

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Pramod Kumar, Vice President
and Shri Ravish Sood, Judicial Member**

**ITA Nos.1459-1460/Mum/2018
(Assessment Year: 2013-14)**

Futura Polyester Limited
B-22, T.V. INDL Estate,
S.K. Ahire Marg, Worli,
Mumbai – 400 030

ITO 6(3)(1)
Vs. Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai – 400 020

PAN – AAACI3404K

(Appellant)

(Respondent)

Appellant by: Shri Vijay Mehta &
Shri Anuj Kisnadwala, A.R's

Respondent by: Shri Debashis Chanda, D.R

Date of Hearing: 15.01.2020

Date of Pronouncement: 16.07.2020

ORDER

PER RAVISH SOOD, JM

The present appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-10, Mumbai, dated 29.12.2013, which in turn arises from the respective orders passed by the A.O under Sec. 143(3) of the Income Tax 1961 (for short 'Act'), dated 31.03.2016 AND under Sec. 154 of the Act, dated 20.06.2016. As the issues involved in the captioned appeals are inextricably interlinked or in fact interwoven, therefore, we shall dispose off the same by way of a consolidated order. We shall first take up the appeal of the assessee arising from the quantum assessment, wherein the impugned order has been assailed before us on the following grounds of appeal:

"The Appellant submits that the below mentioned grounds are independent and without prejudice to one another.

1. The Commissioner of Income Tax (Appeals) erred in confirming disallowance u/s 43B of Rs. 36,66,290/-.
2. The Commissioner of Income Tax (Appeals) erred in confirming disallowance of Bank Commission expenses of Rs. 10,60,512/-.
3. The Commissioner of Income Tax (Appeals) erred in confirming disallowance of Foreign exchange loss of Rs. 2,20,50,511/-
4. The Commissioner of Income Tax (Appeals) erred in confirming disallowance of Bad Debts /Advances written off and Sundry Balances written off aggregating to Rs. 13,83,56,806/-
5. The Commissioner of Income Tax (Appeals) erred in confirming additions of Rs. 18,45,880/- on account of cessation of liabilities u/s 41(1)(a).
6. The Commissioner of Income Tax (Appeals) erred in confirming disallowance of Audit fees of Rs. 26,27,940/-
7. The Commissioner of Income Tax (Appeals) erred in holding that the Deed of cancellation dated 28.09.2017" in connection with Long Term Capital Gains on sale of land was not genuine.
8. The Commissioner of Income Tax (Appeals) erred in confirming additions of Unsecured loans of Rs. 1,11,27,495!- u/s 68 as unexplained cash credit.
9. The Commissioner of Income Tax (Appeals) erred in confirming the action of AO in not setting off Unabsorbed Depreciation brought forward from earlier years amounting to Rs. 66,45,52.265/- against Capital Gain.

The Appellant craves leave to add to, alter by substitution or otherwise the above Grounds of appeal before or during the hearing of the Appeal."

Further, the assessee has raised before us the following additional grounds of appeal:

- "1. The learned CIT (A) ought to have held that there is no transfer of land during the year under consideration and hence no gain arises out of amount of Rs. 315,00,00,000/- mentioned in the MOU dated 19.12.2012 which could be brought to tax. The CIT(A) ought to have appreciated that the said MOU was cancelled subsequently.
2. The learned CIT (A) ought to have directed the A.O. to consider short term capital loss of Rs, 69,72,79,948/- for the purpose of set off against the income of the assessee/ carry forward to subsequent years."

Also, the assessee has moved a letter dated January 15, 2020 seeking liberty for admission of certain documents as additional evidence under Rule 29 of the Appellate Tribunal Rules, 1963, for the reason that they

shall have a strong bearing on the adjudication of certain grounds of appeal, as under:

Gr. No.	Pg Nos of P.B. 3	Nature of documents	Remarks
1.	110-113	Details of VAT/Sales tax payable, journal voucher and ledger account	The assessee has filed these documents to demonstrate that excise duty payable account has not effected profit and loss account and hence no disallowance is required to be made u/s 43B of the Act.
4.	114-127	Details of bad debts and relevant ledger accounts	The disallowance was confirmed on the ground that S. 36(2) condition has not been satisfied. The details filed shows the year in which amount has been shown as income and thus satisfaction of S. 36(2)
7.	128-145	Acknowledgment of return of income along with computation of income for A.Y. 2018-19 and 2019-20	The assessee has filed these copies to demonstrate that capital gain arising on transfer of land has been offered to tax
8.	146-158	Acknowledgement of return of income along with computation of income for A.Y. 2013-14 along with affidavit of Mr. Shyam Ghia and Mr. Mukund Dalal.	The assessee has filed these documents to contest the addition made u/s 68 of the Act.
9.	159-160	Order giving effect to CIT(A)'s order.	

2. Before proceeding any further, we shall first advert to the letter filed by the assessee seeking liberty for admission of 'Additional Grounds of appeal'. On a perusal of the letter dated 09.01.2020 filed by the assessee for admission of the additional grounds of appeal, we find that the additional ground of appeal no.1 is more or less in the form of a clarification, or in fact elaboration of the 'Ground of appeal No. 7' which has been raised in the memorandum of appeal filed by the assessee before us. In sum and substance, the assessee by raising the aforesaid additional ground of appeal has tried to clarify the factual position attending to the issue under consideration. In so far, the additional ground of appeal no. 2 is concerned, the assessee by raising the same has sought adjudication of an issue i.e its entitlement for set off and/or c/forward of Short Term Capital Loss, as claimed by it in its return of income. We find that the adjudication of the aforesaid additional grounds

of appeal is based on the facts borne from the record and would not require any fresh investigation or verification insofar the factual position is concerned. In the course of hearing of the appeal, it was submitted by the Id. A.R that as no new facts are required to be looked into for adjudicating the aforesaid additional grounds of appeal, hence, the same may be admitted. In support of his aforesaid contention the Id. A.R has relied upon the judgments of the Hon'ble Supreme Court in the case of viz. (i) National Thermal Power Corporation Vs. CIT (1998) 229 ITR 383 (SC); and (ii) Jute Corporation of India Ltd. Vs. CIT (1991) 187 ITR 688 (SC). Also support was drawn by him from the judgment of the 'full bench' of the Hon'ble High Court of Bombay in the case of Ahmedabad Electricity Company Ltd. Vs. CIT (1993) 199 ITR 351 (Bom) (FB). Per contra, the Id. Departmental Representative (for short 'D.R') objected to the admission of the additional grounds of appeal.

3. We have heard the authorized representatives for both the parties in context of the issue pertaining to the admission of the additional grounds of appeal. In our considered view there is substantial force in the claim of the Id. A.R that as no new facts are required to be looked into for adjudicating the aforesaid additional grounds of appeal, therefore, the same in all fairness requires to be admitted. Apart from that, as observed by us hereinabove, as the additional ground of appeal no. 1 is merely in the nature of an extension of the 'Ground of appeal No. 7' raised by the assessee in the memorandum of appeal, therefore, there appears to be no justification in declining the admission of the same. Accordingly, on the basis of our aforesaid deliberations, we herein admit the additional grounds of appeal raised by the assessee before us.

4. We shall now deal with the letter filed by the assessee seeking admission of certain documents as additional evidence under Rule 29 of the Appellate Tribunal Rules 1963. On a perusal of the aforesaid letter dated 15.01.2020, we find, that it is the claim of the assessee that during the course of the assessment proceedings its operations were stopped in

July, 2012 and the outstanding dues of the workers remained unpaid. As stated before us, under the aforesaid compelling circumstances the workers did not allow anyone to enter the premises of the assessee company. Accordingly, it is claimed that due to the aforesaid set of circumstances prevailing at the relevant point of time, the requisite documents could not be gathered and filed in the course of the assessment proceedings. However, in the course of the appellate proceedings before the CIT(A) the required documents were located and filed before the appellate authority as additional evidence. In the totality of the facts of the case, the CIT(A) admitted the additional evidence and called for a remand report from the A.O. Acting upon the remand report filed by the A.O, the CIT(A) partly upheld the additions and disallowances. In the backdrop of the aforesaid facts, it is claimed by the assessee that due to lack of professional advice certain vital details and documents had remained omitted to be filed before the lower authorities. As such, as per the advice of its counsel who was engaged to argue the present appeal before the Tribunal the assessee had filed certain documents (forming part of APB-3) before us, seeking liberty to admit the same as additional evidence U/rule 29 of the Appellate Tribunal Rules, 1963, as under:

Gr. No.	Pg Nos of P.B. 3	Nature of documents	Remarks
1.	110-113	Details of VAT/Sales tax payable, journal voucher and ledger account	The assessee has filed these documents to demonstrate that excise duty payable account has not effected profit and loss account and hence no disallowance is required to be made u/s 43B of the Act.
4.	114-127	Details of bad debts and relevant ledger accounts	The disallowance was confirmed on the ground that S. 36(2) condition has not been satisfied. The details filed shows the year in which amount has been shown as income and thus satisfaction of S. 36(2)
7.	128-145	Acknowledgment of return of income along with computation of income for A.Y. 2018-19 and 2019-20	The assessee has filed these copies to demonstrate that capital gain arising on transfer of land has been offered to tax
8.	146-158	Acknowledgement of return of income along with computation of income for A.Y. 2013-14 along with affidavit of Mr.	The assessee has filed these documents to contest the addition made u/s 68 of the Act.

		Shyam Ghia and Mr. Mukund Dalal.	
9.	159-160	Order giving effect to CIT(A)'s order.	

