IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM

BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER

ITA Nos. 493/VIZ/2017
(Asst. Year : 2013-14)

AND

C.O.No. 19/VIZ/2018
(Arising out of ITA No. 496/VIZ/2018)
(Asst. Year : 2012-13)

Kotu Sarat Kumar, Flat No. 111, D.No. 10-28-3, C-Block, Facor Layout, Visakhapatnam.	vs.	DCIT, Circle-1(1), Visakhapatnam.
PAN No. AENPK 3335 H (Appellant)		(Respondent)

ITA Nos. 494/VIZ/2017
(Asst. Year : 2013-14)

Smt. (Late) Kotu Anasuya L/R by KotuSarat Kumar, Flat No. 111, D.No. 10-28-3, C-Block, Facor Layout, Visakhapatnam.	vs.	DCIT, Circle-1(1), Visakhapatnam.
PAN No. AEMPK 9815 K (Appellant)		(Respondent)

ITA Nos. 496/VIZ/2017
(Asst. Year : 2012-13)

DCIT, Central Circle, Visakhapatnam.	vs.	KotuSarat Kumar, Flat No. 111, D.No. 10-28-3, C-Block, Facor Layout, Visakhapatnam.
PAN No. AENPK 3335 H (Appellant)		(Respondent)

Assessee by	:	ShriG.V.N. Hari–Advocate.
Department By	:	ShriD.K. Sonawal–Sr.DR
Date of hearing	:	05/02/2019.
Date of pronouncement	:	20/03/2019.

O R D E R

PER D.S. SUNDER SINGH, ACCOUNTANT MEMBER

ITA Nos.493 & 494/VIZ/2017 & C.O.No. 19/VIZ/2018 have been filed by the different assessees against the separate orders of Commissioner of Income Tax (Appeals), Vijayawada, all dated 24/03/2017 for the Assessment Years 2013-14.

ITA No.496/VIZ/2017 has been filed by the Revenue against the order of Commissioner of Income Tax (Appeals), Vijayawada, dated 24/03/2017 for the Assessment Year 2012-13.

ITA No. 496/VIZ/2017A.Y.2012-13

2. Facts of the case, in brief, are that assessee is a partner in M/s. Sangam Enterprises, which is engaged in the business of entertainment and also the Managing Director of M/s. Vishnu Priya Hotels Pvt. Ltd., which is engaged in hotel business and also deriving income from business and other sources. A search & seizure operation under section 132 of the Act was carried out in the case of Gayatri Group on 20/02/2012 and the assessee was

also covered in the search of Gayatri group. Subsequently, the Assessing Officer issued a notice under section 153A of the Act on 18/03/2014 calling for the return of income. In response to the notice issued, the assessee has filed the return of income for the A.Y. 2012-13 on 03/04/2014, admitting total income of Rs.1,82,87,670/-. During the course of assessment proceedings, the assessee filed the revised return of income on 21/01/2015 revising the total income to Rs.10,70,890/-. From the revised return, the Assessing Officer has found that assessee has declared the income of Rs. 1,26,201/- under the head 'income from other sources' and had claimed the deduction of Rs.96,48,764/- relating to interest on bank loans and Rs.76,68,023/- towards interest on unsecured loans thereby resulting the loss of Rs.1,71,90,586/-. The Assessing Officer has further observed from the returns of income for the Assessment Years 2007-08 to 2012-13, that the assessee had admitted only the remuneration and share income from Partnership firm M/s.Sangam Enterprises and interest income from bank deposits, but no such deduction of interest was claimed till the Assessment Year 2010-11. For the Assessment Year 2012-13, the assessee had admitted the income of Rs.1,26,201/- from other sources representing the interest on savings bank deposits, and the interest on fixed deposits which is

taxable under the head 'income from other sources' and claimed the deduction relating to interest on bank loans and the interest on unsecured loans aggregating to Rs.1,73,16,787/- from the said income from other sources. The Assessing Officer further observed that the assessee has advanced certain amounts, which are outstanding under the head 'advances and loans' and has not charged the interest. The assessee also made the investments in hotel which yields the dividend income and does not form part of total income. The breakup of loans taken by the assessee, interest free loans given and the interest paid by the assessee are furnished by the Assessing Officer as under:-

1) Loans taken by the assessee on which interest is being paid of Rs. 12.96 crores.
2) Interest free loans and advances given by the assessee Rs. 6.91 crores.
3) Investment made by the assessee where the income does not form part of the total income of Rs.31.89 crores.

3. The Assessing Officer is of the view that since, the assessee is deriving only the interest income from the savings bank account and bank deposits claiming of huge expenditure against the said income is not permissible since the funds were diverted for non-business purposes and used for making investments in shares and

giving interest free loans. The Assessing Officer further observed that the investments made in the company does not yield taxable income since it fetches the dividend income which is exempt and does not form part of the total income. Therefore the Assessing Officer held that the interest and expenditure relating to the investments made in the company required to be disallowed under section 14A r.w.r. 8D of the IT Rules, 1962. The Assessing Officer worked out the sum of Rs. 1,63,07,299/-as disallowance u/s 14A r.w.r. 8D of the IT Rules 1962 (out of the total amount of interest payment claimed as deduction from the income from other sources) relating to the investments made in M/s. Vishnu Priya Hotels Pvt. Ltd. The Assessing Officer also disallowed the balance amount of Rs. 8,83,287/- under section 57(iii) of the Act, holding that the assessee did laid out the same wholly and exclusively for the purpose of earning the income.

