IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

Before Sh. N. S. Saini, Accountant Member
And
Sh. N. K. Choudhry, Judicial Member

ITA No. 498/Asr./2013 : Asstt. Year : 2005-06

Jammu Development Authority, Vikas Bhawan, Rail Head Complex, Jammu, J & K	Vs	Dy. Commissioner of Income Tax, Circle-I, Jammu
(APPELLANT)		**(RESPONDENT)**
PAN No. AADFJ7335A		

ITA No. 494/Asr./2013 : Asstt. Year : 2005-06

Dy. Commissioner of Income Tax, Circle-I, Jammu	Vs	Jammu Development Authority, Vikas Bhawan, Rail Head Complex, Jammu, J & K
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCP1720E		

Assessee by : Shri. R. K. Gupta, CA &
Shri. Vasu Gupta, CA
Revenue by : Shri. M. P. Singh, CIT DR

Date of Hearing :21.02.2019		**Date of Pronouncement : 22.03.2019**

ORDER

Per N. S. Saini, Accountant Member:

These are the cross appeals filed by the assessee and Revenue against the order of Commissioner of Income Tax (Appeals) dated 06.05.2013, Jammu.

2. The assessee has filed modified grounds of appeal and submitted that the same may be adjudicated by the Tribunal in place of the original grounds of appeal filed with the appeal memo.

3. The ld. Departmental Representative had no objection in adjudicating the modified grounds of appeal filed by the assessee. Hence, the same are admitted and the parties were allowed to make their submissions thereon.

4. Ground Nos. 1, 23 & 24 of the appeal reads as under:

"1. That the assessee denies its liability to be assessed under Income Tax Act.

23. This ground is general in nature and hence not to be adjudicated independently.

24. That the appellant craves leaves to add or amend the grounds of appeal before the appeal is final heard or disposed off."

5. The Authorized Representative of the assessee submitted that they are general in nature and hence may be treated as withdrawn. Therefore, these grounds of appeal of the assessee are dismissed as withdrawn.

6. Ground Nos. 3, 4, 5 & 6: All these grounds are on one issue and summarized as one:

"That Commissioner of Income Tax (Appeals) has erred in confirming agency commission of 9.50% on all works executed by JDA whereas no agency commission is received on works of State Government Deposits works & state plan works. The Ld. CIT(A) has erred in confirming the addition of Rs.4616069/- on account of agency commission even though relief was allowed in the earlier year on grant of aid from State and Central Government."

7. The Assessing Officer has held as under:

"In the P&L account the assessee has shown income from agency charges accrued on Division No.l amounting to Rs. 14,13,539/- at the rate of 9.5%. As per schedule of work expenditure of other

departments filed in schedule 3, it has been observed that the assessee has not shown income from agency charges in respect of the all the works/schemes executed during the financial year relevant to the assessment year 2005-06. As per schedule -3 assessee has received amount of Rs.6,34,69,560/- from other departments for execution of their works. The assessee was asked vide order sheet entry dated 21.06.2007 as to why income @ 9.5 /o of the amount received from other departments may not be added back to the income. In response to this the assessees vide reply dated 24.12.2007 has stated:-

> *"That development charges are being received on central deposits works which is 9.5% of amount incurred, which have already been accounted for J.DA is an authority created by J&K Govt., for development works. It carries out work under 3 categories, deposit works, state plans and central grant works. The amount of development charges has already been reflected at Rs.14,13,539/- under the agency charges, which has been earned during the year. These are no other development charges received/receivable by Authority. No income is received on state."*

The plea taken by the assessee is not acceptable. The assessee is an independent statutory authority which has to earn the income by development of the area under its jurisdiction, execution of the works on commission basis for other departments, letting out/leasing out of its properties and earning interest income etc. The assessee is not a Govt., department which has to function without a y commission. It is set practice in the execution of construction work that elements of agency commission his already included in the estimate prepared for the proposed work. Such commission is charged even by the Govt., department like CPWD. Accordingly the plea of the assessee that it has not charged any agency commission is not acceptable. Accordingly the agency commission on the amount Rs.6,34,69,560/- @ 9.5% works out to Rs.60,29,608/- and an addition

of Rs.46,16,069/- (Rs.60,29,608/- minus Rs.14,13,539/-) is treated as income from agency commission."

8. Before the Commissioner of Income Tax (Appeals), the assessee submitted as under:

"3A.2.2.1. The Appellant, being a City Development Agency, other Departments wanting to undertake development or construction works, assign the work to the Authority on Deposit Work basis. The Appellant is entitled to a stipulated percentage between 7.5 to 9.5% as supervision charges on the work carried out.

3A.2.2.2. Agency charges is received based on the value of work done on the respective works. During the year under appeal, the Appellant had earned Rs.14.13,539/ against different Deposit Works carried out during the year as per Annexure 'G'.

3A.2.2.3 The Assessing Officer, however, made an addition of Rs.46,16,069/- by arbitrarily calculating 9.5% on the total receipts on account of Deposit Works as well as State and Central Plan Receipts aggregating to Rs.6,34,69,560/- the Agency Charges and added the difference between the Agency Charges thus determined i.e. Rs.60,29,608/- minus Rs.14,13,539/- equal to Rs.46 16 069 on account of Agency Charges. The details of the Receipt of Rs.6,34,69,560/- on which the AO has calculated the agency charges is enclosed as 'Annexure 'H'.

3A.2.2.4 It may be submitted that Deposit Works are works of one Department, the Contractee Department, carried out by another Department viz., the Contractor Department. For supervising the work done, the Contractee Department pays a stipulated percentage of the work done as supervision charges to the Contractor Department. The Contractee Department is the owner of the asset created and pays the actual cost of construction and the agreed supervision charges.

Whereas, releases from State Plan and Central Plan are grants-in-aid from the Government i.e. donations from the Government. The recipient of the grant undertakes the work for himself. It would be appreciated that there can therefore, be no question of seeking payment of agency charges over and above the grant from the Government. No one can seek charges or utilizing the grant.

3A.2.2.5 It would also be appreciated that Agency Charges is earned on the basis of work done and not on the basis of release of deposit. Since all Government Department work on the basis of approved budgets, the Contractee Department releases the funds as 'Deposit' to the Contractor Department out of the budgeted funds. The Contractor undertakes the work only out of the deposits thus given by the Contractee Department and in case, there is no balance of deposit available, the Contractor is not even bound to continue work unless further funds are released. Thus, the addition based on the receipts on account of Deposit Works is not correct. The basis is the actual work done.

3A.2.2.6 The addition of Rs.46,16,069 made has been calculated on grants on which no agency charges is receivable and even in cases of Deposit Works, the calculation has been made on the funds released as 'Deposits' by the Contractee Department instead of the actual expenditure.

3A.2.2.7 The addition made by the AO is a notional income which not been earned by the Appellant. The AO has not discharged his onus of proving that the Appellant has earned the said income.

3A.2.2.8 The addition of Rs.46,16,069 may, therefore, be deleted."