It is the claim of the assessee that as the aforesaid documents filed as additional evidence before us would go to the roots of some of the issues involved in the present appeal, therefore, the same may be admitted under Rule 29 of the Appellate Tribunal Rules 1963. Per contra, the Id. D.R. objected to the admission of the additional evidence.

5. On a perusal of the documents filed by the assessee as additional evidence, we find that the same would have a strong bearing on the adjudication of the issues raised by the assessee before us. In our considered view, the circumstances prevailing at the end of the assessee, i.e at the time of framing of the assessment in itself explains the reason for non-filing of the requisite documents in the course of the assessment proceedings. In fact, the factual position canvassed before us by the Id. A.R cannot be held to be an eye wash, as the same is supported by an 'affidavit' of Shri Shyam Ghia, managing director of the assessee company. Apart from that, no fact to the contrary has been brought to our notice by the Id. D.R which would prove otherwise. Also, considering the nature of documents viz. (i). copies of acknowledgment of returns of income of the assessee company for A.Y. 2018-19 and A.Y. 2019-20; (ii) copies of acknowledgment of returns of income of S/shri Shyam Ghia and Mukund Dalal, directors for A.Y. 2013-14, along with their affidavits; (iii) order giving effect to CIT(A) order; (iv) details of bad debt accounts along with the copy of ledger accounts; and (v) details of VAT/sales tax payable ledger accounts, are documents which either form part of the record of the revenue, or are in the nature of an extract of the 'books of account' of the assessee company for the year under consideration, would thus not require any further verification. In the totality of the facts of the case, we are of the considered view that as the aforesaid documents filed by the assessee before us by way of additional evidence would have a strong

bearing on the adjudication of the respective grounds of appeal raised before us, the same thus merits to be admitted.

6. Briefly stated, the assessee company which is engaged in the business of manufacturing of polyester staple etc., had filed its return of income for A.Y. 2013-14 on 23.09.2013, declaring its total income at Rs. nil. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act. The A.O while framing the assessment inter alia made the following additions /disallowances:

Sr. No.	Particulars	Amount (Rs.)
1.	Disallowance u/s. 43B	36,66,290/-
2.	Disallowance of commission expenses	10,60,512/-
3.	Disallowance of foreign exchange loss	2,20,50,511/-
4.	Disallowance out of sundry balances written off, bad debt and advances to suppliers written off : (i). Sundry balance written off : Rs. 11,99,829/- (ii). Bad debts : Rs. 12,42,69,569/- (iii). Advance to suppliers W/off : Rs. 1,28,87,408/-	13,83,56,806/-
5.	Cessation of liability under Sec.41(1) : (i). Sundry Creditors : Rs. 4,95,23,539/- (ii). Other liabilities : Rs. 18,45,880/-	5,13,69,419/-
6.	Unexplained cash credit under Sec. 68	10,61,27,495/-
7.	Unexplained cash credit under Sec. 68 : (i). Amalfi Properties P. Ltd. :Rs. 4,43,84,000/- (ii). Bhupati Investment & Finance P. Ltd. :Rs. 21,90,39,000/-	26,34,23,000/-
8.	Disallowance of audit fees	26,27,940/-
9.	Unexplained cash credits	3,66,692/-
10.	Short term capital gain	315,00,00,000/-

On the basis of the aforesaid additions/disallowance the income of the assessee was assessed at Rs. 286,02,72,980/-, as against its returned income of Rs. nil.

7. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee partly allowed the appeal.

8. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. A.R at the very outset of the hearing of the appeal submitted, that as instructed, he is not pressing the grounds of appeal Nos. 2,5,6 and 9. Accordingly, as per the

concession of the Id. A.R the grounds of appeal No. 2, 5, 6 and 9 are dismissed as not pressed.

9. We shall now advert to the merits of the case. The assessee has assailed before us the confirming of the disallowance of Rs. 36,66,290/- under Sec. 43B by the CIT(A). Facts in brief, are that the assessee in its 'balance sheet' for the year ending 31.03.2013 had shown VAT & Tax payable at Rs.1,47,08,432/-. As per 'Schedule 3' forming part of the computation of income, the assessee had disallowed VAT payable and Excise duty of Rs.1,79,305/- and Rs.1,08,62,837/-, respectively u/s 43B of the Act. Observing, that the assessee had failed to disallow u/s 43B the entire amount of VAT and Tax payable of Rs.1,47,08,432/-(supra), the A.O disallowed the balance amount of Rs.36,66,290/- [Rs.1,47,08,432/- (minus) Rs.1,79,305/- (minus) Rs.1,08,62,837/-]. On appeal, the CIT(A) finding no infirmity in the view taken by the A.O upheld the disallowance of Rs. 36,66,490/- made by him u/s 43B of the Act.

10. Aggrieved, the assessee has assailed before us the sustaining of the disallowance of Rs. 36,66,490/- u/s 43B by the CIT(A). At the very outset, it was submitted by the Id. A.R that the lower authorities while making/sustaining the aforesaid disallowance u/s 43B had misconceived the factual position. It was submitted by the Id. A.R, that the VAT & Tax payable of Rs.1,47,08,432/- comprised of the closing balances of the earlier years as well. In order to fortify his aforesaid claim the Id. A.R took us through 'Note 4' of the 'balance sheet' of the assessee company on 31.03.2013. Further, the Id. A.R took us through 'Schedule 3' i.e. details of disallowance of unpaid expenditure u/s 43B for the year under consideration. Referring to the 'Schedule 3', it was submitted by the Id. A.R that the sum total of the current year expenditure of Rs. 5,52,74,054/- that was not paid up to the 'due date' within the meaning of Sec. 43B was voluntarily disallowed by the assessee in its computation of income for the year under consideration. In order to drive home his aforesaid claim, the Id. A.R took us through the computation of income of

the assessee company which revealed the said factual position. The Id. A.R further took us through the bifurcated details of the aforesaid amount of Rs.5,52,74,054/-, which inter alia comprised of VAT and Excise duty of Rs.1,79,305/- and Rs.1,08,62,837/-, respectively. It was thus submitted by the Id. A.R, that the current year VAT and Excise duty that was not paid up to the 'due date' was already on a suo motto basis disallowed by the assessee under Sec. 43B. On the basis of the aforesaid facts, it was submitted by the Id. A.R that as the balance amount of VAT and tax payable of Rs.36,66,290/- pertained to the preceding years, therefore, the same could not have been disallowed u/s 43B of the Act. Per contra, the Id. D.R relied on the orders of the lower authorities.

11. We have heard the authorized representatives for both the parties in context of the issue under consideration. Before proceeding any further, it would be relevant to cull out Sec. 43B (relevant extract), which reads as under:

"Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or]

(b) to (g)

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him:

Provided that nothing contained in this section shall apply in relation to any sum [* * * * *] which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

Explanation 1.—For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in

computing the income of the previous year in which the sum is actually paid by him.

Explanation 2.—For the purposes of clause (a), as in force at all material times, “any sum payable means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.....”

Accordingly, as per Sec. 43B(a), deduction for VAT and Excise duty shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him), only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him. As is discernible from ‘Schedule 3’ i.e. details of disallowance of unpaid expenditure u/s 43B for the year under consideration, therein forming part of the ‘revised statement of income’, the current year expenditure towards VAT and Excise duty of Rs.1,79,305/- and Rs.1,08,62,837/-, respectively, was not paid by the assessee up to the ‘due date’ of filing of its return of income under sub-section (1) of Sec. 139 for the year under consideration. As observed by us hereinabove, the aforesaid amount of VAT & Excise duty of Rs.1,79,305/- and Rs.1,08,62,837/-, respectively, formed part of the suo motto disallowance of Rs.5,52,74,054/- made by the assessee under Sec. 43B of the Act. In the totality of the aforesaid facts, we are in agreement with the claim of the Id. A.R that as the balance amount of Rs. 36,66,290/- (forming part of VAT & taxes payable of Rs.1,47,08,432/-) was the ‘closing balance’ of the earlier years that was brought forward to the year under consideration, the same could not have been disallowed u/s 43B. Accordingly, we ‘set aside’ the order of the CIT(A) in context of the issue under consideration and vacate the disallowance of Rs.36,66,290/- made by the A.O u/s 43B of the Act. **Ground of appeal No. 1** is allowed.

12. We shall now deal with the claim of the assessee that the CIT(A) had erred in sustaining the disallowance of foreign exchange loss of Rs. 2,20,50,511/-. As is discernible from the orders of the lower authorities,

the assessee had debited an amount of Rs. 2,20,50,511/- in its profit & loss account on account of loss on fluctuation of foreign exchange. As the assessee failed to substantiate its claim of loss, the A.O disallowed the same. On appeal, the assessee furnished the details of foreign exchange loss as additional evidence with the CIT(A). Admitting the said additional evidence, the CIT(A) called for the comments of the A.O. In reply, it was submitted by the A.O that sufficient opportunity was afforded to the assessee to substantiate its said claim of loss in the course of the assessment proceedings, which however it had failed to avail. On merits, it was submitted by him, that though the assessee in the course of the remand proceedings was called upon to substantiate its claim of foreign exchange fluctuation loss by submitting the complete details alongwith copies of bank statements, ledger accounts and the rate of foreign exchange payments made or received, but except for filing the copy of the ledger account of foreign exchange fluctuation loss, it had failed to place on record any other supporting material. Accordingly, the A.O not being able to verify the veracity of the aforesaid claim of the assessee, rejected the same. Observing, that the assessee had failed to substantiate its claim of foreign exchange fluctuation loss by placing on record the requisite documents, the CIT(A) concurred with the view taken by the A.O as regards the inadmissibility of such claim of deduction raised by the assessee.