4. Aggrieved by the order of the Assessing Officer, the assessee went on appeal to the ld. CIT(A) and the Ld.CIT(A) allowed the appeal of the assessee, hence the Revenue is in appeal before us.

5. Ground No.1 relates to the disallowance of interest expenditure on borrowed funds invested in the company which was disallowed under section 57(iii) of the Act. The assessee has claimed the interest expenditure of Rs.1,73,16,787/- under the

head 'income from other sources' which resulted into loss of Rs.1,71,90,586/- and same was claimed as set off against the income from capital gains and the business income. During the assessment proceedings, the Assessing Officer found that the assessee had diverted the interest bearing funds for non-business purposes by giving interest free loans/ advances and made the investments in M/s. Vishnu Priya Hotels Pvt. Ltd, therefore, the Assessing Officer held that the interest relatable to the investments made in hotel and the advanced given by the assessee required to be disallowed under section 57(iii) of the Act. The gist of the observations of the AO are as follows:-

"1. The assessee is not eligible to claim expenditure u/s 57(iii) of the Act as he is not offering any income.
2. The assessee has not brought on record any evidence in support of his shown that the investments made by him was on account of business expediency.
3. The loans taken by the assessee, on which interest was being paid was also advanced by the assessee as interest free loan.
4. The contention of the assessee that section 14A cannot be invoked unless there is an exempted income was not tenable as the assessee was showing share of profit from M/s.Sangam Enterprises and claiming it as exemption u/s,10(2A).
5. The assessee had made the investment which would yield exempted income.
6. The contention of the assessee that the investment made in M/s.VishnuPriya Hotels & Resorts Pvt. Ltd. was not on account of earning dividend income is not tenable as the assessee had not shown any income on account of remuneration received from the company.
7. The judicial pronouncements relied upon by the assessee would not apply to the assessee's case as the facts of

that cases differ from the assessee's case.

8. *The assessee had not complied with the provisions of section 57(iii) of the Act since the assessee had not offered any income for which the expenditure was being claimed.*
9. *The assessee had given interest free loans and advances, which clearly states that the assessee was diverting the loan funds but simultaneously claiming expenditure on such loans."*

6. On appeal, the ld. CIT(A) observed that the assessee has borrowed money for the purpose of making investment in hotel and paid the interest on borrowings. The ld. CIT(A) further observed that the Assessing Officer has not disputed the fact that the investment made was for the purpose otherwise than for earning of the income. Hence, held that the expenditure on account of interest is allowable deduction under section 57 of the Act and accordingly, deleted the addition made by the Assessing Officer.

7. Aggrieved by the order of the ld. CIT(A), Revenue is in appeal before this Tribunal.

8. We have heard both the sides and perused the material placed on record.

9. The assessee is engaged in the business of running hotel and the made the investments in M/s. Vishnu Priya Hotels Pvt. Ltd. It is not disputed that the investments were made for the purpose of

business and for earning of the income. The assessee has borrowed the funds from cooperative bank and made the investments in M/s. Vishnu Priya Hotels Pvt. Ltd. On verification of the statement of computation of income, it shows that the assessee has declared the interest income from other sources for an amount of Rs. 1,26,201/- and claimed the interest on unsecured loans of Rs. 76,68,023/- and interest on bank loans for Rs. 96,48,764/- (aggregating to Rs. 1,73,16,783/-) which resulted in loss of Rs.1,71,90,586/-and the same was claimed for set off against the income from other sources, business and capital gains under section 71 of the Act, which the Assessing Officer disputed for disallowance. There is no dispute that the assessee has borrowed the funds and made the investments in the business. The Assessing Officer did not make out a case that the assessee has diverted the funds for non-business purpose. Business consideration is the decision of the assessee, but not the Assessing Officer. The Hon'ble Supreme Court in the case of *S.A. Builders Ltd. Vs. CIT* [288 ITR 1 (SC)] held that the expression of 'commercial expediency' is an express of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The ld. CIT(A) deleted the addition relying on the decision of the Hon'ble Apex Court in the case of *CIT Vs. Rajendra*

Prasad Moody (115 ITR 519) and the SA Builders. The assessee has made the investments for the purpose of business and paid the interest. The income under the head 'income from other sources' resulted into loss which was claimed for set off under section 71 of the Act. Intra head loses are allowable to be set off against other sources of income in the same assessment year. Since the Assessing Officer did not make out a case that the assessee has diverted the funds for non-business purposes, we do not see any reason to interfere with the order of the ld. CIT(A) and the same is upheld. Appeal of the Revenue on this ground is dismissed.

10. Ground Nos. 2 & 3 are related to the disallowance made by the Assessing Officer under section 14A r.w.r. 8D of the IT Rules, 1962.

11. The assessee has claimed the total loss of Rs. 1,73,16,787/- as deduction from the taxable income, which includes the interest on borrowed funds for investment in M/s. Vishnu Priya Hotels Pvt. Ltd. Since the investments in M/s. Vishnu Priya Hotels Pvt. Ltd. yield dividend income which is exempt from the total income, the Assessing Officer disallowed a sum of Rs. 1,63,07,299/- u/s 14A of the Act and the balance amount of Rs.8,83,287/- was

disallowed under section 57(iii) of the Act for diverting of funds for non-business purposes.

12. On appeal, ld. CIT(A) deleted the addition made by the Assessing Officer, since, there was no dividend income earned by the assessee and also observed that there is no diversification of funds, for non-business pursoses. While deleting the addition, the ld. CIT(A) relied on the decision of the Hon'ble Madras High Court in the case of *M/s.Redington (India) Ltd., Vs. Addl.CIT* (392 ITR 633) and held that in the absence of dividend income, there is no case for making the disallowance under section 14A of the Act.