9. The Commissioner of Income Tax (Appeals) after considering the above submissions dismissed the appeal of the assessee by observing as under:

"4.2. Ground of Appeal No 2.3 to 2.7 relates to addition of Rs4616069/- on account of agency commission. The appellant stated that it is a city development agency and is responsible for development of Jammu City. It is also responsible for planning development of land and infrastructure construction etc. The appellant also undertakes development constructions and repair work for other government department, autonomous body, boards corporation, trust institution, private individual as deposit work after levying agency charges as per the government rules. During the year under appeal the appellant has shown agency charges for Rs.14,13,539/-, which was duly accounted for in its account. The AO has extended the levy of agency charges on total receipt of gross deposit of Rs.6,34,69,560/-. The appellant argued that the agency charges accrued only on the work done and not on mere receipts of deposits from various agencies. In the submission made before me the appellant has stated that no agency charges were levied on state plan and Central plan grants to it and no question of seeking agency charges from government arises. Further it was added that agency charges are earned on the basis of work done and not on the basis of receipt of deposits.

The appellant submission is required to be analyses in view of the followings.

1. The appellant has declared agency charges for whole year at Rs.14,13,539/- and if one goes by its own version of earning agency charges@7.5% to 9.5%, taking average at 8.5% it can be inferred that the appellant has executed and supervised the work for Rs. 1,20,15,081/- only m whole year. During course of assessment proceedings the appellant has given the details of deposits from other departments for works as on 31.03.2005 and this shows opening balance of Rs.57.87 crores and received during year Rs. 6.34 crore making closing balance of Rs. 62.14 crores. Now this becomes irreconcilable that the appellant having deposits of Rs. 62.14 crores has executed and supervised the

work of Rs.1,20,15,081/-only and earned agency commission of 14.13. lacs approx.

2. It is evident from deposit account that in some cases the appellant is receiving amount of deposit during the year in addition to the opening balance but there can be no inference drawn from the said account to show the value of work executed. On what basis the calculation of agency charges by the appellant is made is not understandable.

3. In preceding years on the same issue, I found that there were certain grants in aid from the Central Government and State Government which have come to Jammu development Authority for social sector on which the appellant did not earn agency commission and I allowed relief accordingly. In this year release, State plan and Central plan grants in aid have not been specifically pointed out so as to excluded them. From the list it is not known whether it relates to the said fund or some other receipt. The AO has taken a figure of receipt of Rs. 6.34 crores as the basis for arriving at the agency commission. Though the amount of work executed and supervised is not discernible but in my opinion it appears reasonable keeping in view that the total deposits available with the appellant was Rs. 62.10 crores and the appellant is expected to execute work of at least 10% of deposit of Rs. 62.10 crore. It is logical also that the appellant must have carried out work equivalent to 10% of the total deposit, otherwise without any progress the respective parties could not keep depositing the money with the appellant endlessly.

4. Appellant has not given the terms and conditions which stipulate that in deposit work when the amount of deposit is due after initiation of work or what percentage of deposit is to be placed at the disposal of appellant for start of work. The procedure for arriving at the deposit is not brought to the notice of the undersigned. This

formulation is very essential in order to arrive at the quantum of agency commission.

5. In absence of any reasonable basis the AO has rightly invoked the provisions of section 145(3)and estimated the agency commission.

In view of this, even though a relief was allowed in the earlier year on certain grants in aid from state and central govt., in this year in absence of such detail the appellant is not entitled for any relief under this head and the addition of Rs. 46,16,069/- is confirmed."

10. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. In the instance case, the assessee is a Development Authority responsible for planning and development of Jammu city. In the course of its activities *inter alia* it also undertakes development and repair works for other Government department, autonomous body, boards corporation, trust institution, private individual after levying agency charges as per the government rules. For carrying out the work, the assessee received funds from them and kept the funds under the head deposit account. The Authorized Representative of the assessee explained that as and when expenditure is incurred on the construction and repairs etc. the amount is deposited under the head deposit account. It was explained that all work undertaken on behalf of Central Government and State Government through it does not receive any supervision charges but for others supervision charges ranging from 7.5% to 9.5% is received which is reflected in the income account under the head agency commission.

11. The Authorized Representative also submitted that the supervision charge accrues to it as and when the related expenditure is incurred by the assessee. However, the copy of relevant agreements were not produced before us.

12. In the instance case, the assessee has disclosed income under the head agency commission of Rs.14,13,539/-. According to the Assessing Officer, the assessee received fresh deposit of Rs.6.34 crores during the year and agency commission i.e. supervision charges there from at the average rate of 9.5% works out to Rs.60,29,608/-. Therefore, he added Rs.46,16,069/- as operational commission income.

13. On appeal, the Commissioner of Income Tax (Appeals) though accepted the contention of the assessee that commission income accrues to the assessee not with reference to the amount of deposit received but on the expenditure incurred during the year, however, in absence of details of expenditure incurred during the year, the Commissioner of Income Tax (Appeals) estimated that @ 10% of aggregate deposit must have been incurred as expense during the year. He, therefore, estimated the amount of expenditure incurred during the year at Rs.6.10 crores and therefore, according to him no relief is required to be given to the assessee on this issue.

14. The ld. Departmental Representative supported the orders of the lower authorities but could not controvert the submission of the Authorized Representative of the assessee.

15. We find that the Authorized Representative of the assessee could not state what was the actual quantum of the expenditure incurred by the assessee during the year and how the commission income of Rs.14,13,539/- was arrived at by the assessee.

16. However, keeping in view the submission of the Authorized Representative of the assessee that whatever, deposit or advance is received for work is credited in the deposit account and whatever, expenses incurred is deposited in the said account when it is expended, the closing balance of deposit account was Rs.62.10 crores and the opening balance was Rs.57.87 crores which reveals that deposit account was increased by Rs.4.27 crores during the year. The Assessing Officer has observed that fresh deposit received during the year was of Rs.6.34 crores. From the above figure, it apparently shows that expenditure of Rs.4.27 crores was incurred during the year. In the circumstances, the estimation of Commissioner of Income Tax (Appeals) of incurring of expenditure by the assessee of Rs.6.10 crores cannot also be accepted.

17. However, it is observed that the assessee has not filed before us the ledger account of deposits. Therefore, the same could not be verified by us. In these circumstances, in our considered opinion, it shall be in the interest of justice to restore the issue back to the file of the Assessing Officer for proper verification and thereafter re-adjudicate the issue afresh as per law. We order accordingly. The assessee is also directed to produce all the relevant materials before the Assessing Officer

as and when called for by the Assessing Officer. Thus, this ground of appeal is allowed for statistical purposes.

18. Ground Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 18, & 19: All these grounds are on one issue and summarized as one:

> *"That CIT(A) is not justified in confirming the addition made by the Ld. A.O. of Rs.4,33,54,756/- on account of premium received by appellant authority against plots, flats & shops and thereafter enhancing this addition to Rs.5,38,08,000/- ignoring the facts that:*
>
> *i) Appellant authority was not the owner of these assets.*
>
> *ii) That cost of these assets in any case has to be reduced.*
>
> *iii) That the premium so received is not for the year under consideration but to be spread over the lease of 40 years."*

19. The Assessing Officer has adjudicated the issue as under:

> *"The assessee vide this office letter dated 20.12.2007 was asked- "as per the balance sheet you have shown premium/earnest money deposits at Rs. 11,78,36,327/-. The deposits under the same head for the assessment year 2004-05 was Rs.7,44,81,571/-. Thus the premium/earnest money received by you amounting to Rs. 4,33,54,756/- has not been reflected by you as your income. Due to the defects mentioned above, I am not satisfied about the correctness or completeness of your accounts as provided under section 145(3) of the Income tax Act, 1961. You are, requested to please explain as to why the assessment under section 144 read with section 145(3) may not be made." In response to this query the assessee has filed reply on 24.12.2007 which is reproduced as under:*
>
> *"As the authority is not indulging purchase and sale of land, the details cannot be furnished and*

no land is in the name of Jammu Development Authority. It is an agency of Govt., created for development and not for purchase & sale of property. It is further brought to your kind notice that the authority s created have been capitalized and no depreciation is being claimed on amount of Rs.1053,124611/- and as such premium received during the year cannot be treated as income of the authority. Premium received can only be adjusted against capital assets and works in progress undertake by the authority and cannot be treated as income. The practice is regularly being followed and has been accepted by department in previous years, which have been assessed of premium is to be treated an income. We must be allowed depreciation of assets/adjustment of capital assets and W. I progress of authority."

