and the assessees placed written submissions before the Pr. CIT. In the impugned order there is a reference to the fact that in response to the show cause notice the Authorised Representative of the assessee attended and filed written submission which have been placed on record. Further there is a reference to the fact that the case of the assesee was heard and discussed in the light of the submissions made and available on record. In the show cause notice u/s 263 of the Act there was not even a mention that the AO failed to examine the assessee's claim for eligibility of exempt u/s 10(2A) of the Act of a sum of Rs.4,84,80,951/-. However, in the impugned order the Pr. CIT has without deciding the correctness of the stand taken by him in the show cause notice u/s 263 of the Act proceeded on a different basis that the AO failed to make proper inquiries on this issue while completing this original assessment. The AO before completing the assessment u/s 143(3) of the Act had called for all the details and examined the same. The question whether this enquiry was adequate or inadequate has not be spelt out in the impugned order. The impugned order proceeds on the basis that there was no enquiry conducted by the AO before completing the assessment. Secondly, the Pr. CIT has passed the impugned order on a totally different basis than what is stated in the show-cause notice

issued u/s.263 of the Act and before taking up such a new case, it appears that he has not afforded opportunity of being heard to the assessee.

32. Since the AO conducted enquiry the question is whether there can be no revision because the power u/s 263 can be invoked only in cases of lack of inquiry and not conducting inadequate inquiry. We are of the view that where an enquiry is conducted by the AO and he is satisfied with a reply given on a query raised, then the CIT cannot intervene through revision for coming to a conclusion that the assessment order passed by the AO was erroneous and prejudicial to the interests of the Revenue for lack of or inadequate enquiry. The CIT in the impugned order has merely pointed out that the Assessee has claimed exemption u/s.10(2A) of the Act on a sum of Rs.4,84,89,051 as his share of profits from the firm whereas the firm has declared total income of only Rs.3,88,780/-. This aspect is clear from the records produced by the Assessee before the AO. The AO has mentioned in the order that all issues and documents were perused and discussed with the AR. The CIT on examination of the Assessment records has invoked his powers u/s.263 of the Act. He has not spelt out in the impugned order as to what was the kind of enquiry that the AO ought to have made and which he failed to make. In the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Gabriel 203 ITR 108 (Bom) cited by the Learned Counsel for the Assessee, it has been laid down that the consideration of the Commissioner as to whether an order is erroneous insofar as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be

reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. The above decision is applicable to the facts of the present case. We therefore hold that orders u/s.263 of the Act cannot be sustained as the conditions for exercise of jurisdiction under the said provisions are absent in the present case. We therefore quash the impugned orders u/s.263 of the Act in these appeals and allow the appeals.

33. In the result, the appeals are allowed.

Order pronounced in the Court on 03.01.2018.

Sd/-	Sd/-
[Dr.A.L.Saini]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 03.01.2018.
[RG Sr.PS]

Copy of the order forwarded to:

1. Shri Vinod Agarwal, 135,G, S.P.Mukherkjee Road, Kolkatta0700026.
2. Shri Shyam Sundar Agarwal, 135,G, S.P.Mukherkjee Road, Kolkatta0700026.
3. Shri Pawan Kumar Agarwal, 135,G, S.P.Mukherkjee Road, Kolkatta0700026.
4. Shri Ram Naresh Agarwal, 135,G, S.P.Mukherkjee Road, Kolkatta0700026.
5.Pr. C.I.T., Central, Kolkata-2,Kolktata.
6. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head Of Office/ D.D.O., ITAT Kolkata Benches