13. We have heard both the parties and perused the material placed on record. In the instant case as stated by the assessee and as observed from the ld. CIT(A)'s order, the Assessing Officer has invoked section 14A r.w.r. 8D incorrectly and made the disallowance without having earned the dividend income. On an identical issue, in the case of *M/s. Redington (India) Ltd., (supra*) Hon'ble Madras High court has taken a view that no disallowance is called for under section 14A in the absence of dividend income. This tribunal has followed the decision of Hon'ble Madras High Court and decided the issue in favour of the assessee in *P. Venkateswara Rao Vs. ACIT*. For the sake of clarity and convenience, we extract the relevant part of the order of this

Tribunal in the case of *P. Venkateswara Rao Vs. ACIT* in ITA No. 429/VIZ/2018, dated 30/11/2018 which reads as under:

> *"4. We have heard both the parties and perused the material placed on record. In the impugned assessment year, the assessee made the investment out of interest free surplus fund available to the assessee and the assessee did not earn the income which is exempt u/s 14A of the Act. The above facts were not disputed by the lower authorities. The AO made the addition placing reliance on the Circular No.5/2014 of the CBDT and the Ld.CIT(A) confirmed the addition. Hon'ble High Court of Delhi in the case of Pr.Commissioner of Income Tax Vs. IL &FS Energy Development Company Ltd. (supra) considered the Board Circular and held that the Circular cannot override the express provisions of section 14A r.w.Rule 8D of I.T.Rules. After considering various decisions, Hon'ble High Court of Delhi held that no disallowance u/s 14A of the Act was called for in case of no exempt income earned by the assessee, in the relevant assessment year. For the sake of clarity and convenience, we extract relevant part of the order of the Hon'ble High Court of Delhi which reads as under :*
>
> > *"12. Section 14A of the Act, which was inserted with retrospective effect from 1st April 1962, provides for disallowance of the expenditure incurred in relation to income exempted from tax. From 11th May 2001, a proviso was inserted in Section 14A to clarify that it could not be used to reopen or rectify a completed assessment. Sub-sections (2) and (3) of Section 14A were inserted with effect from 1st April, 2007 to provide for methodology for computing of disallowance under Section 14A. However, the actual methodology was provided in terms of Rule 8D only from 24th March 2008. There was a further amendment to Rule 8D with effect from 2nd June 2016 limiting the disallowance the aggregate of the amount of expenditure directly relating to income which does not form part of total income and an amount equal to one per cent of the annual average of the monthly average of the opening and closing balances of the value of investment, income from which does not form part of the total income. It is also provided that the amount shall not exceed the total expenditure claimed by the Assessee.*
> >
> > *13. In the above background, the key question in the present case is whether the disallowance of the expenditure will be made even where the investment has not resulted in any exempt income during the AY in question but where potential exists for exempt income being earned in later AYs.*
> >
> > *14. In the Explanatory Memorandum to the Finance Act 2001, by which Section 14A was inserted with effect from 1st*

April 1962, it was clarified that "expenses incurred can be allowed only to the extent they are relatable to the earned income of taxable income" The object behind Section 14A was to provide that "no deduct/on shall be made in respect of any expenditure incurred by the Assessee in relation to income which does not form part of the total income under the Income Tax Act".

15. What is taxable under Section 5 of the Act is the "total income" which is neither notional nor speculative. It has to be 'real income'. The subsequent amendment to Section 14A does not particularly clarify whether the disallowance of the expenditure would apply even where no exempt income is earned in the AY in question from investments made, not in that AY, but earlier AYs.

16. Rule 8D (1) of the Rules is helpful, to some extent, in understanding the above issue. It reads as under:

> *"8D. (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with—*
> *the correctness of the claim of expenditure made by the assessee; or*
> *(b) the claim made by the assessee that no expenditure has been incurred, in relation to income which does not form part of the total income under the Act for such previous year,*
> *he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2)."*

17. The words 'in relation to income which does not form part of the total income under the Act for such previous year" in the above Rule 8D(1) indicates a correlation between the exempt income earned in the AY and the expenditure incurred to earn it. In other words, the expenditure as claimed by the Assessee has to be in relation to the income earned in 'Such previous year'. This implies that if there is no exempt income earned in the AY in question, the question of disallowance of the expenditure incurred to earn exempt income in terms of Section 14A reed with Rule 8D would not arise.

18. The CBDT Circular upon which extensive reliance is placed by Mr. Hossain does not refer to Rule 8D(1) of the Rules at all but only refers to the word "includible" occurring in the title to Rule 8D as well as the title to Section 14A, The Circular concludes that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered.

19. In the considered view of the Court, this will be a truncated reading of Section 14 A and Rule 8D particularly when Rule 8D (1) uses the expression 'such previous year'.

Further, it does not account for the concept of 'real income'. It does not note that under Section 5 of the Act,- the question of taxation of 'notional income' does not arise. As explained in Commissioner of Income Tax v. Walfort Share and Stock Brokers Pvt. Ltd [2010] 326 ITR 1 (SC), the mandate of Section 14A of the Act is to curb the practice of claiming deduction of expenses incurred in relation to exempt income being taxable income and at the same time avail of the tax incentives by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. Consequently, the Court is not persuaded that in view of the Circular of the CBDT dated 11th May 2014, the decision of this Court in Cheminvest Ltd. (supra) requires reconsideration.