The above answer of the assessee is not acceptable. The main business of the assessee is to develop the new residential colonies, markets, Malls, flats and their ancillary supports. While carrying out all those activities, JDA charges premium on all of them. In addition to this it also charges rent, leased rent and other maintenance charges. While fixing the premium of plots, flats, Shops etc. the element of profit is always included as JDA is not carrying out any charity by allotting them at a loss or at the cost price. Majority of lands under the occupation of JDA have been transferred by the State Govt., without charging any premium. Thus the contention of the assessee that - "It is an agency of Govt., created for development and not for purchase & sale of property. It is further brought to your kind notice that the authority s created have been capitalized and no depreciation is being claimed on amount of Rs. 1053,124611/- and as such premium received during the year cannot be treated as income of the authority. Premium received can only be adjusted against capital assets and works in progress undertake by the authority and cannot be treated as income." is factually incorrect. Since the lands acquired by JDA is only through the transfer of the Govt., land as such its cost to the agency is nil. Thus

assets created by JDA have either been sold out or have been leased out. As such the question of providing the depreciation on those does not arise. Further the non-inclusion of the premium received on sale/leased out properties does not conform to the accounting standard 7 (AS-7). AS-7 recognizes two types of accounting for determining the profits derived out of the construction works/real estate development. The first method is percentage of completion method and second one is completed contract method. However, the international standards committee has revised the International Accounting standards (IAS 11) and scrapped the completed contract method. Thus the assessee was required to adopt the percentage of completion method as provided in AS-7. However, the assessee has not done so.

In view of the discussions held in the foregoing paras it is clear that the accounts prepared and submitted along with the return of income do not reflect true and exact picture of the business conducted by the assessee. Due to the foregoing reasons I am not satisfied about the correctness or completeness of the accounts of the assessee. I, therefore, invoke the provisions of section 145(3) of the I.T Act and compute the income of the assessee as provided in section 144 of the Act under this head premium received as under:-

Total premium received upto 31.03.2005	*Rs.11,78,36,327/-*
Total premium received upto 31.03.2004	*Rs.7,44,81,571/-*
Premium received during the year	*Rs.4,33,54,756/-*

In view of the discussions held above whole of this amount of Rs.4,33,54,756/- is treated as income of the assessee for the year under consideration which has not been returned as income."

20. Before the Commissioner of Income Tax (Appeals), the assessee submitted as under:

"3A.2.3.1.As has been explained in the background in para 1 above, the Appellant is entrusted with nazul lands for development purposes. These lands,

after development, are disposed off as per the Government notifications for various purposes like residential, commercial, institutional, etc. and utilized for roads, greens, etc. as per the Master Plan. The ownership of the nazul lands rests with the State Government and hence, the expenditure on the development of the nazul lands is chargeable to the Nazul Account and the receipts from disposal of the nazul lands is also required to be credited to the Nazul Account which is the account of the transactions undertaken on the State Government's behalf.

3A.2.3.2.The Appellant is also entitled to appropriate the developed nazul lands towards construction schemes, in respect of which the land premia is required to be transferred to Nazul Account. Such schemes undertaken by the Appellant and other activities carried out on its own account are required to be accounted for under General Development Account.

3A.2.3.3. However, the Appellant was maintaining only one account, since inception in 1970, for both nazul and non-nazul activities, as it did not have any corpus of its own and was meeting all its expenses out of the nazul funds. However, all the receipts of premia as well as all the expenditure on development of lands and construction schemes were being carried forward in the Balance Sheet as 'liability' and 'asset', respectively since the major portion of the receipt on account of premia and expenditure schemes pertained to Nazul and hence, were neither income nor expenditure of the appellant. In the assessment, however, while the AO included all the premia receipts as income of the appellant, he did not consider any deduction on account of expenditure on the schemes.

3A.2.3.4.The total premia receipts of the year under appeal was Rs.11,57,35,243 of which Rs.9,58,09,089 pertained to Nazul Account i.e. State Government's Account and Rs.1,99,26,154 pertained to General Development Account i.e. the Appellant's own

account. The appellant had also incurred an expenditure of Rs.12,06,64,979/- on works and development schemes, of which Rs.4,92,83,178 pertained to nazul schemes and Rs.7,13,81,801 pertained to GDA schemes. The AO however, considered only the income side and ignored the expenditure totally.

3A.2.3.5.As submitted earlier, the appellant had duly engaged experts for segregating the nazul and non-nazul accounts and the revised accounts for the year under appeal are submitted herewith as per Annexure 'I' comprising of the following accounts –

a. General Development Account-

i. Balance Sheet
ii. Income & Expenditure Account
iii. Receipts & Payment Account

b. Nazul Account - Receipts & Payment Account.

3A.2.3.6.It is prayed to your kind honour to kindly take the revised accounts as above on record to correctly determine the income taxable in the hands of the appellant after including the income that is accruing to the appellant and duly allowing the expenditure deductible in its hands as reflected in the Revised Accounts.

3A.2.3.7 In this connection, we beg to rely upon the judgment rendered by the Hon'ble Supreme Court in the case of National Thermal Power Company Limited vs. Commissioner of Income Tax (1997) 7 SCC 489 (1998) 229 ITR 383, copy enclosed as Annexure 'J' wherein the Hon'ble Apex Court has upheld the power of the appellate authority to consider fresh claims made in the appellate proceedings. The Hon'ble Court had held thus in view of the fact that the purpose of assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law.

In the case of Ahmadabad Electricity Limited vs. CIT (1993) 199 ITR 351 also, the Hon'ble Bombay High Court has held that the Appellate Assistant Commissioner has very wide powers while considering an appeal which may be filed by the assessee. He may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of an assessee in accordance with law. Hence, the Appellate Assistant Commissioner also has the power to enhance the tax liability of the assessee although the Department does not have a right of appeal before the Appellate Assistant Commissioner. The Explanation to sub-section (2), however makes it clear that for the purpose of enhancement, the Appellate Assistant Commissioner cannot travel beyond the proceedings which were originally before the Income Tax Officer or refer to new sources of income which were not before the Income-tax Officer at all. For this purpose, there are other separate remedies provided under the Income Tax Act." Copy of this judgment is also annexed as Annexure 'K'.