13. The assessee has assailed the confirming of the disallowance of foreign exchange fluctuation loss in appeal before us. Ld. A.R for the assessee took us through the consolidated details of the foreign exchange fluctuation gain/loss which had culminated into a loss of Rs. 2,20,50,511.65 during the year under consideration. Our attention was drawn to the copy of the ledger accounts of foreign exchange fluctuation gain/loss as appearing in the 'books of accounts' of the assessee. It was averred by the Id. A.R, that though the requisite details in support of the foreign exchange fluctuation loss suffered by the assessee during the year

was there before the lower authorities, however, they had most arbitrarily rejected the assessee's claim for deduction. On being confronted with the observations of the lower authorities that the assessee despite specific directions had failed to substantiate its claim of foreign exchange fluctuation loss by submitting the complete details alongwith copies of bank statements, ledger accounts and the rate of foreign exchange payments made or received, the Id. A.R could not controvert the same. Per contra, the Id. D.R supported the orders of the lower authorities. It was submitted by the Id. D.R, that as the assessee had failed to substantiate its claim of foreign exchange fluctuation loss, both in the course of the assessment and remand proceedings, therefore, the CIT(A) had rightly upheld the said disallowance.

14. We have heard the authorised representatives for both the parties, and also perused the orders of the lower authorities in context of the issue under consideration. Admittedly, the assessee in the course of the proceedings before the lower authorities had failed to substantiate its claim of foreign exchange fluctuation loss, to their satisfaction. In fact, we would not hesitate to observe, that the assessee except for furnishing the copy of the ledger account of foreign exchange fluctuation loss, had despite specific directions of the A.O failed to place on record any other supporting material viz. copies of bank statements, ledger accounts and the rate of foreign exchange payments made or received. Admittedly, in case of revenue items falling under s. 37(1), para 9 of AS-11 which deals with recognition of exchange differences, needs to be considered. Under that para, exchange differences arising on foreign currency transactions have to be recognized as income or as expense in the period in which they arise, except as stated in para 10 and para 11 which deals with exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which topic falls under s. 43A. Para 9 of AS-11 recognises exchange differences as income or expense. But then, the onus to substantiate the claim of having suffered a foreign exchange

fluctuation loss remains on the assessee. On a perusal of the orders of the lower authorities, we find that the assessee despite specific directions had failed to place on record the requisite documents in support of its claim of having suffered the foreign exchange fluctuation loss viz. copies of bank statements, ledger accounts and the rate of foreign exchange payments made or received. In our considered view, though there is no infirmity in the declining of the unsubstantiated claim of the assessee by the lower authorities, but then, a perusal of the Foreign exchange fluctuation gain/loss ledger accounts filed by the assessee (Page 22-32 of 'APB'), does inspire some confidence as regards the veracity of such claim. Accordingly, in all fairness, we herein restore the matter to the file of the A.O for fresh adjudication. In case the assessee is able to substantiate its claim for foreign exchange fluctuation loss to the satisfaction of the A.O, then the latter shall allow the deduction of the same. Needless to say, the A.O in the course of the 'set aside' proceedings shall afford a reasonable opportunity of being heard to the assessee, who shall remain at a liberty to substantiate its aforesaid claim of loss on the basis of fresh documentary evidence. **Ground of appeal No. 3** is allowed for statistical purposes.

15. We shall now take up the claim of the assessee, that the CIT(A) had erred in confirming the disallowance of bad debts/advances w/off and sundry balances w/off, therein aggregating to Rs. 13,83,56,806/-. As can be gathered from the records, we find, that the assessee had claimed deduction of Rs. 13,83,56,806/- u/s 36(1)(vii) of the Act, as under:

Disallowance out of sundry balances written off, bad debt and advances to suppliers written off :	
(i). Sundry balance written off : Rs. 11,99,829/-	
(ii). Bad debts : Rs. 12,42,69,569/-	
(iii). Advance to suppliers W/off : Rs. 1,28,87,408/-	
	13,83,56,806/-

Observing, that involving identical facts in the preceding year i.e A.Y 2012-13 the claim of deduction raised by the assessee was disallowed, coupled with the fact that the assessee could not demonstrate as to how the conditions laid down in Sec. 36(2) of the Act were satisfied, the A.O

disallowed the aforesaid amount of Rs. 13,83,56,806/-. On appeal, the assessee by way of additional evidence submitted with the CIT(A) the details of the balances w/off, bad debts, and the advances to suppliers w/off. Also, support was drawn by the assessee from the judgment of the Hon'ble Supreme Court in the case of TRF Ltd. Vs. CIT, (2010) 323 ITR 397 (SC). The additional evidence filed by the assessee was forwarded by the CIT(A) to the A.O for his comments. In reply, it was submitted by the A.O, that in the course of the remand proceedings the assessee on being called upon to justify its claim for deduction of bad debts/write off of the aforesaid amounts, had only submitted the list of the parties and claimed that the copies of bills, invoices and other documents were not available with it, as the same had been destroyed pursuant to closure of the factory in July, 2012. As such, the A.O reverted back to the CIT(A), therein stating that the aforesaid claim of deduction raised by the assessee was not verifiable for want of documentary evidence. Observing, that as per the CBDT Circular No. 12/2016, dated 30.05.2016, claim for deduction of any debt or part thereof in any previous year shall be admissible under Sec. 36(1)(vii) of the Act, if inter alia it fulfilled the conditions stipulated in sub-section (2) of Sec. 36 of the Act, the CIT(A) called upon the assessee to demonstrate satisfaction of the said mandatory condition. However, the assessee in the absence of the requisite documents stated that it was not possible for it demonstrate the fulfilment of the conditions stipulated in sub-section (2) of Sec. 36. In the backdrop of the aforesaid facts, the CIT(A) not finding any infirmity in the declining of the assessee's claim for deduction u/s 36(1)(vii) by the A.O, therein upheld his order to the said extent.

16. The assessee has assailed before us the upholding by the CIT(A) of the aforesaid disallowance of Rs. 13,83,56,806/- u/s 36(1)(vii) of the Act. The Id. A.R took us through the 'bad debt' account of the assessee company (Page 115 of 'APB'), wherein the respective bad debts of its

various divisions were transferred vide respective journal entries on 31.12.2012, as under:

Particulars	Amount
Fibre Division	Rs. 2,55,41,586.53
Polymer division	Rs. 1,04,59,346.76
Preform division	Rs. 19,40,469.86
Chemicals sundry debtors	Rs. 96,32,210.00
Innovasynth Technologies Private Limited	Rs. 53,76,799.00
Innovasynth Technologies Private Limited	Rs. 7,13,19,157.00
Total	Rs. 12,42,69,569.15

Further, the Id. A.R submitted that as the aforesaid debts had emerged pursuant to the sales of the said respective divisions in the preceding years, thus the same as per the mandate of Sec. 36(2) of the Act were taken into account in computing the income of the assessee for the said respective preceding years. In order to fortify his said claim, the Id. A.R took us through the corresponding sales of its aforesaid three divisions viz. (i). Futura Fibre Division (Page 116-118 of 'APB'); (ii). Futura Polymer Division (Page 119 of 'APB'); and (iii). Futura Preform Division (Page 120 of 'APB'). However, no such supporting documentary evidence in respect of the remaining three parties viz. (i). Chemical sundry debtors; (ii). Innovasynth Technologies Pvt. Ltd.; and (iii). Innovasynth Technologies Private Limited, was brought to our notice.

17. We have given a thoughtful consideration to the issue as regards W/off of the 'bad debts' by the assessee. As observed by us hereinabove, the A.O/CIT(A) had declined the assessee's claim for deduction u/s 36(i)(vii), as the assessee could not demonstrate satisfaction of the conditions contemplated in Sec. 36(2) of the Act. On a perusal of the details filed by the assessee by way of additional evidence before us, we find that it had prima facie demonstrated that as the amount of bad debts in so far relatable to its three divisions viz. (i). Futura Fibre Division; (ii).

Futura Polymer Division; and (iii).Futura Preform Division, had their genesis in the respective sales for the preceding years, therefore, the condition required in Sec. 36(2) stood satisfied. However, as the said details had been filed by the assessee before us by way of additional evidence, and were never there before the lower authorities, therefore, we refrain from adjudicating the issue at this stage. Accordingly, in all fairness we restore the issue in so far the aforesaid three divisions are concerned to the file of the A.O for fresh adjudication. In the course of the 'set aside' proceedings, the A.O shall readjudicate the assessee's claim for deduction of 'bad debts'. Needless to say, the A.O shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate its claim on the basis of fresh documentary evidence.

18 We shall now advert to the claim of the Id. A.R that the CIT(A) had erred in upholding the disallowances made by the A.O, viz. (i). sundry balances w/off : Rs. 11,99,829/-; and (ii). advances to suppliers w/off : Rs. 1,28,87,408/-. It was submitted by the Id. A.R, that as giving of the aforesaid amounts of advances/sundry balances was incidental to carrying of the business of the assessee, therefore, the irrecoverability of the same in its ordinary commercial meaning was to be construed as an allowable business loss incurred in the normal course of its business. The Id. A.R took us through the complete bifurcated party wise details, alongwith the respective dates on which the amounts aggregating to Rs. 1,28,87,407/- were advanced in the preceding years by its divisions viz. (i) Futura Fibre Division: Rs. 1,17,41,598/-; (ii). Futura Polymer Division: Rs. 6,75,180/-; (iii). Futura Performs Division: Rs. 3,96,475/-; and (iv). Chemtax Division :Rs. 74,154/- (Page 121 -126 of 'APB'). Also, the Id. A.R drew our attention to the bifurcated party wise/date wise details of the Sundry balances W/off: Rs. 11,99,829/- (Page 127 of 'APB'). It was reiterated by the Id. A.R, that as the aforesaid amounts were advanced/given in the normal course of its business, the irrecoverability of the same was to be

allowed as a business loss to the assessee. Per contra, the Id. D.R relied on the orders of the lower authorities.