20. In M/s. Redington (India) Ltd. v. The Additional Commissioner of Income Tax, Company Range — V. Chennai (order dated 23rd December, 2016 of the High Court of Madras in TCA No. 520 of 2016), a similar contention of the Revenue was negated. The Court there declined to apply the CBDT Circular by explaining that Section 14A is "clearly relatable to the earning of the actual income and not notional income or anticipated income." It was further explained that,

> *"The computation of total income in terms of Rule 8D is by way of a determination Involving direct as well as indirect attribution. Thus, accepting the submission of the Revenue would result in the imposition of an artificial method of computation on notional and assumed income. We believe thus would be carrying the artifice too far."*

21. The decisions in CIT v. M/s Lakhani Marketing Inc, 2014 SCC Online P&H 20357, CIT v. Winsome Textile Industries Limited [2009] 319 ITR 204 (P&H), CIT v. Shivam Motors (P) Ltd (2014) 272 CTR (All) 277 have all taken a similar view. The decision in Taikisha Engineering India Pvt. Ltd. (supra) does not specifically deal with this issue.

22. It was suggested by Mr. Hussain that, in the context of Section 57(iii), the Supreme Court in Commissioner Of Income Tax, West v. Rajendra Prasad Moody [1978] 115 ITR 519 (SC) explained that deduction is allowable even where income was not actually earned in the AY in question. This aspect of the matter was dealt with by this Court in M/s Cheminvest Ltd. (supra) where it reversed the decision of the Special Bench of the ITAT by observing as under:

> *"20. Since the Special Bench has relied upon the decision of the Supreme Court in Rajendra Prasad Moody (supra), it is considered necessary to discuss the true purport of the said decision. It is noticed to begin with that the issue before the Supreme Court in the said case was whether the expenditure under Section 57 (iii) of the Act could be allowed as a deduction against dividend income*

assessable under the head "income from other sources". Under Section 57 (iii) of the Act deduction is allowed in respect of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. The Supreme Court explained that the expression "Incurred for making or earning such income?, did not mean that any income should in fact have been earned as a condition precedent for claiming the expenditure. The Court explained:

"What s. 57(ii) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. It is the purpose of the expenditure that is relevant in determining the applicability of s. 57(iii) and that purpose must be making or earning of income. s. 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of s. 57(iii) to suggest that the purpose for which the expenditure is made should fructify into any benefit by way of return in the shape of income. The plain natural construction of the language of s. 57(iii) irresistibly leads to the conclusion that to bring a case within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure."

21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajetidra Prasad Moody (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is "for the purpose of making or earning such income." Section 14A of the Act on the other hand contains the expression 'in relation to income which does not form part of the total income." The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act."

23. The decisions of the ITAT in ACIT v. Ratan Housing Development Ltd. (supra) and Relaxo Footwear Ltd. V. Addl. CIT (supra), to the extent that they are inconsistent with what has been held hereinbefore do not merit acceptance. Further, the mere fact that in the audit report for the AY in question, the auditors may have suggested that there should be a disallowance cannot be determinative of the legal position. That would not preclude the Assessee from taking a stand that no disallowance under Section 14 A of the Act was called for in the AY in question because no exempt income was earned.

24. For all of the aforementioned reasons, this Court is of the view that the CBDT Circular dated 11th May 2014 cannot

override the expressed provisions of Section 14A read with Rule 8D."

4.1. This Tribunal also in the case of SLC Projects Pvt. Ltd. vs. ACIT, CC-2 (supra) for the A.Y. 2013-14 held that no disallowance is called for in the absence of exempt income. We extract relevant part of the order of this Tribunal from para No.9 to 10 which reads as under:

"9. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The Ld. A.R. argued that no expenditure required to be disallowed in case the assessee did not earn any exempt income. In the instant case, the assessee has not earned any dividend income which is exempt u/s 14A of the Act. On identical facts, this Tribunal in the case of D. Veerabhadra Reddy (HUF) Vs. JCIT, Kakinada in ITA No.263/Vizag/2014 dated 23.6.2017 for the assessment year 2009-10 placing reliance on Hon'ble Madras High Court judgement in the case of Redington India Limited Vs. Addl. CIT 77 Taxmann. Com 257 held that no disallowance is called for when there is no exempt income. For ready reference, we extract relevant paragraph No.6 of this Tribunal order which reads as under:

"6.We have heard the rival submissions and perused the material on record. The assessee has rental income from godowns and the business loss. The assessing officer has completed the assessment u/s 143(3) by order dated 04.11.2011. The Ld.CIT has called for the record u/s 263 and issued the notice for revision for incorrect set off of business loss against the rental income. After verification of the material on record, the Ld.CIT has dropped the issue with regard to incorrect set off of business loss against the income from property which was examined by the assessing officer. During the course of revision proceedings, it has come to the notice of Ld.CIT that the assessee has made investments in shares and bonds and did not make disallowance which was required to be made u/s14A of IT Act. The assessee explained that there were no expenses incurred in relation to the exempt income which was claimed as deduction for the assessment year 2009-10. Hence, the assessee argued before the Ld.CIT that Section 14A is not applicable in assessee's case. As per the observation of the Ld.CIT, the assessee made the investments to the tune of Rs.19,90,625/- in shares and bonds from the borrowed funds and the interest expenditure relating to the earning of dividend income is required to be disallowed u/s 14A. Though CIT opined that the expenditure relating to the earning of dividend income required to be disallowed, there was no finding given by the CIT in his order with regard to earning of dividend income. The CIT also did not rebut the explanation offered by the assessee stating that no expenditure was incurred for making the