A very latest judgment of the Bombay High Court rendered in the case of CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd. ITA No.3908 of 2010 dated 2T! June, 2012 is also enclosed as Annexure 'L' wherein many judgments with regard to consideration of fresh claim in appellate proceedings has been discussed. In the present case, however, the appellant had, during the assessment proceedings, also claimed that the nazul revenue is not includible in its hands, but was maintaining one account of nazul and non nazul transactions, non-nazul account being a loss since inception.

3A.2.3.8 lt may not be out of place to submit herein that the issue regarding the ownership of Nazul lands has also been elaborately dealt with by the Hon'ble J&K High Court in the case of Jammu Development Authority vs. Bhag Din (2004) 1 JKJ 1.

The relevant finding of the Hon'ble J&K High Court is reproduced hereunder:

"It may be mentioned here that all State land situated in and around the twin cities of Jammu and Srinagar constitutes Nazul land. It is thus seen that in terms of the provision contained in Section 18 of the Act, the Government could place at the disposal of the Authority all or any developed and undeveloped Nazul land for purpose of development in accordance with the provisions of the Act. Certain things are axiomatic from a reading of this provision of the Act: first and the foremost, that the words used are "place at the disposal of the Authority". The phrase "place at the disposal of does not mean or connote transfer in ownership. It means to keep "available for one's use" or "subject to one's orders and decisions" (The concise Oxford Dictionary Ninth Edition). The second meaning assigned to the word, as mentioned above, is eliminated by the latter part of Sub-section (1) when it says "for the purpose of development in accordance with the provisions of this Act". That means the power of disposal of immovable property vested in the Authority under Sub-section (2) of Section 3 read with Section 17 of the Act cannot be exercised by the Authority in relation to the Nazul land placed at its disposal. This land is transferred to the Development Authorities only for purposes of development. In other words, Section 18 of the Act does not envisage transfer of Nazul land to the Development Authority in ownership rights. This is further fortified by Sub-section (4) of Section 18 of the Act which says that if any Nazul land placed at the disposal of the Authority under Sub-section (1) is required at any time thereafter by the Government, the Authority shall, by notification in Government Gazette, place it at the disposal of the Government upon such terms and conditions as may be agreed upon between the Government and the Authority. Learned counsel for the appellants has made reference to Government order No. Rev (NDI) 46 of 1973 dated 28th January, 1973 to canvass that all Nazul land in and around the Jammu City

Stands transferred to the Jammu Development Authority and that the intention of the Government was to transfer the ownership rights in the land to the Development Authority. The aforesaid Government order is quoted hereunder:

"Government of Jammu and Kashmir, Revenue Department.

Sub: Transfer of Nazool lands to the Development Authorities.

Cabinet Decision No. 39 dated 28.1.1973.

Govt. Order No. Rev.(ND!) 46 of 1973, dated 28.1.1973.

It is ordered that:

1. *All vacant and lease free Nazool lands situated in and around the Cities of Jammu and Kashmir (should be Srinagar) shall be transferred to the respective Development Authority immediately.*

2. *Government order No. 649 of 1972 dated 28.10.72, issued in pursuance of Cabinet Decision No. 446 of 19th Oct., 1972 shall be modified to the extent that patches of Nazool land measuring 10 Marias and above within and around two cities of Jammu and Srinagar, which are encroached upon, shall be handed over to the respective Development Authorities after the encroachment are removed by the Revenue Department.*

3. *Survey of all Nazool lands respectively within the two Cities of Srinagar and Jammu which have been encroached upon shall be completed as early as possible.*

4. *The work of identification of Nazool lands encroached upon by private individuals but required for any public purpose regardless of the sizes, shall be completed by the Chief Executive Officer of the respective Development Authority*

on the nishandehi of Assistant Commissioner Nazool or his nominee within a period of one month after the completion of survey work.

5. *Patches of Nazool land below ten marlas but encroached by private individuals and required for any public purpose shall be transferred by the Revenue Department to the respective Development Authorities after removal of encroachments therefrom.*

6. *Patches of Nazool land below 10 marlas but not required for any; public purposes shall be sold off in proprietary rights to the en-croachers on payment of price at market rate prevailing in the locality to be fixed by the Revenue Minister on the recommendations of the concerned Dy. Commissioner except in case where market rate of a tertian piece of land of either kees or more than that falling in the locality. In such a case market rates shall be fixed with concurrence of Finance Department.*

7. *Sale proceeds of all lands mentioned at para 6 above shall be credited to the Account of respective Development Authorities.*

8. *Deputy Commissioner concerned shall be competent to execute necessary documents of transfer.*

By order of the Government of Jammu and Kashmir."

There is no dispute and, in fact, nobody's case that the land in question was not transferred to the Development Authority. It is rather the admitted case of the parties that the land in question stands transferred to the Jammu Development Authority for the purpose envisaged by Section 18(1) of the Development Act. But the transfer has not been to the extent of transfer of ownership thereof to the Development Authorities. Transfer of ownership in respect of immovable

ownership thereof to the Development Authorities. Transfer of ownership in respect of immovable property, in law, has necessarily to be followed by registered documents. Learned counsel for the appellants has not shown us or produced before the Court any such document having been executed by Deputy Commissioner, Jammu, nor has any such document been placed on record. What is, at best, gathered from the aforesaid Government order dated 28th January, 1973 is that all Nazul land in and around the cities of Jammu and Srinagar has been placed at the disposal of the respective Development Authorities as envisaged and contemplated by Sub-section (1) of Section 18 of the Development Act for use by the Development Authorities to achieve the object of the Jammu and Kashmir Development Act, 1970."

Copy of the judgment is enclosed as Annexure 'M'.

3A.2.3.9 The addition on account of premia amounting to Rs.4,33,54,756 may kindly be deleted and the appellant may kindly be assessed as per the Income & Expenditure Account submitted as per Annexure 'I' as above."

21. After considering the submissions of the assessee, the Commissioner of Income Tax (Appeals) enhanced the addition to Rs.5,38,08,000/- from Rs.4,33,54,756/-.

22. The ld. Departmental Representative relied on the orders of the Commissioner of Income Tax (Appeals).

23. We have heard the rival submissions and perused the orders of the lower authorities and the materials on record. In the instant case, according to the Assessing Officer, the assessee has received Rs.4,33,54,976/- as premium on sale of nazul land. The assessee has claimed it as a liability payable to the State Government and therefore, not its income. The

Assessing Officer has not accepted the above contention of the assessee and treated the said amount as income of the assessee.

24. On appeal, the Commissioner of Income Tax (Appeals) referring Jammu and Kashmir Development Act, 1970, Rule 18 of Jammu and Kashmir Development Authorities Rules, 1976 and Cabinet decision no. 38 of 1973 dated 28.01.1973 held that there is no material to show that the assessee was under a legal obligation to refund this amount to the State Government. Therefore, he confirmed the action of the Assessing Officer and further finding that the actual receipt of the premium during the year was Rs.5,38,08,000/- enhanced the assessee's income to that amount in respect of this issue. The order of the CIT(A) is reproduced as under:

> *"4.4. Ground of Appeal No 2.9 to 2.19 relates addition on account of Premium received amounting to Rs 4,33,54,756/-.*
>
> *As per the appellant out of the total premium receipts of Rs 11,57,35,243/- of the year under consideration, Rs 9,58,09,089/- pertains to Nazul Land. The appellant has argued that the Jammu Development Authority is not the owner of the Nazul lands and they are only doing development work on land and transferring such land on behalf of state government and the amount standing in the Nazul Account is payable to the State government. It is also argued that Rule 43 clause (m) on page 33 stipulate that 'provided that without the prior approval of government, no appropriation shall be made from Nazul to non-nazul or vice versa.'*
>
> *It is observed that the Government of Jammu & Kashmir vide its cabinet decision no. 38 of 1973 dated 26.01.1973 has clearly transfer the Nazul lands situated in and around Jammu city to Jammu Development Authority and Nazul lands situated in and around Srinagar city to Srinagar development*

Authority. The cabinet decision is reproduced hereunder:

'GOVERNMENT OF JAMMU & KASHMIR REVENUE DEPARTMENT

Sub:- Transfer of Nazool lands to the Development Authorities.