19. We have heard the authorised representatives for both the parties, and also perused the orders of the lower authorities in context of the aforesaid issue under consideration before us. As is discernible from the records, the assessee's claim for deduction of the advances paid to customers, which were written off by the assessee company during the year, was disallowed, because the assessee was not in the business of money lending. On a perusal of the observations of the A.O, we find, that the entitlement of the assessee for claim of deduction of the advances written off during the year was addressed by the A.O only in the backdrop of the second limb of Sec. 36(2)(i), which takes within its sweep writing off of money lent in the ordinary course of the business of banking or money-lending carried on by the assessee. As such, the A.O observing that neither the advances written off by the assessee during the year were ever taken into account by the assessee in computing of its income, nor the same represented money lent by the assessee in the ordinary course of business of banking or money lending, thus, it did not satisfy either of the conditions contemplated in Sec. 36(2) of the Act. Although, we concur with the view taken by the lower authorities that the advances written off by the assessee would not qualify for deduction u/s 36(1)(vii) r.w Sec. 36(2), but then, the same on the said standalone basis cannot jeopardise its entitlement towards claim for deduction of the same as a business loss u/s 37 of the Act. In fact, we find that the **Hon'ble High Court of Bombay** in the case of **Harshad J. Choksi Vs. CIT (2012) 349 ITR 250 (Bom)**, had an occasion to deal with the issue, that where an amount is held to be not deductible as a bad debt in view of non-compliance of the conditions precedent as provided u/s 36(2), then could the same be considered as an allowable business loss. The Hon'ble High Court while answering the said issue, had observed that non-satisfaction of the conditions for claim of bad debts, would not prevent the assessee

from claiming deduction of the same as a business loss incurred in the course of carrying on of business as that of a share broker. The Hon'ble High Court, while concluding as hereinabove, had observed as under:

"10. Section 28 of the Act imposes a charge on the profits or gains of business or profession. The expression "Profits and gains of business or profession" is to be understood in its ordinary commercial meaning and the same does not mean total receipts. What has to be brought to tax is the net amount earned by carrying on a profession or a business which necessarily requires deducting expenses and losses incurred in carrying on business or profession. The Supreme Court in the matter of *Badridas Daga v. Commissioner of Income Tax*, reported in 34 ITR page 10, has held that in assessing the amount of profits and gains liable to tax, one must necessarily have regard to the accepted commercial practice that deduction of such expenses and losses is to be allowed, if it arises in carrying on business and is incidental to it.

11. On the basis of the aforesaid decisions, it can be concluded that even if the deduction is not allowable as bad debts, the Tribunal ought to have considered the assessee's claim for deduction as business loss. This is particularly so as there is no bar in claiming a loss as a business loss, if the same is incidental to carrying on of a business. The fact that condition of bad debts were not satisfied by the assessee would not prevent him from claiming deduction as a business loss incurred in the course of carrying on business as share broker.

12. In fact this court in the matter of *Commissioner of Income Tax v. R.B. Rungta & Co. (Supra)* upheld the finding of the Tribunal that the loss could be allowed on general principles governing computation of profits under Section 10 of the Indian Income Tax Act, 1922 which is similar/identical to Section 28 of the Act. The revenue in that case urged that the assessee having claimed deduction as a bad debt the benefit of the general principle of law that all expenditure incurred in carrying on the business must be deducted to arrive at a profit cannot be extended. This submission was negated by this court and it was held that even where the debt is not held to be allowable as bad debts yet the same would be allowable as a deduction as a revenue loss in computing profits of the business under Section 10(1) of the Indian Income Tax Act, 1922.

13. In view of the above, the question as referred to us is answered in the affirmative i.e. in favour of the assessee and against the respondent. No order as to costs."

In the backdrop of the aforesaid observations of the Hon'ble High Court, we find ourselves to be principally in agreement with the contention of the Id. A.R, that the assessee's claim for deduction of the advances paid to customers, which were written off by it during the year under consideration were supposed to be looked into u/s 37 of the Act. In our considered view, as observed by the Hon'ble High Court in its aforesaid order, even if the deduction of the advances written off by the assessee during the year was not allowable as bad debt, the same would not ipso facto for the said reason jeopardize the assessee's claim for deduction of the same as a business

loss, provided the same satisfied the conditions contemplated in Sec. 37 of the Act. At the same time, we cannot remain oblivious of the fact, that the assessee had failed to substantiate before the lower authorities its claim that the writing off the amounts advanced to its customers was in the nature of a 'business loss' within the meaning of Sec. 37 of the Act. In fact, the bifurcated details of the advances written off by the various divisions of the assessee had been furnished before us as additional evidence. In the backdrop of the aforesaid facts, we are of the considered view, that the assessee's claim that the amount of advances written off during the year was in the nature of a business loss requires to be adjudicated upon by the A.O. On a similar footing, the claim of the assessee that the sundry balances written off during the year were also a loss incidental to its business, on the same terms requires to be visited by the A.O. Accordingly, we herein direct the A.O to adjudicate upon the claim of the assessee as regards allowability of its claim for deduction of, viz. (i) the amounts advanced to suppliers written off during the year: Rs. 1,28,87,408/-; and (ii). the sundry balances written off during the year: Rs. 11,99,829/-, as a business loss within the meaning of Sec. 37 of the Act. Needless to say, the A.O shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate its aforesaid claim on the basis of fresh material. **Ground of appeal No. 4** is partly allowed for statistical purposes in terms of our aforesaid observations.

20. We shall now take up the grievance of the assessee that the CIT(A) had erred in confirming the addition of Unsecured loans of Rs. 1,11,27,495/- as an unexplained cash credit u/s 68 of the Act. Facts in brief, are that the A.O in the course of the assessment proceedings observed that the assessee had inter alia claimed to have received loans aggregating to Rs. 1,11,27,495/- from its two directors, viz. (i). Shri. Shyam Ghia: Rs. 55,00,000/-; and (ii). Shri. Mukund Dalal : Rs. 56,27,495/-. As the assessee failed to furnish any confirmation from the said persons, nor

placed on record their respective PAN nos. and addresses, the A.O inter alia treated the same as an unexplained cash credit within the meaning of Sec. 68 of the Act. Before the CIT(A), the assessee by way of an additional evidence filed the confirmations of the aforesaid persons, which were forwarded by the appellate authority to the A.O for his report. As per the remand report filed by the A.O, though the assessee had in support of the loans received from the aforesaid directors filed their confirmations alongwith the respective bank statements, but it had failed to substantiate their creditworthiness on the basis of supporting documentary evidence. In the backdrop of the aforesaid report of the A.O, the CIT(A) directed the assessee to substantiate/explain with documentary evidence, and bring on record the source of income of the directors especially when the operations of the company had been discontinued w.e.f July, 2012 on account of financial problems and difficulties and there was total shut down of the business for non-payment of the workers dues. However, as the assessee failed to come forth with any explanation, the CIT(A) holding a conviction that the assessee had failed to prove the creditworthiness of the directors, therein sustained the addition of Rs. 1,11,27,495/- made by the A.O u/s 68 of the Act.

21. Aggrieved, the assessee has assailed before us the upholding by the CIT(A) of the addition of Rs. 1,11,27,495/- made by the A.O u/s 68 of the Act. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record in context of the aforesaid issue under consideration. Before us, the assessee has filed by way of additional evidence, the copies of the income-tax returns alongwith the computation of income for A.Y 2013-14 of the aforesaid directors, and also the 'affidavits' of the aforesaid directors viz. S/shri. Shyam Ghia and Mukund Dalal, wherein they had admitted of having advanced loans to the assessee company during the year under consideration. In the course of hearing of the appeal the Id. A.R took us through the aforesaid additional evidence viz. copies of the returns of

income and 'affidavits' of the respective directors, at Page 146-158 of the 'APB'. On a perusal of the respective returns of income, we find that during the year under consideration viz. A.Y 2013-14, the directors viz. S/sh. Shyam Ghia and Mukund Dalal had returned an income of Rs. 21,38,448/- and Rs. 26,77,008/-, respectively. As regards the source of advancing of the respective loans, both of them had deposed in their respective 'affidavits' that the same was out of their past savings. To sum up, the aforesaid directors viz. S/sh. Shyam Ghia and Mukund Dalal, after providing their respective income-tax credentials, had admitted of having advanced loans to the assessee company during the year under consideration. However, as the aforesaid documents viz. copies of the returns of income, and also their respective 'affidavits' had been filed before us as additional evidence, and the same were not there before the lower authorities, therefore, in all fairness we restore the matter to the file of the A.O for readjudication, after considering the said material. Needless to say, the A.O shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee. **Ground of appeal No. 8** is allowed for statistical purposes.

22. We shall now take up the additional ground of appeal No.1 raised by the assessee alongwith the 'Ground of appeal No. 7', wherein the assessee has assailed the observation of the CIT(A), that as the assessee had failed to substantiate its claim that ass the MOU, dated 19.12.2012 for sale of land was subsequently cancelled, vide deed of cancellation dated 28.09.2017, therefore, the sale transaction having not materialized, no capital gain could have been brought to tax. Facts in brief, are that the assessee company vide a "Memorandum of Understanding" (MOU), dated 19.12.2012, had agreed to sell its factory at Manali, Chennai i.e land, building, plant & machinery, furniture & fixtures, vehicles, office equipments and inventory, to M/s Golden Star Promoters Pvt. Ltd., Regd. Office at No. 1, 4th Avenue, Harrington Road, Chet pet, Chennai – 600 031, for a total consideration of Rs. 355 crores. On a perusal of the records, the aforesaid sale consideration was comprised of viz. (i). Land (210 acres) : Rs. 315 crores; and (ii).