investments. The Ld.DR did not make any clarification with regard to the quantum of dividend income earned by the assessee. The Ld.AR submitted paper book enclosing the copy of statement of computation, return of income, balance sheet and profit and loss account. It is seen from the profit and loss account and the statement of computation of income that the assessee has not derived any dividend income. When the assessee has no exempt income, the question of disallowance u/s14A r.w.Rule 8D is not called for. The same view is expressed by the decision of Hon'ble Madras High Court in Redington (India) Ltd. Vs. Addl.CIT, 77 taxman.com 257, Hon'ble Delhi High Court in Chem Investments Vs. CIT, 61 taxman.com 118 and the Hon'ble Gujarat High Court in Principal CIT Vs. Sintex Industries Ltd., 82 taxman.com 171 held that no disallowance is called for when assessee makes small investment from the surplus funds. There was no dividend income earned by the assessee and the case was taken for revision to disallow the business loss claimed against the property income which was examined by the AO and dropped the assessment proceedings and the Ld.CIT also satisfied that there is no case for revision on account of incorrect set off of business loss. With regard to the issue of disallowance u/s 14A as per the judicial pronouncements no disallowance is called for when there is no exempt income. Therefore, we are of the considered opinion that there is no case for revision of order u/s 263 and accordingly we set aside the orders of the CIT and allow the appeal of the assessee."

10. Since the facts are identical, we hold that no disallowance is called for u/s 14A of the Act in the absence of exempt income. Accordingly, the order of the Ld. CIT(A) on this issue is set aside and this ground of appeal of the assessee is allowed."

5. Since the facts of the case are identical, respectfully following the view taken by the Hon'ble High Court of Delhi as well as the Coordinate Bench of this Tribunal, we set aside the order of the Ld.CIT(A) and allow the appeal of the assessee."

14. Respectfully following the view taken by this Tribunal in the above referred to case, we uphold the order of the ld. CIT(A) and dismiss this appeal of the revenue on this issue.

C.O.No.19/VIZ/2018

15. Cross Objection filed by the assessee is only to support the order of the ld. CIT(A). Since the Revenue's appeal is dismissed, the cross objection filed by the assessee becomes infructuous and hence dismissed.

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16. The assessee filed appeal against the order of the Commissioner of Income Tax (A) in this case and raised as many as five grounds in this appeal. Ground Nos. 1 & 5 are general in nature, which do not require any adjudication.

17. Ground No.2 is related to the receipt of on money amounting Rs.35,10,000/- for sale of flat jointly owned by the assessee and his mother. Out of the said total sum of Rs. 35,10,000/- the assessee's share of Rs.15,13,161/- was brought to tax as unexplained income. During the course of search proceedings, the incriminating material was found and marked as Annexure-A/KSK/R/2 on which the transaction regarding the sale of flat No.805 belonged to the assessee and his mother was found recording the sale consideration of flat to Shri Ch.Madhusudhan Rao at a price of Rs.74.10 lakhs and out of which a sum of Rs.39.00 lakhs was to be paid officially and Rs. 35.10 lakhs was to be paid in black. The assessee was asked to clarify the said

notings during the course of search and the assessee confirmed that the said loose sheet was found in their premises and the writing was identified as relating to Shri Ch. Madhusudhan Rao, his friend who happens to be the professor of AVN college, Old town Visakhapatnam. He further stated that Shri Ch.Madhusudhan Rao has worked out the sale consideration of flat No. 805, admeasuring 1950sq.ft. @ Rs.3,800/- per sq.ft. for a sum of Rs.74.10 lakhs, out of which Rs. 39.00 lakhs as official and Rs.35.10 lakhs to be payable in black. For the sake of clarity and convenience, we extract the relevant part of statement which reads as under:-

> *"Q.11 I am showing you page no, 74 of Annexure-KSR/R/2 which is a bundle of loose sheets serially numbered 1 to 96. Please go through the same, identify the document and explain its contents?*
>
> *Ans. I have seen the page no. 74 of Annexure-KSR/R/2. I confirm that the same has been seized during the course of Search proceedings today at my residence. The contents of this page pertaining to sale of flat no.805 to Mr. Ch. Madhusudhan Rao, a professor in AVN College, Old Town, Visakhapatnam. The scribbling on this page are in the handwriting of a friend of Mr. Madhusudhan Rao who scribbled the workings of the sale consideration of flat No. 805 admeasuring 1950sq.ft. @Rs.3,800/- per sft. The total consideration was arrived at Rs.74,10,000/- out of which as mentioned that Rs. 39,00,090/- is to be paid officially and Rs, 35,10,000/- is to be paid in black i.e., in cash,"*

18. During the assessment proceedings, the Assessing Officer has issued a show-cause notice calling for the assessee's

explanation as to why the on money (amount paid in black) should not be brought to tax as undisclosed income in their hands and in response, the assessee filed reply stating that handwriting on the scanned image was of Shri Ch. Madhusudhan Rao and the amounts written in the annexure was purely provisional and estimations but not actual and no such amounts were received by the assessee. The assessee further stated that the property in question was sold before completion of construction, as per price registered in the sale deed, hence, the question of undisclosed income does not arise. The assessee further submitted in the sworn statement that nowhere the assessee had agreed for the addition or confessed that said amount was received by him. The Assessing Officer not being convinced with the explanation of the assessee held that the assessee has sold the flat for Rs. 74.10 lakhs and received a sum of Rs. 35.10 lakhs in cash which was not disclosed, hence, he taxed the assessee's share of 42%, which worked out to Rs.15,13,161/- as unexplained income in the hands of the assessee.