Ref:- Cabinet Decision No: 38 dated: 28.1.1973.

Government order No; REV(NEJ) 46 of 1973. Dated 26.1.1973

It is ordered that:-

1. *All vacant and lease free nazool lands situate in and around the cities of Jammu and Srinagar shall be transferred to the respective Development Authorities immediately.*

2. *Government order No:649 of 1972 dated:28.12.72 issued in pursuance of Cabinet Decision No: 446 of 19th Oct,1972 shall be modified to the extent that patches of Nazool land measuring 10 marlas and above within and around the two cities of Jammu and Srinagar which are encroached upon shall be handed over to the respective Development Authorities after the encroachments are removed by the Revenue department.*

3. *Survey of all nazool lands, especially within the two cities of Srinagar and Jammu which have been encroached upon shall be completed as early as possible.*

4. *The work of identification of nazul lands encroached upon by private individuals but required for only public purposes, regardless of their size, shall be completed by the Chief Executive officer of the respective Development Authority on the Nishbandehi of Assistant Development Authority on the Nishbandehi of*

Assistant Commissioner Nazul or his nominee within a period of one month after the completion of survey work.

5. *Patches of Nazul lands below ten marlas encroached upon but required for any public purpose shall be transferred by the Revenue Deptt. To the respective Development Authorities after the removal of encroachment there from.*

6. *Patches of Nazul land below 10 Marlas but encroached upon by private individuals and not required for any public purpose shall be sold off in proprietary rights to the encroachers on payment of price at market rates prevailing in the locality to be fixed by the Revenue Minister on the recommendations of the concerned Dy. Commissioner except in cases where market rate of a certain piece of land is either less or more than that prevailing in the locality . In such cases market rates shall be fixed with concurrence of Finance Deptt.*

7. *Sale proceeds of all lands mentioned at para 6 above shall be credited to the account of respective Dev. Authorities.*

8. *Dy. Commissioner concerned shall be competent to execute necessary documents of transfer.*

By order of the Government of Jammu and Kashmir.

Sd/-
(I.D. Gupta)
Spl. Secretary to Govt.
Revenue department.
NO. REV(NDJ)72/27
Dated:02.02.1973

It is clear from the above cabinet decision that all the nazul lands in around Jammu were transferred to the Jammu Development Authority. The decision specifically mentions that even the encroached land

by private parties below 10 marlas shall be sold off and the sale proceeds shall be credited to the accounts of development authority.

With regards to the arguments of the appellant that the balance in the Nazool account is payable to the government, it is observed that since the creation of the authority in 1970, no amount on account of sale of Nazul Land was ever paid to the government. Further, the audited financial statements submitted by the Jammu Development Authority along with the return of income does not show any Nazul Account or any amount payable to the government. The financial statements for the year under consideration i.e. 2005-06 was redrafted and prepared on 28.09.2010 i.e. around 3 year after passing the assessment order, by transferring an amount lying in the capital fund to Nazul Account, which is clearly an after thought and could not be relied upon.

Further, with regard to the requirement of prior approval of government from Nazul to Non Nazul funds, It is observed that no prior approval was ever taken from the government for using funds received on account of sale of Nazul Land for the purpose of Non Nazul Lands. The appellant has argued that the authority has got its accounts approved by placing the same in budget. The accounts produced before the government did not contain separate accounts on account of nazul and non nazul lands. Even the financial statements produced before the government did not reflect any amount payable to the government on account of Nazul liability and these accounts were approved by the government, which also establishes that there is no liability towards the government on account of Nazul lands. It is only the redrafted accounts that shows the Nazul Account separately but in the accounts presented before the government which were also submitted along with the return of income, no such liability was reflected. Moreover, the approval in budget is a post approval and not an prior approval. Even in revised accounts, it has been shown that an amount of Rs 4 crores has been transferred from

Nazul to General development account and that too without prior approval of government in defiance of rule 43(m) of J & K development authority rule 1976. Thus, reference of rules and Act by the appellant is only for the sake of arguments.

The appellant has argued that Section 18 of the Jammu Development Act, 1980 and Rule 18 of the Jammu & Kashmir Development Authority Rules, 1976 provides the manner in which the nazul lands are to be dealt with. The section 18 & Rule 18 as mentioned above are reproduced below:-

Section 18 of the Jammu Development Act 1980-

'18. Nazul lands

(1) The Government may, by notification in the Government Gazette and upon such terms and conditions as may be agreed upon between the Government and the Authority, place at the disposal of the Authority all or any developed and undeveloped lands in the zone or the local area vested in the Government (known and hereinafter referred to as " Nazul Land") for the purpose of development in accordance with the provisions of this Act.

(2) No development of any Nazul land shall be undertaken or carried out except by or under the control and supervision of the Authority after such land has been placed at the disposal of the Authority under sub section (1).

(3) After any such Nazul land has been developed, by or under the control and supervision of the Authority, it shall be dealt with by the Authority in accordance with rules made and directions given by the Government in this behalf.

(4) If any Nazul land placed at the disposal of the Authority under sub-section (1) is required at any time thereafter by the Government, the Authority shall by notification in Government Gazette, place

it at the disposal of the Government upon such terms and conditions as may be agreed upon between the Government and the Authority.'

From the perusal of above section, it is observed that all the nazul land are under the control or supervision of the Authority. If any land is required by the government, it shall be placed at the disposal of government on the mutually decided terms and conditions between the government and authority. The government is not free to take back any land by its order, but it is only after a mutual agreement on terms and conditions for such transfer with the authority that the land can be restored back to the government. It clearly establishes that the lands placed at the disposal of the authority as per sub section 2 gives the ownership right to the authority.

Rule 18 of Jammu & Kashmir Development Authority Rules, 1976-

'The manner in which nazool lands shall be dealt with after development.

(1) The nazul lands transferred by the Govt., to the Authority for development purpose, shall, after having been developed by it or under its control and supervision be, by a notification in the Govt. Gazette replaced by the Authority at the disposal of the Govt., upon such terms and conditions as may be agreed to by the Government and the authority. In this deal the total cost of development shall be borne/ paid by the Department of the Govt., requiring the land.

(2) In case, it is not required by any Deptt. Of the Govt., the authority shall use it for raising residential colonies, public markets, shopping centres; parking places, cinema halls and theatres and similar other objects suitable to yield income and generate resources and also lease it out to private individuals/ group of persons on perpetual lease basis. The period of such lease shall be fixed

by the Authority in due consideration of the locality and the areas.'