Building, plant & machinery, office equipments, furniture & fixture, inventory etc. : Rs. 40 crores. In its return of income, the assessee adopting the Fair Market Value (F.M.V) of the land as on 01.04.1981 at Rs. 6.33 crores, had worked out the Long Term Capital Gain (LTCG) on the sale of the same at Rs. 261 crores. However, as the assessee during the course of the assessment proceedings failed to furnish the copy of the purchase agreement, and also could not support the adoption of the F.M.V at Rs. 6.33 crores on the basis of a valuation report, the A.O treated the entire sale consideration of Rs. 315 crores as Short Term Capital Gain (STCG) in the hands of the assessee. On appeal, the assessee submitted before the CIT(A) as additional evidence the copy of the purchase agreement and the valuation report as on 01.04.1981, alongwith the copy of the MOU dated 19.12.2012, which was forwarded by the appellate authority to the A.O for his comments. In reply, it was stated by the A.O that as the assessee had filed the copy of the MOU for sale of land, dated 19.12.2012, copy of the purchase agreement and the valuation report as on 01.04.1981, therefore, the LTCG on the sale of the land, as claimed by the assessee in its return of income could be admitted on the basis of the aforesaid documents. In the backdrop of the aforesaid facts, the CIT(A) directed the A.O to compute LTCG on sale of land as per the extant law. But then, the assessee in the course of the appellate proceedings, vide its letter dated 26.09.2017, raised a new issue, that as pursuant to a deed of cancellation dated 28.09.2017 the MOU dated 19.12.2012 had been cancelled, therefore, the sale transaction under consideration stood nullified. In order to buttress its said claim, the assessee vide its letter dated 06.10.2017 placed on record the deed of cancellation, dated 28.09.2017, and requested that the same be admitted as additional evidence. In sum and substance, it was the claim of the assessee, that now when the sale transaction had not fructified, no capital gain could be brought to tax on the basis of the MOU dated 19.12.2012. Further, the assessee vide its letter dated 22.12.2017, submitted, that it would be passing the requisite entries in its 'books of accounts' for the current year. As the assessee had filed the deed of

cancellation, dated 28.09.2017, as additional evidence in the course of the appellate proceedings, the CIT(A) forwarded the same to the A.O for his report. In reply, the A.O vide his report dated 27.12.2017, submitted, that in the course of the remand proceedings notices u/s 133(6) were issued to the assessee and M/s Golden Stars Promoters Pvt. Ltd., wherein they were called upon to furnish/produce certain information/details viz. (i). communication details for cancellation of MOU, dated 19.12.2012 between the assessee and M/s Golden Star Promoter; (ii). details of amount transacted; (iii). copies of the bank statements from F.Y 2011-12 to till date of all bank accounts; (iv). original deed of cancellation for verification; and (v). details of legal fees paid both for the execution of the MOU, dated 19.12.2012 and the deed of cancellation. It was stated by the A.O in his report, that the assessee vide his letter dated 13.12.2017 (filed in tapal) had filed part reply, and had stated viz. (i). that the cancellation of MOU was based on several discussions and deliberations and there was no written communication in this regard; (ii). that part amount of sale consideration of Rs. 25.47 crores was received from M/s Golden Star Promoters Pvt. Ltd., out of which an amount of Rs. 91 lac was repaid; and (iii). that till date no legal fees was paid wither for the MOU or the cancellation deed. Further, it was stated by the A.O, that an e-mail was received at his office e-mail id Mumbai.dcit5.1.2@incometax.gov.in from Shri. Parthasarathy Rajasekhran, C.A, through his e-mail id rajasekhranca@yhoo.co.in, wherein it was stated that the MOU of M/s Futura Polyesters, Mumbai and M/s Golden Star Promoters Pvt. Ltd had been terminated vide a deed of termination dated 28.09.2017. It was noticed by the A.O, that a copy of the said e-mail was also forwarded to Mr. Alex Chinnasamy, director of M/s Golden Star Promoters Pvt. Ltd. However, it was stated by the A.O, that as no reply as regards cancellation/termination of the MOU was received by him from M/s Golden Star Promoters Pvt. Ltd., therefore, in the absence of the confirmation of the other party it remained unproved that the MOU was terminated. After perusing the report filed by the A.O, it was observed by the CIT(A) that the

assessee in the course of the remand proceedings had despite specific directions of the A.O failed to place on record the requisite details/documents in support of its claim that the sale transaction was terminated viz (i). details of amount transacted; (ii). copies of the bank statements from F.Y 2011-12 onwards; (iii). original deed of cancellation of the agreement; and (iv). details as regards the legal fees paid by the assessee for the agreement and its cancellation, both. Observing, that the assessee had failed to substantiate its claim that the sale transaction had been terminated, the CIT(A) concurred with the view taken by the A.O and rejected the claim of the assessee that the sale transaction had not materialized. On the basis of his aforesaid deliberations, the CIT(A) directed the A.O to assess the LTCG on transfer of the land in the hands of the assessee.

23. Aggrieved, the assessee has assailed before us the order of the CIT(A), to the extent he had directed the A.O to assess the LTCG in respect of the aforesaid sale transaction, which as per the assessee did not see the light of the day. Admittedly, the assessee company vide a MOU, dated 19.12.2012, had agreed to sell its factory at Manali, Chennai i.e land, building, plant & machinery, furniture & fixtures, vehicles, office equipments and inventory to M/s Golden Star Promoters Pvt. Ltd., Regd. Office at No. 1, 4th Avenue, Harrington Road, Chet pet, Chennai – 600 031, for a total consideration of Rs. 355 crores. As per the 'Notes' forming part of the financial statements of the assessee company, the aforesaid sale consideration was comprised of viz.(i). Land (210 acres): Rs. 315 crores; and (ii). Building, plant & machinery, office equipments, furniture & fixture, inventory etc.: Rs. 40 crores. In its return of income, the assessee adopting the Fair Market Value (F.M.V) of the land as on 01.04.1981 at Rs. 6.33 crores had worked out the LTCG on the sale of the same at Rs. 261 crores. For the reasons discussed at length hereinabove, the A.O assessed the entire sale consideration of Rs. 315 crores as STCG in the hands of the assessee. On appeal, the CIT(A) accepted the claim raised by the assessee

in its return of income, and directed the A.O to assess the gain arising from sale of land as LTCG in the hands of the assessee. But then, the controversy herein involved finds its genesis in the claim raised by the assessee in the course of the proceedings before the CIT(A), that as the MOU, dated 19.12.2012 was subsequently cancelled as per the terms of the deed of cancellation, dated 28.09.2017, and the sale transaction was nullified, therefore, no capital gain was liable to be assessed in respect of the impugned sale transaction which did not see the light of the day. However, the CIT(A), concurring with the view arrived at by the A.O in the course of the remand proceedings declined to accept the said unsubstantiated claim of the assessee.

24. In the backdrop of the aforesaid facts, we shall now look into the maintainability of the aforesaid claim of the assessee. At this stage, we may herein observe, that the assessee had filed before us as additional evidence the copies of the returns of income alongwith respective computations of income of the assessee company for A.Y 2018-19 and A.Y 2019-20, Page 128 -145 of APB. Relevance of the copies of the returns of income of the assessee company for the succeeding years viz. A.Y 2018-19 and A.Y 2019-20, is to draw our attention to the fact that part of the land under consideration was thereafter sold by the assessee in the succeeding years. To sum up, the assessee by referring to the sale transactions of the land under consideration, had tried to fortify its claim that the impugned sale transaction of the land during the year under consideration had not materialized, and stood cancelled. The Id. A.R took us through the facts pertaining to the issue under consideration. The Id. A.R took us through the definition of the term "transfer" as envisaged in Sec. 2(47) of the Act. It was averred by the Id. A.R that as the assessee had only entered into an unregistered MOU, dated 19.12.2012, with the other party, which too stood repudiated vide a deed of cancellation, dated 28.09.2017, therefore de hors transfer of the land under consideration no capital gain was liable to be assessed in respect of the transaction which did not materialize. In fact, it

was pointed out by the Id. A.R that the possession of the land under consideration remained with the assessee, and at no stage was ever delivered to the purported buyer viz. M/s Golden Star Promoters Pvt. Ltd. In order to buttress his aforesaid claim the Id. A.R took us through the MOU, dated 19.12.2012 and the deed of cancellation, dated 28.09.2017. In order to drive home his claim that there was no transfer of the land under consideration within the meaning of Sec. 2(47)(v) & (vi) of the Act, the Id. A.R relied on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini (2017) 398 ITR 531 (SC) and that of the Hon'ble High Court of Bombay in the case of PCIT Vs. Fardeen Khan (2019) 411 ITR 533 (Bom). It was submitted by the Id. A.R, that both of the lower authorities had erred in law and the facts of the case by saddling the assessee with capital gain income in respect of a transaction which had never fructified. Per contra, the Id. D.R relied on the orders of the lower authorities.

25. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record in context of the issue under consideration. Admittedly, the assessee had on its own reflected the LTCG on transfer of the land under consideration in its return of income. As such, before proceeding any further, we shall first deal with the issue as to whether an assessee in the course of the assessment proceedings could be permitted to raise a claim, which would lead to exclusion of an income offered by him in his return of income. We find that the said issue had been deliberated upon at length by the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 349 ITR 336 (Bom)**. In its said judgment, it was held by the Hon'ble High Court that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims to wit claims not made in the return filed by it. The Hon'ble High Court while concluding as hereinabove, had observed as under:

"10. A long line of authorities establish clearly that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims to wit claims not made in the return filed by it. It is necessary for us to refer to some of these decisions only to deal with two submissions on behalf of the department. The first is with respect to an observation of the Supreme Court in *Jute Corporation of India Limited v. Commissioner of Income Tax*, 1991 Supp (2) SCC 744 = (1991) 187 ITR 688. The second submission is based on a judgment of the Supreme Court in *Goetze (India) Limited v. Commissioner of Income Tax*.

11(A). In *Jute Corporation of India Limited v. CIT*, for the assessment year 1974-75 the appellant did not claim any deduction of its liability towards purchase tax under the provisions of the Bengal Raw Jute Taxation Act, 1941, as it entertained a belief that it was not liable to pay purchase tax under that Act. Subsequently, the appellant was assessed to purchase tax and the order of assessment was received by it on 23rd November, 1973. The appellant challenged the same and obtained a stay order. The appellant also filed an appeal from the assessment order under the Income Tax Act. It was only during the hearing of the appeal that the assessee claimed an additional deduction in respect of its liability to purchase tax. The Appellate Assistant Commissioner (AAC) permitted it to raise the claim and allowed the deduction. The Tribunal held that the AAC had no jurisdiction to entertain the additional ground or to grant relief on a ground which had not been raised before the Income Tax Officer. The Tribunal also refused the appellant's application for making a reference to the High Court. The High Court upheld the decision of the Tribunal and refused to call for a statement of case. It is in these circumstances that the appellant filed the appeal before the Supreme Court.

The Supreme Court held as under :-

"5. In *CIT v. Kanpur Coal Syndicate*, a three Judge bench of this Court discussed the scope of Section 31(3)(a) of the Income Tax Act, 1922 which is almost identical to Section 251(1)(a). The court held as under: (ITR p. 229)

"If an appeal lies, Section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under Section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is co-terminus with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do." (emphasis supplied)

6. The above observations are squarely applicable to the interpretation of Section 251(1)(a) of the Act. The declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income Tax Officer, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations if any prescribed by the statutory provisions. In the absence of any statutory provision the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the Appellate Assistant

Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income Tax Officer." [emphasis supplied]

(B) It is clear, therefore, that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. They have the jurisdiction to entertain the new claim. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction.

12. At page 694, after referring to certain observations of the Supreme Court in *Additional Commissioner of Income-tax v. Gurjargravures P. Ltd.*, (1978) 111 ITR 1, the Supreme Court observed at Page 694 as under :-

"The above observations do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made, or that the ground became available on account of change of circumstances or law. There may be several factors justifying raising of such new plea in appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose." [emphasis supplied]

13. The underlined observations in the above passage do not curtail the ambit of the jurisdiction of the appellate authorities stipulated earlier. They do not restrict the new/additional grounds that may be taken by the assessee before the appellate authorities to those that were not available when the return was filed or even when the assessment order was made. The sentence read as a whole entitles an assessee to raise new grounds/make additional claims :-

"if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made..."

"or"

if "the ground became available on account of change of circumstances or law"

The appellate authorities, therefore, have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The first part viz. "if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made..." clearly relate to cases where the ground was available when the return was filed and the assessment order was made but "could not have been raised" at that stage. The words are "could not have been raised" and not "were not in existence". Grounds which were not in existence when the return

was filed or when the assessment order was made fall within the second category viz. where "the ground became available on account of change of circumstances or law."

14. The facts in Jute Corporation of India Ltd., various judgments referred to therein as well as in subsequent cases, which we will refer to, establishes this beyond doubt. In many of the cases, the grounds were, in fact, available when the return was filed and/or the assessment order was made. In Jute Corporation of India Ltd., the ground was available when the return was filed. The assessee did not claim any deduction of its liability to pay purchase tax as "it entertained a belief that it was not liable to pay purchase tax under the Bengal Raw Jute Taxation Act, 1941". Thus, the ground existed when the return was filed. The assessment order was even made and received by the assessee. It is only after the appeal was filed that the assessee claimed a deduction in respect of the amount paid towards the purchase tax under the said Act. It is also significant to note that the assessee's entitlement to claim deduction had been held to be valid in view of an earlier judgment of the Supreme Court in Kedarnath Jute Manufacturing Company Limited v. Commissioner of Income-tax, (1971) 82 ITR 363. This was, therefore, a case of error in perception/judgment. Despite the same, the Supreme Court upheld the decision of the Appellate Assistant Commissioner in allowing the deduction. The words "could not have been raised" must, therefore, be construed liberally and not strictly.

15. It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made. As held by the Supreme Court there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts.

However, such cases include those, where the ground though available when the return was filed or the assessment order was made, was not taken or raised for reasons which the appellate authorities may consider valid. In other words, the jurisdiction of the appellate authorities to consider a fresh or new ground or claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made.

16(A). A Full Bench of this Court in Ahmedabad Electricity Limited v. Commissioner of Income-tax, (1993) 199 ITR 351 considered a similar situation. In that case, the appellant/assessee did not claim a deduction in respect of the amounts it was required to transfer to contingencies reserve and dividend and tariff reserve either before the Income Tax Officer or before the Appellate Assistant Commissioner in appeal. Subsequently, this Court had, in Amalgamated Electricity Company Limited v. Commissioner of Income-tax, (1974) 97 ITR 334, held that such amounts represented allowable deductions on revenue account. The appellant, therefore, raised a new claim and additional grounds before the Tribunal in that connection. The Tribunal rejected the same. The second question which was raised in the reference before the Division Bench was as under :-

"(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in not allowing the assessee leave to raise in its own appeals additional grounds and in the departmental appeals cross objections regarding the deductibility of the sums transferred to contingency reserve and tariff and dividend control reserve?"

(B) The Division Bench which heard the reference, finding that there was a conflict of decisions, placed the papers before the Hon'ble Chief Justice for constituting a larger bench to resolve the controversy.

The Full Bench answered the reference in the affirmative and in favour of the assessee. The Full Bench held :-

"Thus, 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 an 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 subsection (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."

(C) It is unnecessary to refer to all the judgments that the Full Bench referred to while answering the reference. The Full Bench referred to the observations of the Supreme Court in *Jute Corporation of India Limited v. Commissioner of Income-tax (supra)* set out above. It is important to note that even in this case, therefore, the ground existed when the return was filed. The mere fact that a decision of a court is rendered subsequently does not indicate that the ground did not exist when the law was enacted. Judgments are only a declaration of the law. The assessee could have raised the ground in its return itself. It did not have to await a decision of a court in that regard. Indeed, even if a judgment is against an assessee, it is always open to the assessee to claim the deduction and carry the matter higher. The words "could not have been raised", therefore, cannot be read strictly. Neither the Supreme Court nor the Full Bench of this Court meant them to be read strictly. They include cases where the assessee did not raise the claim for a reason found to be reasonable or valid by the appellate authorities in the facts and circumstances of a case.

17. The next judgment to which our attention was invited by Mr. Mistri is the judgment of a Bench of three learned Judges of the Supreme Court in *National Thermal Power Company Limited v. Commissioner of Income-tax*, (1997) 7 SCC 489 = (1998) 229 ITR 383. In that case, the assessee had deposited its funds not immediately required by it on short term deposits with banks. The interest received on such deposits was offered by the assessee itself for tax and the assessment was completed on that basis. Even before the Commissioner of Income-tax (Appeals), the inclusion of this amount was neither challenged by the assessee nor considered by the Commissioner of Income-tax (Appeals). The assessee filed an appeal before the Tribunal. The inclusion of the amount was not objected to even in the grounds of appeal as originally filed before the Tribunal.

Subsequently, the assessee by a letter, raised additional grounds to the effect that the said sum could not be included in the total income. The assessee contended that on an erroneous admission, no income can be included in the total income. It was further contended that the ITO and the Commissioner of Income-tax (Appeals) had erred and failed in their duty in adjudicating the matter correctly and by mechanically including the amount in the total income. It is pertinent to note that the assessee contended that it was entitled to the deduction in view of two orders of the Special Benches of the Tribunal and the assessee further stated that it had raised these additional grounds on learning about the legal position subsequently.

The Tribunal declined to entertain these additional grounds.

The Supreme Court did not answer the question on merits, but framed the following question and held as under :-

"4. The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on

merit, we do not propose to answer the questions relating to the merit of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:

"Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same."

Under Section 254 of the Income Tax Act the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with the appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

18. In the case before us, the CIT(A) and the Tribunal have held the omission to claim the deduction of Rs.40,00,000/- to be inadvertent. Both the appellate authorities held, after considering all the facts, that the assessee had inadvertently claimed a deduction of Rs.20,00,000/- paid after the end of the year in question. We see no reason to interfere with this finding. We see less reason to interfere with the exercise of discretion by the appellate authorities in permitting the respondent to raise this claim. That the respondent is entitled to the deduction in law is admitted and, in any event, clearly established. In the circumstances, the respondent ought not be prejudiced.

19. The orders of the CIT(A) and the Tribunal clearly indicate that both the appellate authorities had exercised their jurisdiction to consider the additional claim as they were entitled to in view of the various judgments on the issue, including the judgment of the Supreme Court in National Thermal Power Corporation Limited. This is clear from the fact that these judgments have been expressly referred to in detail by the CIT(A) and by the Tribunal.