19. Aggrieved by the order of the Assessing Officer, the assessee went on appeal to the ld. CIT(A), who confirmed the addition observing that the assessee and his mother have already executed the construction agreement on 21/02/2017 vide registered

document No.4452/2010, having executed the agreement the ld.CIT(A) is of the opinion that they might have received the full consideration. The ld. CIT(A) further opined that the assessee has recovered the cost of construction from the purchaser and paid to the builder. The said fact was not disputed by the assessee, hence, held that there is no reason to interfere with the order of the Assessing Officer and accordingly upheld the order.

20. Aggrieved by the order of the ld. CIT(A), assessee is in appeal before this Tribunal.

21. During the appeal hearing, ld. AR argued that the scribbling note was found in the premises of the assessee during the course of search, and the hand writing was of Shri Ch. Madhusudhan Rao, who happens to be the friend of the assessee and working with AVN College, Visakhapatnam. He has estimated the expected rate for flat No.805 @ 3800 per sq.ft. which works out to Rs. 74.10 lakhs and the registration value would be Rs. 39.00 lakhs and cash competent would be Rs. 34.10 lakhs. This proposal was not materialized and the assessee has sold the flat before completion of construction for the registered price of Rs.35.00 lakhs as per the sale deed. The ld. AR further stated that the assessee has not received any amount over and above the documented price. Ld.AR argued that the seized material only shows the estimated price, it

was undated, not in the hand writing of the assessee and it does not bear the signature of the assessee, thus, argued that the loose-sheet is unauthenticated document, hence much reliance cannot be placed on the loose sheet. The Assessing Officer has neither examined the buyer of the flat nor ascertained the actual consideration. The assessee has neither admitted the income under section 132(4) of the Act, nor had agreed that the flat consideration was Rs.74.10 lakhs. In the absence of any evidence to show that the assessee had received the consideration over above the registered sale price, the same cannot be made addition in the hands of the assessee.

22. *Per* contra, ld. Departmental Representative vehemently opposed the contention of the ld. AR and argued that there is an evidence found during the course of search evidencing the sale price of flat at Rs. 74.10 lakhs and it was clearly shown that the sum of Rs. 39.00 lakh as official and Rs. 35.10 lakhs in block. When Rs.39.00 was officially received was correct, it is not correct to ignore the black money. The ld. DR further argued that the contents of the loose-sheet cannot be partly false, partly correct, therefore, submitted that on the basis of the evidence found during the search, the Assessing Officer has rightly made the addition of Rs.35.10 lakhs in the hands of the vendor, hence, the

order of the ld. CIT(A) should be upheld and to dismiss the appeal of the assessee.

23. We have heard both the parties and perused the material placed on record.

24. During the course of search under section 132, the department has found the loose-sheet numbered as page No.4 of Annexure-A/KSK/R/2 wherein it was mentioned that 3,800 x 1950 working out to Rs. 74.10 lakhs, and sum of Rs.39,00,000/- was recorded as official and Rs.35.10 lacs as black. The assessee has clarified in the statement that it was proposal for sale of flat No. 805 admeasuring 1950 sq.ft.at the rate of 3,800/- per sq.ft. for a total consideration of Rs. 74.10 lakhs, out of which Rs. 39.00 lakhs was to be paid officially and Rs.35.00 was to be paid in cash. The assessee further submitted that the assessee has to sell the flat before completion of construction hence, sold the flat for the consideration recorded in the registered sale deed and he did not receive the amount over and above the sale price recorded in the registered sale deed. On the same loose-sheet found during the course of search indicating the price at Rs. 74.10 lakhs, other notings were also mentioned which was not verified by the Assessing Officer, thus, the arguments of the Ld. DR that accepting the notings partly as correct and partly incorrect has no

basis. In other notings there was several amounts mentioned in the loose sheet i.e.Rs. 39.00 lakh, Rs. 14.00 lakhs, Rs. 35.00 lakh &Rs. 21.00 lakhs, Rs. 34.00 lakhs, 80% etc. which was not verified by the Assessing Officer or the investigation team. Therefore, we are unable to take the contents of the seized material as the sale consideration of the flat. In the absence of correct information with regard to the actual consideration the Ld.DR's argument that the information available in the loose-sheet has to be considered in full does not hold that waters. The Assessing Officer without examining and ascertaining the complete information of the notings on the loose-sheet gave his finding which is favourable to the revenue. There is no other evidence found in the course of search evidencing the receipt of on money for sale of flat as rightly argued by the ld. AR. The Assessing Officer neither examined the vendee nor the person who has written loose-sheet. In the absence of relatable evidence we are unable to consider the loose sheet as reliable evidence. It is settled issue by the Hon'ble Punjab & Haryana High Court [2010] 195 Taxman 273 (PUNJ. & HAR.) Parmijit Singh. V. Income-tax Officer on similar facts and held that:

> *"It is a well-known principle that no oral evidence is admissible once the document contains all the terms and conditions. Sections 91 and 92 of the Indian Evidence Act, 1872*

incorporate the aforesaid principle. According to section 91, when terms of a contract, grants or other dispositions of property have been reduced to the form of documents, then no evidence is permissible to be given in proof of any such terms of such grant or disposition of the property except the document itself or the secondary evidence thereof. According to section 92, once the document is tendered in evidence and proved as per the requirements of section 91, then no evidence of any oral agreement or statement would be admissible as between the parties to any such instrument for the purposes of contradicting, varying, adding to or subtracting from its terms. Therefore, it follows that no oral agreement contradicting/varying the terms of a document can be offered. Once the aforesaid principal is clear, then in the instant case, ostensible sale consideration disclosed in the sale deed had to be accepted and it could not be contradicted by adducing any oral evidence. Therefore, the order of the Tribunal did not suffer from any legal infirmity in reaching to the conclusion that the amount shown in the registered sale deed was received by the vendors and deserved to be added to the gross income of the assessee. [Para 4].”