The perusal of this rule clarifies that in case the nazul land is required by the government as provided in the sub section 4 of the Jammu Development Act, the control of land shall by notification in official gazette be transferred to the government on the terms and conditions settled between government and the authority. The government has to pay the cost of development of such land to the authority. All other Nazul lands which are not required by the government shall be used by the Authority for raising colonies, malls etc and to yield income and generate resources from such land. Thus, the rule itself clarifies that the authority is free to yield income from such lands.

Nowhere in the section 18 of the Jammu Development Act 1970, Cabinet decision 38 of 28.01.1973 and Rule 18 of the Jammu & Kashmir Development Authority Rules mentions that the income and resources generated from such land are to be paid to the government. Rather, it states that if any land is required by the government, the government has to pay the cost of development of such land to the Authority and agree to other terms and of the Authority before such land could be transferred to the government.

The appellant has argued that the rule 18 has been created in 1973 after the cabinet decision 38 of 28.01.1973. However, it is observed that there is no contradiction in the Rule 18 and cabinet decision as mentioned above.

The appellant has argued that in the case of JDA Vs Bhag Din & Ors, the Hon'ble High Court of Jammu & Kashmir has held that since no transfer deed is registered in the court of law, the land cannot be considered to be transferred to the authority by way of cabinet decision.

With regard to the said judgment, it is observed that the said judgment has been decided on the basis of provisions of the The Land and Acquisition Act, 1984 under which the registry of document is essential to treat the transfer as complete. However, the position under the Income Tax Act is different. Various judicial pronouncements and provisions of the Act on various sections of income Tax Act suggests that ownership is to be seen from the facts, who enjoys the rights of the property and not from whether the title is registered or not.

Further, in the said case, the appellant themselves has pleaded the following legal facts-

> *'it was further the case of the Jammu Development Authority that in terms of section 18 of the development act, the government could not allot any land in favour of any person unless it was re-vested in government by the development authority by notification to be published in government gazette, on the mutually agreed terms and conditions by and between the development authority and the government.'*

Hon'ble High Court of Jammu & Kashmir while discussing the provisions under the income tax Act Tax has held in the case of Commissioner of Income Tax Vs Jammu & Kashmir Tourism Department Development Corporation (2001) 166 CTR (J & K) 554 has held that the assessee corporation was entitled to depreciation in respect of the immovable properties taken over by it from the state government on payment of consideration, even though registered deed of conveyance was not executed in its favour. In this case also the State government had transferred all the assets including buildings and establishment to JKTDC by order in accordance with the cabinet decision no. 58 dated 11th March 1969. The Hon'ble High Court has followed the decision of Hon'ble Supreme Court in the case of Mysore Minerals Ltd Vs CIT (1999) 239 ITR 775 (SC) in which it was concluded that anyone in possession of property in his own title exercising

such dominion over the property as would enable others being excluded therefrom and having right to use and occupy the property in his own right would be the owner of building for the purpose of s. 32(1) though a formal deed of title may not have been executed and registered, and he would be entitled to depreciation thereon.

The Hon'ble Supreme Court in the case of CIT Vs Podar Cement (P) Ltd has while interpreting the section 22 of the Act has observed that 'owner' for the purpose of sec 22, is person who is entitled to receive income from the property in his own right. The requirement of registration of sale deed in the context of sec 22 is not warranted.

Hon'ble Supreme Court in the case of R.B. Jodha Mai Kuthalia Vs CIT (1971) 82 ITR 570 had taken the view that irrespective of the title to the property, the person who is entitled to enjoy the income from the property was liable to income tax.

The appellant has also argued some facts regarding the Delhi Development Authority, I am of the view that the case of Jammu Development Authority depends on the Act, Rules, Cabinet decisions of the J & K Governments, accounting procedures and records of JDA. The case of JDA cannot be decided on the basis of accounts, audit reports and laws governing DDA.

The appellant has taken a ground of Appeal that premium received is a capital receipts and not revenue receipt. During the course of appellate proceedings, the appellant has not given any submission or arguments to justify its claim that premium is capital receipt and not revenue receipt. It is observed that the authority is engaged in the business of development of colonies and malls etc and earning income by way of let out and making perpetual lease out of these properties for more than 20 years to the public. The authority receives income by way of rental and premiums which is the regular income of the authority and is clearly a revenue

receipt. Further, in Jammu & Kashmir Development Authority Rules, 1976 , Form No: DAB 11 is provided as a format of Income and Expenditure Account for arriving at the gross profits of the authority. The said form clearly shows revenue by way of Premia and sale money of land etc. as revenue income. It is also observed that the lease premiums are received in the case of long period leases which are further renewable after such long period on payment of meager amount which is far less than market value. In fact these transactions are in the nature of transfer as the said lease transactions are in effect results in conveyance of property. In case of colonies, the plots are transferred to the public and public constructs building worth crores of rupees, the public is free to transfer such plots/buildings on payments of a minor transfer fee. These transactions are in the nature of sale and the consideration received in the form of premium/rentals. Thus, the plea of the appellant that premium received is capital receipt is not justified and is, therefore, rejected.

The appellant has taken a ground of appeal that the premium is received for 40 years cannot be taxed in one year, however during the course of appellate proceedings appellant has not given any submission or arguments to justify its claim. As already discussed in foregoing para, the lease for 40 years which can further be renewed on payment of a meager amount which is far less than market value is in the nature of sale and the sale consideration is to be taxed in the year of sale. Thus, this plea of the appellant is not acceptable.

The appellant has taken a ground of appeal the AO has wrongly invoked the provisions of section 145(3) of the Act, however during the course of appellate proceedings appellant has not given any submission or arguments to justify its claim. It is observed that during the course of appellate proceedings, the appellant has submitted redrafted financial statements which are different from the financial statements submitted along with the return of

income and which were available at the time of assessment. When the authority itself does not treat the financial statements provided during assessment as reliable and has redrafted the financial statements, then the rejection of accounts by the AO cannot be objected upon. The recasted account has been placed during the appellate proceedings and this is not admitted as additional evidence in view of the fact that sufficient and reasonable cause was not brought on record for not placing them before the AO and also the redrafted account is an afterthought. Further the appellant has shown the revenue receipts on account of premium received as capital receipt both in original as well as revised accounts, as such the results reflected in the books cannot be relied upon. Therefore, the AO has rightly rejected the books of accounts by invoking the provisions of section 145(3) of the Act.

The appellant has taken a ground of Appeal that the value as on 01.04.81/date of transfer be adopted and indexed and allowed as deduction, however during the course of appellate proceedings appellant has not given any submission or arguments to justify its claim. It is observed that the authority is engaged in the business of development/ construction of land/buildings malls and as such the income is to be treated as business income and not capital gains and as such the plea of the appellant is irrelevant. Moreover, the appellant in ground of appeal no 17 admitted that either there is no cost of asset or the cost cannot be determined of the assets leased out.

Keeping in view, the above discussed legal and factual position, the plea of the appellant cannot be accepted and accordingly the addition on this account is upheld. Here it is to mention that the addition on this account is enhanced to Rs. 5,38,08,000/- instead of Rs. 4,33,54,756/- as discussed in the beginning of para-4 of this order. This ground of appeal of the appellant is rejected and addition is enhanced to Rs. 5,38,08,000/-."