20. We wish to clarify that both the appellate authorities have themselves considered the additional claim and allowed it. They have not remanded the matter to the Assessing Officer to consider the same. Both the orders expressly direct the Assessing Officer to allow the deduction of Rs.40,00,000/- under section 43B of the Act. The Assessing Officer is, therefore, now only to compute the respondent's tax liability which he must do in accordance with the orders allowing the respondent a deduction of Rs.40,00,000/- under section 43B of the Act.

21. The conclusion that the error in not claiming the deduction in the return of income was inadvertent cannot be faulted for more than one reason. It is a finding of fact which cannot be termed perverse. There is nothing on record that militates against the finding. The appellant has not suggested, much less established that the omission was deliberate, mala-fide or even otherwise. The inference that the omission was inadvertent is, therefore, irresistible.

22. It was then submitted by Mr. Gupta that the Supreme Court had taken a different view in *Goetze (India) Limited v. Commissioner of Income-tax*. We are unable to agree. The decision was rendered by a Bench of two learned Judges and expressly refers to the judgment of the Bench of three learned Judges in *National Thermal Power Company Limited vs. Commissioner of Income-tax (supra)*. The question before the Court was whether the appellant-assessee could make a claim for deduction, other than by filing a revised return. After the return was filed, the appellant sought to claim a deduction by way of a letter before the Assessing Officer.

The claim, therefore, was not before the appellate authorities. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Act to make an amendment in the return of income by modifying an application at the assessment stage without revising the return. The Commissioner of Income-tax (Appeals) allowed the assessee's appeal. The Tribunal, however, allowed the department's appeal. In the Supreme Court, the assessee relied upon the judgment in *National Thermal Power Company Limited* contending that it was open to the assessee to raise the points of law even before the Tribunal. The Supreme Court held :-

"4. The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income- tax Act, 1961. There shall be no order as to costs." [emphasis supplied]"

23. It is clear to us that the Supreme Court did not hold anything contrary to what was held in the previous judgments to the effect that even if a claim is not made before the assessing officer, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. In fact, the Supreme Court made it clear that the issue in the case was limited to the power of the assessing authority and that the judgment does not impinge on the power of the Tribunal under section 254.

24. A Division Bench of the Delhi High Court dealt with a similar submission in *Commissioner of Income-tax v. Jai Parabolic Springs Limited*, (2008) 306 ITR 42. The Division Bench, in paragraph 17 of the judgment held that the Supreme Court dismissed the appeal making it clear that the decision was limited to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return and did not impinge on the powers of the Tribunal. In paragraph 19, the Division Bench held that there was no prohibition on the powers of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter and for the just decision of the case.

Now, in the case before us, we find that the assessee had assailed the assessing of the LTCG on the impugned transfer of land and subjecting of the same to tax, as the MOU, dated 19.12.2012 i.e the "agreement to sell", was thereafter cancelled vide a deed of cancellation, dated 28.09.2017. As such, the said ground raised by the assessee was not available at the time of filing of the return of income, and in fact had become available on account of

change of circumstances in the course of hearing of the appeal before the CIT(A). Accordingly, in our considered view, the assessee remaining well within its right had validly assailed the assessing of the LTCG on the impugned transfer of land before the CIT(A).

26. We shall now advert to the maintainability of the claim of the assessee that in the absence of transfer of the land under consideration, no LTCG could have been assessed in its hands. The issue herein involved lies in a narrow compass i.e as to whether or not the land under consideration was transferred by the assessee during the year under consideration. At this stage, we may herein observe, that the assessee by way of an unregistered MOU, dated 19.12.2012, had sought to transfer the property to the purported buyer viz. M/s Golden Star Promoters Pvt. Ltd. Before adverting any further, as regards the fate of the said MOU, which as observed by us hereinabove was cancelled vide a deed of cancellation, dated 28.09.2017, it would be relevant to deliberate upon the validity of the MOU, dated 19.12.2012 as an instrument for transfer of the land under consideration. As observed by us hereinabove, the **Hon'ble Supreme Court** in the case of **CIT Vs. Balbir Singh Maini (2017) 398 ITR 531 (SC)**, had observed, that pursuant to the Registration and Other Related Laws (Amendment) Act, 2001, amendments were made simultaneously in Section 53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words "the contract, though required to be registered, has not been registered, or" in Section 53A of the 1882 Act were omitted. Simultaneously, Sections 17 and 49 of the 1908 Act were amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. It was observed by the Hon'ble Apex Court, that after the commencement of the Amendment Act of 2001, if an agreement, was not registered, then it

shall have no effect in law for the purposes of Section 53A. In short, there would be no agreement in the eyes of law which could be enforced under Section 53A of the Transfer of Property Act. In the backdrop of its aforesaid observations, the Hon'ble Apex Court had concluded that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. In sum and substance, the Hon'ble Apex Court had observed, that in terms of Sec. 2(47)(v) of the Act, transfer of any immovable property in part performance of a contract of the nature referred in Sec. 53A of the Transfer of Property Act, 1882, will be completed only when the 'agreement' under Sec. 53A of the Transfer of Property Act is registered under the Indian Registration Act. Also, we find that the **Hon'ble High Court of Bombay** in the case of **PCIT Vs. Fardeen Khan (2019) 411 ITR 533 (Bom)**, had followed the aforesaid view of the Hon'ble Apex Court. Apart from that, we find that in the aforesaid judgments, it was further observed that for Sec. 2(47)(vi) to be applicable, the transfer of the immovable property should enable its enjoyment as the purported owner thereof i.e even though there is no transfer of title in law, there is a transfer of title in fact. Now, in the case before us, as the assessee by way of an unregistered MOU, dated 19.12.2012 had though sought to transfer the land under consideration to the purported buyer viz. M/s Golden Star Promoters Pvt. Ltd., but then, the very fact that the possession of the land was never parted with/delivered to by the assessee to the other party, on the said count itself would render the provisions of Sec. 2(47)(v) of the Act r.w.s 53A of the Transfer of Property Act, 1882, as inapplicable. Apart from that, even otherwise as the instrument of transfer was an unregistered MOU, dated 19.12.2012, the same in the backdrop of the aforesaid judicial pronouncements would exclude the applicability of Sec. 2(47)(v) of the Act r.w Sec. 53A of the Transfer of Property Act. In so far the provisions of sec. 2(47)(vi) are concerned, we find that the assessee who had not even parted with the possession of the land in favour of the purported buyer, had not entered into any arrangement or acted in any other manner, which had the

effect of transferring, or enabling the enjoyment of the property under consideration to the purported buyer. Rather, the fact that the MOU, dated 19.12.2012 was subsequently cancelled vide a deed of cancellation, dated 28.09.2017, therein proves to the hilt that the impugned sale transaction had never crystallized. As a matter of fact, the lower authorities had failed to place on record any material which would rebut the aforesaid claim of the assessee. In fact, it is not even the case of the revenue that the deed of cancellation, dated 28.09.2017 is a sham or a fabricated document. In fact, the subsequent sale of part of the land by the assessee in the period relevant to A.Y 2018-19 and A.Y 2019-20, further fortifies the veracity of the aforesaid claim of the assessee. At this stage, we may herein observe that the revenue by assessing the LTCG in the hands of the assessee had sought to tax a hypothetical income, which finds its roots in a transaction which had never fructified into a sale transaction. As observed by the **Hon'ble Apex Court** in the case of **CIT Vs. Shoorji Vallabhdas and Co., (1962) 46 ITR 144 (SC)**, income-tax is a levy on income. No doubt, the Income-tax act takes into account two points of time at which the liability to tax is attracted ,viz., the accrual of the income or its receipt, but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialize. As observed by the Hon'ble High Court, where the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the 'books of account'. On the basis of our aforesaid observations, we are unable to persuade ourselves to concur with the view taken by the lower authorities, and therein vacate the addition towards LTCG made by them, on the basis of the MOU, dated 19.12.2012. **Ground of appeal No. 7** r.w **additional ground of appeal no. 1**, are allowed in terms of our aforesaid observations.

27. We shall now take up the claim of the assessee that the CIT(A) had erred in not directing the A.O to consider the capital loss of Rs. 69,72,79,948/- for

the purpose of 'set off' against the income of the assessee/carry forward to the subsequent years. As is discernible from the revised statement of income filed by the assessee alongwith its return of income, Page 7-8 of APB, the assessee had computed the Short Term Capital Loss (for short "STCL") from depreciable assets (as per depreciation schedule) at (-) Rs. 69,72,79,848/-. It is submitted by the Id. A.R, that as the CIT(A) while disposing off the appeal had not directed the A.O to consider the STCL of (-)Rs. 69,72,79,948/- for the purpose of 'set off' against the income of the assessee/carry forward to the subsequent years, therefore, the latter in his order giving effect to the order of the CIT(A), dated 18.12.2018, had not considered the STCL of (-) Rs. 69,72,79,948/-.

28. We have given a thoughtful consideration to the contentions advanced by the authorized representatives for both the parties in context of the aforesaid issue under consideration. Before proceeding any further, we may herein observe that the A.O while framing the assessment had in the absence of the details of the assets sold declined the assessee's claim of Short Term Capital Loss of Rs. 69,72,79,948/-. In sum and substance, in the absence of the requisite details as regards the loss claimed by the assessee on account of sale of depreciable assets along with working and other relevant documents, the aforesaid claim of STCL was rejected by the A.O while framing the assessment. Elaborating on the said issue, we find that the A.O had in the course of hearing of the appeal by the CIT(A), against the order passed by him u/s. 154 of the Act, had stated the reasons for rejecting the claim of STCL raised by the assessee in its return of income, as under:

"In this regard, the assessee was asked vide order sheet notings dated 28-7-2017 to justify the loss claimed on account of sale of depreciable assets along with workings and other relevant documents. The assessee was further asked on perusal of MOU that lumpsum amount of Rs. 40 crs has been shown as sale consideration for other assets. In view of this fact, the assessee was asked to specify as to how it had allocated the amount of sale consideration between various assets sold and ratio adopted for working of loss on account of depreciable assets.