In the instant case a loose sheet was found evidencing the on money consideration for sale of the flat. The said loose sheet was not in the handwriting of the assessee or of any of the family members. No statement was recorded from the author of the loose sheet regarding the contents and enquiries were conducted with the buyer of the flat. The assessee has never agreed or accepted that he has received the sale consideration over and above the amount recorded in the registered document and no evidence was found with regard to receipt of cash. Therefore, we are unable to sustain the order of the ld. CIT(A)) and the same is set aside and the appeal of the assessee is allowed.

25. Ground No.3 is related to the addition of Rs.5,37,775/- representing cash found at the time of search.

26. During the course of search, cash of Rs.5,37,775/- was found in the assessee's residence. The assessee was asked to explain the sources of cash, for which the assessee explained that the cash represents the daily cash balance as per the accounts. Since the assessee could not produce the evidence, the Assessing Officer made the addition of Rs.5,37,775/- as unexplained cash and brought to tax.

27. Aggrieved by the order of the Assessing Officer, the assessee went on appeal before the ld. CIT(A), who confirmed the addition holding that the assessee could not produce any evidence to support the cash balance available as on the day of search. Cash flow statement submitted by the assessee was not accepted on by the CIT(A) since the assessee did not file wealth tax returns for the assessment year under consideration before the date of search.

28. Against the order of the ld. CIT(A), the assessee is in appeal before this Tribunal. During the appeal hearing, ld. AR submitted that the cash found represents the correct cash balance as per the books of accounts and there is no unexplained transaction. In support, the assessee furnished cash flow statement for the

Financial Years 2007-08 to 2012-13 and argued that neither Assessing Officer nor ld. CIT(A) found any defect in cash flow statement. As per cash flow statement, the cash on hand as on 31/03/2013 was of Rs.38,07,136/- therefore submitted that cash found should be treated as explained. Apart from the above, the assessee also submitted that the assessee has filed the wealth tax returns for the Assessment Years 2009-10 and 2010-11, and the wealth tax assessments were completed under section 16(3) read with section 17 of the Wealth Tax Act and the Assessing Officer did not find any defect in the cash flow statement submitted for the relevant assessment year. The wealth tax statement shows that there is huge cash balance for the relevant assessment year which was not disputed by the department. Therefore, argued that there is no basis for making the addition without considering the cash flow statement submitted by the assessee. On the other hand, the ld. DR supported the orders of the lower authorities.

29. We have heard both the parties and perused the material placed on record. As on the date of search, a sum of Rs.5,37,775/- was found in cash in the residence of the assessee, for which assessee explained that the cash represented the book balance and there was no unaccounted or unexplained cash. In support of the availability of the cash balance, the assessee has

filed a cash flow statement for the Financial Years2007-08 to 2012-13, which indicated that there was huge cash balance available with the assessee for the year ended 31/03/2012 and 31/03/2013. Cash on hand as on 31/03/2013 was Rs. 38,07,136/- As stated by the ld. AR, assessee filed the wealth tax returns in response to the notice issued by the Assessing Officer under section 17 of the Wealth Tax Act and the assessments were accepted by the department taking the cash balance as per wealth tax returns and no defects were found. Therefore, we are unable to discard the cash flow statement. Neither the Assessing Officer nor the ld. CIT(A) find any defect in the cash flow statement submitted by the assessee during the wealth tax proceedings also Therefore, we hold that the cash balance available as on the date of search is treated as explained and no addition is warranted. Accordingly, we set aside the order of the ld. CIT(A) and delete the addition made by the Assessing Officer. The appeal of the assessee on this issue is allowed.

30. Ground No.4 is related to the addition on account of jewellery found during the course of search.

31. During the course of search, gold jewellery of 1064.6 grams, diamonds of 27 ct and silver of 11525 grams were found. The Assessing Officer asked the assessee to explain the source of gold

jewellery and silver articles and the assessee explained that both gold jewellery and silver articles are belonging to his wife and his mother. The Assessing Officer accepted the explanation as reasonable, but due to non-submission of evidence to support the claim with wealth tax returns of his wife and mother, treated 50% of the jewellery as unexplained and added the sum of Rs.24,45,531/- (50% of 48,91,062/-) as unexplained investment.

32. Aggrieved by the order of the Assessing Officer, the assessee went on appeal to the ld. CIT(A) and the ld. CIT(A) allowed the gold jewellery keeping in view of the Board Circular. As per the Board Circular, gold jewellery to the extent of 500 grams for a married lady, 250 grams for unmarried lady and 100 grams for male member is not to be seized in case they are not assessed to wealth tax. As the assessee is having wife, mother and two unmarried daughters and all of them are not assessed to wealth tax, the ld. CIT(A) held that holding of 1000 grams of gold jewellery is reasonable and accordingly, allowed 1000 grams of gold. With regard to silver articles, ld. CIT(A) held that 50% of the silver articles required to be taxed in the hands of the assessee and his mother. Accordingly, 50% of the value of the silver articles amounting to Rs. 9,69,737/- (50% of 19,31,474/-) was confirmed and allowed the appeal partly.