25. Before us, the first contention of the ld. Authorized Representative is that the premium received by the assessee is for and on behalf of the State Government and the same is returnable by it to the State Government and hence it is not the income of the assessee. In support of this contention, he placed reliance on the revised audited account wherein the premium amount instead of being credited in the income and expenditure account was shown as liability under the head nazul account.

26. We do not find any force in the above argument of the assessee. It is an established position of law that the accounting made by the assessee in its books of account or its presentation in the Financial statement are not determinative of the true nature and character of the transaction. The true nature has to be ascertained on the basis of applicable laws and taxability of the transaction will depend upon the true nature and character of the transaction. We find that the assessee could not bring any material before us to show that the assessee was under a legal obligation to pay the premium which it received from other persons to the State Government or to utilize the same only in accordance with the directions of the State Government. Thus, it is observed that the premium amount received by the assessee was on its own account.

27. The next argument of the assessee was that no registered sale deed was ever executed by the State Government in respect of nazul land in its favour and therefore, the assessee had never became the owner of the

nazul land and consequently the sale proceeds was received by it on account of the State Government.

28. We find that it is not in dispute that the premium amount was actually received by the assessee for which necessary deed or document were executed by the assessee itself and not in the capacity of power of Attorney Holder or Trustee of the State Government.

29. In our considered view, registered deed of sale is not only the sole manner in which title of land gets transferred or vested in a person. For example, on a conversion of form into a Chapter IX Company under the Erstwhile Companies Act, 1956, all the assets including land of the partnership firm gets vested and becomes the property of the company by the process of law and for that separate registered deed is not required.

30. In the instant case, by virtue of Jammu and Kashmir Act, 1970, the assessee became the owner of the nazul land even in absence of any specific registered sale deed executed in its favour by the State Government because of the above law.

31. The next argument of the assessee was that the receipt of the premium was on account of transfer of nazul land which is a capital asset and therefore, the premium amount was capital receipt in its hand.

32. We find force in this argument of the assessee. The Commissioner of Income Tax (Appeals) has held the premium as revenue receipt in the hands of the assessee because in his

opinion, the nazul land were trading assets in the hands of the assessee as the assessee was engaged in the business of development of colonies and malls etc. and earning income by way of let out and making perpetual lease out of these property for more than 20 years to the public.

33. We find that Section 6 of the Jammu and Kashmir Act, 1970 provides the object for which the assessee was constituted and the same reads as under:

> *"6. The objects of the Authority shall be to promote and secure the development of the local area for which it is constituted, according to plan and dispose of land and other property, carry out building, engineering and other operations, to execute works in connection with supply of water and electricity, disposal of sewerage and other services and amenities and generally to do anything necessary or expedient for purposes of such development and for purposes incidental thereto:*
>
> *Provided that save as otherwise provided in this Act, nothing contained in this Act shall be construed as authorizing the disregard by the Authority of any law for the time being in force."*

34. Further, it is observed that the assessee was not engaged in the activity of acquiring land for the purpose of earning income by selling land. Thus, in our considered view, the nazul land which was received by it from the State Government under a Special Act of the Legislative Assembly of the State Government cannot be held as a trading asset of the assessee. Thus, the nazul land constituted capital asset in the hands of the assessee and consequently premium received on transfer thereon was capital receipt in the hands of the assessee.

35. The above finding posses next question before us as to how the capital gains arising out of transfer of capital asset is to be computed in the hands of the assessee when no cost of acquisition was incurred by it or by its predecessor i.e. the State Government from which it received without any consideration.

36. We find that for computing capital gains u/s 45 of the Act two amounts are necessary. Those are amount of sale consideration and amount of cost.

37. In the instant case, the cost to the assessee of the said nazul land was Nil and the cost to its predecessor which is State Government is not ascertainable. Therefore, the computation provision fails in the instant case.

38. We find that the Hon'ble Supreme Court in the case of CIT Vs B. C. Srinivasa Setty (1981) 128 ITR 294 (SC) has held that charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provision cannot apply at all, its evident that such a case was not intended to fall within the charging section.

39. In view of the above, the capital receipt in the form of premium received by the assessee is not chargeable to tax. We, therefore, delete the addition of Rs.5,38,08,000/- made by the CIT(A) and allow the related grounds of appeal of the assessee.

40. Ground No. 20 of the appeal of the assessee reads as under:

> *"Non deduction of tax at source on Rs.81789/- and Rs.83051/- is not applicable to the assessee since it is not or the advertisement but for the recruitment and allotment of plots, etc. to which provision of section 194C are not applicable. Hence addition is erroneous and is prayed to be deleted."*

41. At the time of hearing, the Authorized Representative of the assessee submitted that he has withdrawing this ground of appeal, hence, the same is dismissed as withdrawn.

42. Ground No. 21 of the appeal of the assessee reads as under:

> *"That the rent received has to be assessed as income from house property and deduction @ 30% of the gross amount is allowable under section 24 of the Income Tax Act, which is prayed to be allowed."*

43. The Commissioner of Income Tax (Appeals) has observed as under:

> *"4.9 Ground of Appeal No. 2.31 relates to treatment of rental income u/s 24 of the Act and allowance of 30% deduction. There is no addition on this account the appellant has not given any submission or arguments to justify its claim. It is observed that the authority is engaged in the business of development of malls/building and letting out the same on rental. Since there is no addition on account of treating rental income instead of business income the ground is infructuous and does not require to be adjudicated."*

44. Before us also, no arguments were advanced on this ground of appeal by the Authorized Representative of the assessee. Therefore, this ground of appeal of the assessee is dismissed.

45. Ground No. 22 of the appeal of the assessee reads as under:

> "22. That Ld. CIT(A) has erred in law not allowing depreciation under Income Tax Act."

46. The Commissioner of Income Tax (Appeals) has held as under:

> *"4.10 Ground of Appeal No. 2.32 relates to claim of depreciation. During the course of assessment proceedings, the appellant did not furnish details of fixed assets and additions therein and no claim was made. At the appellate stage also the appellant did not furnish any details or submission in support of such claim. Moreover, the depreciation claimed is as per recasted financial statement of which no cognizance has been taken in this order. This ground of appeal is thus rejected."*

47. In absence of any detail furnished before us, during the course of hearing by the assessee and in absence of any submission of the assessee in respect of this issue, we do not find any good reason to interfere with the order of the ld. CIT(A). It is confirmed. The ground of appeal of the assessee is dismissed.