In response, the assessee vide letter dated 3-8-2017 has submitted that the total value of Rs. 27.19 Crs. in respect of sale of other depreciable assets has been taken on the basis of book value of these assets as on 31-12-2012 (52 Annual Report 2011-12 Pg. No. 34) A Copy of Annual Report 2011-12 submitted. Accordingly, from the opening WDV for depreciable assets as on 31-03-2012 has been deducted from the sale value and the total loss has been worked out at Rs. 69,72,79,948/-. The said loss has been disclosed in Schedule DPM and Schedule DOA forming part of return of income Pg. Nos.18 & 19.

In this regard, on perusal of terms and conditions laid down in MOU dated 19-12-2012 entered between the assessee company and Golden Star Promoters Pvt. Ltd., it is seen that the parties have agreed to purchase and sell all building, plant & machinery, office equipment, furniture and fixtures, etc., on an "As Is Where Is" basis at FPL's factory at Manali, Chennai - Rs. 40 Crs.

It can be seen from the above condition mentioned in the MOU that the purchaser party has purchased all the depreciable assets for total consideration of Rs. 40 Crs: whereas, the assessee has allocated Rs. 27.20 crs out of Rs. 40 crs. for working out loss on account of depreciable assets as per book value and Rs. 12.80 crs has been allocated against the inventories, which is not proper."

As per the facts discernible from the records, we find that the assessee had claimed Short Term Capital Loss on sale of depreciable assets, as under:

Block of Assets	Rate	WDV	Sale Consideration	Capital Gain/Loss
Building	5%	10,47,133	0	-10,47,133
	10%	1,32,85,035	1,96,63,539	63,78,504
Plant & Machinery	15%	44,41,68,026	25,20,59,898	-19,21,08,128
	30%	1,06,92,601	41,500	-1,06,51,101
	60%	3,16,473	3,16,473	0
Furniture & Fittings	10%	66,57,131	4,04,833	-62,52,298
Intangible Assets	25%	49,35,99,792	-	-49,35,99,792
Total		96,97,66,191	27,24,86,243	-69,72,79,948

Although, as per the MOU, dated 19.12.2012, a sale consideration of Rs.40 crores was assigned to building, plant and machinery, furniture and fixture, inventory etc., without values being assigned to the individual assets, but then, the assessee had assigned an amount of Rs.27,24,86,243/- to the assets sold and remaining amount to the inventory sold. However, the basis of such allocation is not apparent from record. Apart from that, we find that though the assessee had further assigned the sale consideration to individual assets while working out the Short Term Capital Loss on sale of the

depreciable assets, however, no justification or basis for assigning such respective costs to the individual assets can be gathered from the records. In fact, the sale consideration of the depreciable assets has neither been justified by the assessee on the basis of any valuation report nor with the cost allocated by the purchaser in its 'books of accounts'. Further, we find that the assessee while claiming the Short Term Capital Loss on sale of depreciable assets had not assigned any costs to the intangible asset in its return of income, and resultantly had claimed a loss of Rs.49,35,99,792/- on transfer of intangible assets. On the contrary, no such loss is reported in the 'annual report' of the assessee company for 2011-12. As regards the sale consideration taken by the assessee for the inventory sold, the same had neither been correlated with the market value of the inventory nor with the cost recorded in the 'books of account' of the purchaser or its subsequent sale by the purchaser. In the backdrop of the aforesaid facts, it can safely be concluded that as the assessee had failed to substantiate the basis for allocation of the sale consideration to the individual assets, and also its inventory, the A.O had for the said reason disallowed its claim for Short Term Capital Loss of (-) Rs.69,72,79,928/-. In our considered view, the matter in all fairness requires to be revisited by the A.O, for allowing an opportunity to the assessee to substantiate its claim of Short Term Capital Loss so raised in its return of income. Accordingly, we herein restore the matter to the file of the A.O with a direction to re-adjudicate the same. At the same time, the assessee is directed to substantiate its claim of Short Term Capital Loss, as raised in its return of income, by justifying the basis for allocation of sale consideration qua the depreciable assets and its inventory. Also, the A.O shall call for the basis, as per which, the cost allocation qua the individual depreciable assets had been carried out by the assessee. The A.O shall after calling for the requisite details from the assessee, and considering the same shall therein re-adjudicate afresh the latter's entitlement towards claim of Short Term Capital Loss on sale of depreciable assets during the year under consideration. The **additional ground of appeal No. 2** is allowed for statistical purpose in terms of our aforesaid observation.

ITA No. 1460/Mum/2018
A.Y. 2013-14

28. We shall now take up the appeal of the assessee which is directed against the order passed by the CIT(A)-10, Mumbai, dated 29.12.2017, which in turn arises from the order passed by the A.O under Sec. 154 of the Act, dated 20.06.2016. The Assessee has assailed the impugned order on the following effective grounds of appeal:

- “1. The Commissioner of Income Tax (Appeals) erred in confirming the action of A.O in not setting off Unabsorbed Depreciation brought forward from earlier years amounting to Rs.66,45,52,265/- against Capital Gain.
2. The Commissioner of Income Tax (Appeals) erred in confirming disallowance of Bad Debts/Advances written off and Sundry Balances written off aggregating to Rs.13,83,56,806/-.
3. The Commissioner of Income Tax (Appeals) erred in confirming disallowance of Short Term Capital Loss of Rs.69,72,79,948/- on sale of depreciable assets.”

29. Briefly stated, the assessment in the case of the assessee company for A.Y. 2013-14 was framed by the A.O vide his order passed under Sec. 143(3), dated 31.03.2016 at an income of Rs.286,02,72,984/-. After the culmination of the assessment, the assessee filed a letter dated 03.06.2016, therein seeking rectification of certain mistakes in the body of the assessment order under Sec. 154 of the Act. However, the A.O observing that the impugned mistakes pointed out by the assessee in its rectification application were not in the nature of mistake apparent from record, rejected the claim of the assessee.

30. Aggrieved, the assessee assailed the order passed by the A.O under Sec. 154, dated 20.06.2016 in appeal before the CIT(A). After necessary deliberations, it was observed by the CIT(A) that the issues raised by the assessee before him were beyond the scope of adjustments permissible under Sec.154 of the Act. Accordingly, the CIT(A) drawing support from the judgment of the **Hon'ble Supreme Court** in the case of **T.S. Balaram, Income Tax Officer Vs. Volkart Brothers & Ors. (1971) 82 ITR 50 (SC)**, rejected the claim of the assessee for the reason that the mistakes

pointed out in the rectification application did not fall within the purview of rectification under Sec. 154 of the Act. Accordingly, the appeal of the assessee was dismissed.

31. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We have given a thoughtful consideration and concur with the view taken by the lower authorities, that as the issues raised by the assessee in its application for rectification under Sec. 154 are not free from doubts and debate, and would involve a long drawn process of reasoning, the same would thus not fall within the realm of rectification within the meaning of Sec. 154 of the Act. As such, finding no infirmity in the view taken by the lower authorities, who in our considered view had rightly rejected the application filed by the assessee under Sec. 154, we uphold the same. Alternatively, we find that that as even otherwise all the issues raised by the assessee in its present appeal had been dealt by us while disposing off its appeal against the quantum assessment in ITA No. 1459/Mum/2018, therefore, on the said count itself the present appeal of the assessee would be rendered as infructuous. Be that as it may, we concur with the view taken by the CIT(A), who in our considered opinion had rightly rejected the appeal of the assessee, thus uphold his order.

32. The appeal filed by the assessee is dismissed in terms of our aforesaid observations.

33. Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on 15.01.2020, however, this order is being pronounced after the expiry of 90 days from the date of conclusion of hearing. We find that Rule 34(5) of the Income-tax Appellate Tribunal Rules, 1962, which envisages the procedure for pronouncement of orders, provides as follows: (5) The pronouncement may be in any of the following manners:— (a) The Bench may pronounce the order immediately upon the conclusion of the hearing. (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the

Bench shall give a date for pronouncement. In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board. As such, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein it was inter alia, observed as under:

"We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment".

In the rule so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether or not the passing of this order, beyond a period of ninety days in the case before us was necessitated by any "extraordinary" circumstances.

34. We find that the aforesaid issue after exhaustive deliberations had been answered by a coordinate bench of the Tribunal viz. ITAT, Mumbai 'F' Bench in DCIT, Central Circle-3(2), Mumbai Vs. JSW Limited & Ors. [ITA No. 6264/Mum/18; dated 14/05/2020, wherein it was observed as under:

"Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. The epidemic situation being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure...". The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club Vs DIT* [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High

Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by the Hon'ble High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case."

We have given a thoughtful consideration to the aforesaid observations of the tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockout was in force shall stand excluded for the purpose of working out the time limit for pronouncement orders, as envisaged in Rule 34(5) of the Appellate Tribunal Rules, 1963.

35. Resultantly, the appeal filed by the assessee in ITA No. 1459/Mum/2018 is partly allowed in terms of our aforesaid observations, while for the appeal in ITA No. 1460/Mum/2018 is dismissed.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-
(Pramod Kumar)
VICE PRESIDENT
मुंबई Mumbai; दिनांक 16.07.2020
P.S Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT,**
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