33. Against the order of the ld. CIT(A), the assessee is in appeal before this Tribunal. During the appeal hearing, the ld. AR argued that the gold jewellery and silver articles are belonging to the assessee's wife and mother Smt. Kotu Anasuya and inherited the gold jewellery ancestrally. The Ld.AR further submitted that though, the Assessing Officer during the course of assessment proceedings accepted the explanation with regard to source of gold jewellery as inherited ancestrally made the addition for not furnishing the wealth tax returns. The ld. AR argued that once the Assessing Officer viewed that the explanation is reasonable, there is no case for making the addition to protect the interest of the revenue. The ld. AR further submitted that it is not possible to submit any evidence for moveable property inherited ancestrally. If something required to be taxed in the hands of the assessee for the purpose of wealth tax, the Assessing Officer should take action in the hands of Smt. Kotu Bhavani and Smt. Kotu Anasuya for escapement of wealth but should not tax in the hands of the assessee. Therefore, requested to delete the addition made by the Assessing Officer and allow the appeal of the assessee.

34. On the other hand, ld. Departmental Representative supported the order of lower authorities.

35. We have heard both the parties and perused the material placed on record. During the course of search, gold jewellery of 1064.6 grams, diamonds of 27 ct and silver of 11525 grams were found in the premises of the assessee. The source of acquisition of gold jewellery is stated to be acquired out of ancestral property. The Assessing Officer also examined the explanation of the assessee and viewed that the explanation of the assessee found to be reasonable. Once the Assessing Officer found the explanation is reasonable, there is no case for making the addition in the hands of the assessee. The ld. CIT(A) allowed relief of 1000 grams of gold and taxed 50% of the value of the silver articles. On close verification of the assessment orders, it is clear that the Assessing Officer has accepted the explanation of the assessee that the gold jewellery and silver articles found in the premises of the assessee were belonging to the assessee's wife and his mother inherited ancestrally. The Assessing Officer even categorically found that the explanation of the assessee is found to be reasonable, however, the Assessing Officer made the addition in the absence of any evidence in form of wealth tax returns. Once the explanation found to be reasonable, there is no case for making the addition in the hands of the assessee. Merely because of non-furnishing of wealth tax returns, the Assessing Officer

cannot make the addition in the hands of the assessee when it was explained to the Assessing Officer that the jewellery belonged to his wife and mother. If at all the addition is required to be made it should be made in the right person duly initiating the proceedings. In the absence of wealth tax returns, if the gold and jewellery is to be taxed, the same is required to be brought to in the hands of the assessee's wife & mother, but not in the hands of the assessee. Apart from the above, the assessee filed wealth tax returns for the Assessment Years 2009-10 & 2010-11, which was accepted by the department without making any addition. Therefore we hold that there is no case for making the addition on account of gold and jewellery found during the course of search in the hands of the assessee, accordingly, we set aside the order of the ld. CIT(A) and allow the appeal of the assessee.

ITA No. 494/VIZ/2017

36. All the grounds of appeal are related to the addition of Rs.19,96,839/- towards on money received for sale of flat.

37. During the course of search, loose sheet page No. 74 of the seized material Annexure-A/KSK/R/2 was found in the premises of the assessee. As per the loose-sheet, there was a sum of Rs.74.10 lakhs as sale consideration, out of which 39.00 lakhs was to be paid officially and 35.10 lakhs in black. The AO confronted

the contents of loose sheet with the assessee's son and he clarified that loose-sheet was written by his friend Shri Ch.MadhusudhanRao in respect of flat No. 805. According to the loose-sheet, the sale value of the property was Rs. 74.10 lakhs, out of which Rs. 39.00 lakhs was paid officially and Rs. 35.10 lakhs was to be paid in cash. Accordingly, the share of the assessee in black amount works out toRs. 19,96,839/- towards her share of 57.40% and Rs. 15,13,161/- by her son Mr.Sarat Kumar. However, the assessee has admitted the consideration as recorded in the registered document of Rs. 39.00 lakhs and stated that she has not received the consideration over and above the registered document. Disbelieving the explanation of the assessee, the Assessing Officer made the addition of Rs. 19,96,839/- in the hands of the assessee.

Identical issue has come up for adjudication in appeal No. 493/VIZ/2017 in the case of Kotu Sarat Kumar which was discussed in this order and held that there is no evidence for receipt of on money and accordingly allowed the appeal of the assessee. Since the facts are identical, we set aside the order of the ld.CIT(A) and delete the addition made by the Assessing Officer and allow the appeal of the assessee.

38. In the result, appeals filed by the assessees in ITA Nos. 493, 494 are allowed. ITA No.496/VIZ/2017 filed by the Revenue is dismissed. C.O.No. 19/VIZ/2018 filed by the assessee-Kotu Sarat Kumar is also dismissed.

Order Pronounced in open Court on this 20th day of March, 2019.

Sd/-	sd/-
(V. DURGA RAO)	**(D.S. SUNDER SINGH)**
Judicial Member	**Accountant Member**

Dated: 20th March, 2019.

vr/-

Copy to:

1. *The Assessee –*

   *1)*KotuSarat Kumar &
   2)Smt. (late) KotuAnasuya
   Both are resident of Flat No. 111, D.No. 10-28-3, C-Block, Facor Layout, Visakhapatnam.

2. *The Revenue – DCIT, Circle-1(1), Visakhapatnam.*
3. *The Pr.CIT(Central), Visakhapatnam.*
4. *The CIT(A), Vijayawada.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.