48. Ground No. 1 of the appeal of the department reads as under:

> *"1. On the facts and circumstances whether the Ld. CIT(A) was right in deleting the addition of Rs.91,62,576/- on account of interest accrued on FDRs when the assessee has only shown accrued interest for 179 days & 75 days on different FDRs whereas these FDRs were invested for the whole of the year and addition was made for the balance period on which no accrued interest was shown by the assessee."*

49. The Assessing Officer has held as under:

"The assessee vide this office letter dated 20.12.2007, was asked as to why the interest on accrual basis has not been reflected correctly as it has been grossly understated in the following accounts:-

i. Pledged FDRs
ii. Unpledged FDRs

The assessee vide his letter dated 24.12.2007 has stated which is reproduced as under:-

> *"The authority has folly accounted for interest on FDR both pledged or otherwise As the FDR has matured during the years, the income has directly been credited to interest income and these FDR being renewed for one year or so. The accrued interest for remaining period has been properly calculated as per details enclosed. Kindly refer to schedule attached."*

As per balance sheet filed for the assessment year 2005-06, assessee had FDRs amounting to Rs.27,87,90,781/- as on 31.03.2005. As per balance sheet filed for assessment year 2004-05 assessee had FDRs amounting to Rs.28,86,99,820/-. The two figures confirm that assessee had invested almost equal amount of about Rs.28 crores for whole of the year. However, as per schedule 5 and 6 to the balance sheet the assessee has reflected the interest accrued at Rs.48,17,403/- only. Under schedule 5 the assessee has reflected the interest on Rs.13,73,95,468/- at Rs. 33,69,012/- for 179 days only. It has further reflected interest on nine FDRs amounting to Rs.13,20,28,843/- at Rs.14,48,391/- for an average period of 75 days only. The comparative figures of FDRs available for the current year and previous year clearly indicates that almost equal figure of FDRs remained invested with the bank for whole of the year. Assessee has not furnished interest accrued on Rs. 13,73,95,468/- for six months only while the interest for balance period has not been reflected. Therefore the interest accrued on those FDRs amounting to Rs.33,69,012/-

is treated as interest income accrued on FDRs. Similarly the assessee has reflected interest for 1/5th of the year on FDRs amounting to Rs.13,20,28,843/- whereas interest accrued on balance period of 4/5th of the year has not been reflected which is calculated at Rs.57,93,564/-. Thus the total interest which has accrued to the assessee but not reflected in the return of income is assessed at Rs.91,62,576/- (33,69,012/- + 57,93,564/-) which is treated as income of the assessee the particulars of which have been concealed by the assessee. Penalty proceedings u/s 271(1)(c) are being initiated separately for furnishing wrong and inaccurate particulars of income.

(Even by adopting the straight line method, the interest accrued on FDRs amounting to Rs.27,87,90,781/- @ 5% (the rate reflected by the assessee in the return of income) comes to Rs.1,39,39,539/-. If the interest reflected by the assessee in the return of income at Rs.48,17,403/- is reduced from this the resulted interest which has not been reflected by the assessee comes to Rs.91,22,136/- which is almost equal to the interest calculated above."

50. The CIT(A) has held as under:

"4.5 Ground of Appeal no. 2.20 to 2.27 relates to addition of interest income on FDRs amounting to Rs.91,62,576/-. The appellant has argued that the AO has considered the figure of Rs.48,17,403/- shown as interest accrued under current assets and ignored the interest income booked by the appellant amounting to Rs.1,53,81,613/- in the profit and loss account. I have considered the financial statements of the appellant filed along with the return of income and is of the view that the submission of the appellant is valid. The appellant has already disclosed an interest income on FDR higher than the interest income assessed by the AO. This ground of appeal of the appellant is thus allowed."

51. The ld. Departmental Representative could not point any specific error in the order of the CIT(A). Therefore, this ground of appeal of the revenue is dismissed.

52. Ground Nos. 2 & 3 of the appeal of the department reads as under:

> *"2. On the facts and circumstances whether the Ld. CIT(A) was right in deleting the addition of Rs.25,32,090/- on account of late deposit of EPF when the assessee has failed to deposit the PF deducted with in statutory period as prescribed u/s 36(1)(va) of the Income Tax Act, 1961.*
>
> *3. On the facts and circumstances whether the Ld. CIT(A) has failed to appreciate that the assessee has failed to deduct and deposit PF in respect of four months viz. May 2004, November 2004, January 2005 & March 2005 for which no details have been submitted."*

53. The Assessing Officer has held as under:

> *"As per column 16(b) of form 3CD, the Chartered Accountant is Required to point out the delay in depositing the employees contribution towards the provident fund and other funds. Against this col. the CA of the assessee has reported "as per attached". However, no such detail has been attached with the form dated 3CD or the return of the income. Accordingly assessee vide order sheet entry dated 21.06.2007 was requested to file the details of provident fund payments read With section 2(24)(x). The C.A. of the assessee attended the case from time to time but did not file the said details. Finally, the detail was filed vide letter dated 24.12.2007 with the following comments:-*
>
> > *"The details were not furnished as per col. 16(b) of 3CD report. However we enclose herewith the deduction & payments made which are credited on the date of payment of salary."*

The above statement of counsel of the assessee speaks volumes about the manner in which the audit report has been prepared. The statement that the deduction & payments made which are credited on the date of payment of salary is a confession itself that the payments have not been paid in time. The details filed along with the above reply are prepared in haphazard manner. The details are neither on the letter head of the C.A or the assessee, nor it has been signed by anybody. As such no cognizance of this detail can be taken. The details filed by the assessee is reproduced asunder:-

Month	Amount of Employees share	Due date	Date of payment
4/2004	1,84,404	Not given	5.4.2004
5/2004	-	-	.
6/2004	3,01,204	-	9.6.2004
7/2004	2,60,478	-	24.07.2004
8/2004	1,87,759	-	20.08.2004
9/2004	1,87,823	-	20.09.2004
10/2004	1,89,870	-	28.10.2004
11/2004	-	-	-
12/2004	1,89,503	-	06.12.2004
01/2005	-	-	-
02/2005	1,87,019	-	21.02.2005
03/2005	-	-	-
Total	16,88,060		

The above details filed by the assessee is not only incomplete but also misleading and twisted. The detail does not tell as to how the employee's contribution for the months of May, 2004, Nov., 2004, Jan., 2005 and March, 2005 has been taken care of. The only inference that can be drawn from the above statement is that the employee's contribution to EPF has been deposited in the following months which obviously is in violation to the provisions of section 36(1)(va). Further the details have been filed for eight months only, Hence, the apply the average method assessee has deducted Rs.25,32,090/- from the employee share of provident fund which has not been deposited by it within the time prescribed under section 36(1)(va).

Under the circumstances the whole of the amount of Rs.25,32,090/- is treated as income of the assessee u/s 2(24)(x) of the I.T. Act, 1961."

54. On appeal, the Commissioner of Income Tax (Appeals) held as under:

"Ground of appeal no 2.29 relates to addition of Rs 2532090/- u/s 36(1)(va) of the Act. The appellant in his submission before me has stated that" employees contribution to the fund is credited to the ledger account maintained by the Jammu Development Authorities PF section immediately on deduction and there is no statutory period applicable in this case. The accounts of the employees of the Authority are not maintained by the Employees Provident Fund Organization but by the Authority itself. After going to the provision of Section 36(1)(va), I find that the legal requirement is to credit the employees account with the contribution receipt. The appellant has discharge this obligation by crediting the account of the employees though maintained by the authority itself. Thus I am of the view addition on this account is not justified and hence deleted. This ground of appeal is allowed."

55. The Departmental Representative could not point out any specific error in the order of the CIT(A), therefore, this ground of appeal of the revenue is dismissed.

56. Ground No. 4 of the appeal of the department reads as under:

"The appellant craves to amend or add any one or more grounds of appeal."

57. In absence of any plea taken by the Departmental Representative of the assessee, during the course of hearing this ground of appeal of the revenue is dismissed.

58. In the result, the appeal of the assessee is partly allowed for statistical purposes and the appeal of the department is dismissed.

(Order Pronounced in the Open Court on 22/03/2019)

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(N. S. Saini)
Accountant Member

Dated: 22/03/2019

Subodh

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR