IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.3522/AHD/2016

(निर्धारणवर्ष / Assessment Years: (2007-08)

(Virtual Court Hearing)

Ashish Natvarlal Vashi, Tolat Falia, At & Post. Kaccholi, Taluka Gandevi, Dist: Navsari, Navsari - 396370.	**Vs.**	The Income Tax Officer, Ward-1, Navsari.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **ABYPV5202C**		
(Assessee)		**(Respondent)**

Assessee by : Shri Rasesh Shah, CA

Revenue by : Ms Anupama Singla, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 11/03/2021

घोषणाकीतारीख/Date of Pronouncement: 19/04/2021

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee, pertaining to the Assessment Year (AY) 2007-08, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals), Valsad [in short "the ld. CIT(A)"] in Appeal No. CIT(A)/VLS/76/15-16/1053, dated 05.10.2016, which in turn arises out of an order passed by Assessing Officer (in short "the AO) under section 144 r.w.s 147 of the Income Tax Act, 1961 [hereinafter referred to as the "Act"]. The grievances raised by the assessee are as follows:

> *"1. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income-Tax (Appeals) has erred in confirming the action of assessing officer in making addition of Rs.22,77,550/- on account of unexplained cash deposit in bank account u/s 69A of the Act.*
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> *2. It is therefore prayed that above addition made by Assessing Officer and confirmed by CIT(A) may please be deleted.*
>
> *3. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."*

2. Assessee has also raised additional grounds of appeal before the Bench by way of letter dated 20.10.2020 which is reproduced below:

> *"On the facts and in circumstances of the case as well as law on the subject, learned Assessing Officer has erred in in re-opening assessment u/s 147 by issuing notice u/s 148 of the IT. Act, 1961."*

3. At the outset, ld Counsel for the assessee requested the Bench that additional ground raised by the assessee goes to the root of the matter therefore it should be adjudicated first. In such additional ground, the assessee has challenged the validity of reopening the assessment under section 147 of the Act.

4. Ms. Anupama Singla, Ld DR for the Revenue objected the additional ground raised by the assessee and stated before the Bench that at this stage the assessee cannot raise the additional ground. She pleaded that during the appellate proceedings, the assessee has not challenged the reopening of assessment under section 147 of the Act, therefore, now before this Tribunal, the assessee cannot make a fresh ground to argue on reopening proceedings.

5. We have heard both the parties on this preliminary issue and note that during the assessment proceedings, Assessing Officer has issued notice under section 148 of the Act. The assessing officer, vide para 2 of his assessment order, has stated that in response to notice under section 148 of the Act, the assessee has not furnished his return of income in the prescribed time.

However, we note that assessee has furnished the return of income in response to notice under section 148 of the Act stating that the original return was filed by assessee on 01.01.2008 and the said return of income may be treated, as if, the return filed in response to notice under section 148 of the Act, *vide* paper book page no.3, letter submitted by the assessee before the assessing officer. We note that the issue relating to the re-assessment proceedings was there before the assessing officer and we note that the said issue raised by the assessee in additional grounds is a purely legal objection going to the root of

the jurisdiction of the matter and in view of the Hon'ble Apex Court judgment in the case of NTPC Vs CIT(1998) 229 ITR 383 (SC) it can be raised at this stage even for the first time. The Hon'ble Supreme Court while dealing with ground raised before the ITAT for the first time relating to legal issue has held that Tribunal should not be prevented from considering questions of law arising in assessment proceedings although not raised earlier. It was also held that under section 254 of the Act the Tribunal has jurisdiction to examine a question of law which though not arose before lower authorities but arose before it from facts as found by lower authorities and having a bearing on tax liability of assessee. Therefore, we do not agree with contention of ld DR for the Revenue to the effect that assessee can not raise this legal issue first time before the Tribunal. Since the additional ground raised by the assessee challenging the validity of reassessment proceedings is a legal issue which goes to the root of the matter and no further inquiry is needed for deciding the said legal issue as all facts are already on record, hence we admit the said additional ground of appeal of the assessee for adjudication.

6. Facts of the case which can be stated quite shortly are as follows: Before us, assessee is an individual. As per AIR information available with the department, it was noticed by the assessing officer that the assessee has deposited cash of Rs.22,77,550/- in his saving bank account of ICICI Bank **during the Financial Year 2006-07, relevant to Assessment Year 2007-08 and the assessee has not furnished any return of income for Assessment Year 2007-08.** Therefore, the assessee`s case was reopened under section 147 of the Income Tax Act. The notice under section 148 of the Income Tax Act was issued on 26/03/2014 and duly served upon the assessee on 28/03/2014.
In response to the notice issued under section 148, the assessee has not furnished his return of income in the prescribed time, as held by the assessing officer, vide para 2 of assessment order. The notice under section 142(1) of the Act, was issued on 05/09/2014 and served upon the assessee, however, the assessee has not furnished any details/information, in response to notice issued

under section 142(1) of the Income Tax Act. Therefore, assessing officer proceeded to make the assessment under section 144 of the Income Tax Act.

7. As per AIR/CIB information and bank statement received from the bank in response to notice issued under section 133(6) of the Act it was noticed by the assessing officer that the assessee has deposited cash of Rs.22,77,550/- in his saving account of ICICI Bank. The assessee has failed to furnish the source of cash deposit in saving bank account of ICICI Bank along with supporting evidences. Therefore, assessing officer made addition of Rs.22,77,550/- as unexplained cash deposits, under section 69 of the Income Tax Act.

8. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Ld. CIT(A) who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

9. Shri Rasesh Shah, Learned Counsel for the assessee contends that reasons recoded by the assessing officer are itself bad in law. Learned Counsel pleads that reasons so recorded by the Assessing Officer under section 147 of the Act does not show application of his mind. Merely cash deposit in a saving bank account does not show that income has escaped assessment. The process of reasoning is absent, and these reasons were not recorded on standalone basis therefore reopening made by the Assessing Officer may be quashed.

10. However, the ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and is not being repeated for the sake of brevity.

11. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record.

We note that one of the reasons for reopening the assessment, which is mentioned in the assessment order is that assessee has not filed his return of income, vide para No.1 of assessment order, wherein the assessing officer states as follows:

"During the Financial Year 2006-07, relevant to Assessment Year 2007-08, the assessee has not furnished any return of income for Assessment Year 2007-08".

Therefore, the assessee`s case was reopened under section 147 of the Income Tax Act.

However, the real fact is that the assessee has filed his return of income *vide* paper book page no.7 wherein the assessee submitted the copy of the income tax return for AY.2007-08, therefore one of the reasons for reopening the assessment under section 147 of the Act that assessee has not filed return of income is not correct, therefore the reasons recorded by the Assessing Officer on this count is defective and has to fail.

12. In order to examine the validity of reopening the assessment under section 147/148 of the Act, let us, first of all, we should examine the reasons for reopening the assessment, which is placed at paper book page no.5, and the same is reproduced below:

> *"11.* ***Reasons for the belief that income has escaped assessment:***
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> *In this case the assessee has cash deposit Rs.22,77,550/- in ICICI Bank. A query letter was issued to the assessee on 03.01.2014 requesting the assessee to furnish copy of return of income filed for AY.2007-08 with necessary evidence of cash deposit. The letter was duly served upon the assessee. The assessee has not replied till this date. In this case the A.Y. for 2009-10, 2010-11 & 2011-12 has been finalized and unexplained cash has been added in his total income.*
>
> *Considering the above facts, the assessee has no comments for reply. It is seen that assessee's cash-deposit is genuine or not since no evidence on records.*
>
> *Therefore, I have reason to believe that income of the assessee exceeding Rs.1 lacs for the accounting period 2006-07 relevant to A.Y. 2007-08, has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.*

Place: Navsari
Date: 24.03.2014

(J.C. Dhorawala)
Income –tax Officer, Ward-1
Navsari"

13. Now, we shall analyze the above reasons recorded by the Assessing Officer. We note that in the reasons recorded by the Assessing Officer it is mentioned that assessee has deposited cash to the tune of Rs.22,77,550/- in ICICI Bank. The assessee did not file necessary evidence of cash deposit, therefore assessing officer presumed that income has escaped assessment to the extent of cash deposit of Rs. 22,77,550/-.

We note that Assessing Officer has opined that an income of Rs. 22,77,550/- has escaped assessment of income because the assessee has Rs 22,77,550/- in his bank account but then such an opinion proceeds on the fallacious assumption that the bank deposits constitute undisclosed income, and overlooks the fact that the sources of deposit need not necessarily be income of the assessee. The amount deposited in the bank account may be out of sale proceeds of investments, property or agricultural income of the assessee which may be exempted under the Income Tax Act. Of course, it may be desirable, from the point of view of revenue authorities, to examine the matter in detail, but then reassessment proceedings cannot be resorted to only to examine the facts of a case, no matter how desirable that be, unless there is a reason to believe, rather than suspect, that an income has escaped assessment.

Thus, just to reopen the assessment, based on the cash deposits would not make the Revenue's case strong, because mere fact that these cash deposits have been made in a bank account, which according to us do not indicate that these deposits constitute an income which has escaped assessment. Such cash deposit may be out of past savings. The above reasons recorded for reopening the assessment do not make out a case that the assessee was engaged in some business and has not been filed return of income. Therefore, the cash deposit in

the bank account could not be basis for holding the view that income has escaped assessment. The assessee may have deposited the cash out of his sale of capital asset, sale of property and sale of investment etc. Therefore, reasons recorded by the Assessing Officer are not valid and hence the reassessment proceedings initiated based on the reasons recorded is bad in law. We note that on the similar facts the Co-ordinate Bench of Surat in the case of Rinakumar A. Shah (in ITA No.172/AHD/2017 for AY.2007-08, order dated 30.04.2019, held the reassessment proceedings an invalid. The findings of the Coordinate Bench are reproduced below:

> *"10. We have heard the rival submissions and perused the relevant material on record. The learned counsel for the assessee has alleged that the AO in his reason record for reopening of assessment stated that the assessee has not filed any return of income for the assessment year under consideration whereas the assessee has duly filed return of income for the assessment year under consideration. Therefore, the AO has assumed wrong facts, hence, reassessment proceeding are liable to be quashed. In order to appreciate the facts in proper perspective, it would be relevant to reproduce the reason recorded by the AO which are appearing at Paper Book Page No. 72-73 as under:-*
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> *"In this case AIR data has been generated from ITD application and it is noticed that during F.Y. 2006-07 relevant to A.Y. 2007-08, the assessee has deposited Rs. 37,10,70/- in bank account. On verification of the record, it is found that the assessee has not filed his Return of Income. The failure on the part of the assessee to make a return u/s. 139 of I.T. Act, the income chargeable to tax to the extent of Rs. 37,10,700/- has escaped assessment within the meaning of sec. 147 of the Act. I have, therefore, reason to believe that income of Rs.37,10,700/- has escaped assessment within the meaning of section 147 of I. T. Act. It is therefore, necessary to initiate action u/s.147 of I.T. Act, 1961 in the case of the assessee for A.Y. 2007-08."*
>
> *11. The perusal of above reasons would show that the AO has proceeded to reopen the assessment on the ground that the assessee has not filed his return of income and the assessee did not disclose cash deposits of Rs.37,10,700/- in bank account. However, we find that the assessee did file his return of income on 21.11.2007, i.e. before issue of notice under section 148 of the Act on 21.03.2014. Further, the addition was made on account of cash deposits in bank account was at Rs.80,77,695/- after obtaining copy of bank account from bank authorities under section 133(6) of the Act during the course of assessment proceedings. These facts would reveal that both the grounds of reopening of assessment are factually incorrect as it is undisputed fact that the assessee has did file return of income for the assessment year under consideration. Further, the cash deposits in bank account were at Rs.80,77,695/- and not at Rs.37,10,700/- as mentioned in reasons for reopening of assessment and show-cause notice issued for making addition*

meaning thereby that the AO was not gone through the bank account and notice under section 148 of the Act was issued for making roving enquiries without verification of record. Thus, the notice under section 148 of the Act was issued without verification of assessment record and return of income filed by the assessee. Therefore, relying on the decision of Hon'ble Gujarat High Court in the case of Mumtaz Haji Mohmad Memon v. ITO Ward- 6(1) (1) Ahmedabad [SCA No. 21030 of 2017-dated 21.03.2018] (supra) the notice for reopening of assessment is liable to be quashed. The Hon'ble High Court observed as under:-

"However, on verification from ITD system, it is seen that the assessee has not filed return of income for A.Y. 2010-11. Since, the assessee has not filed return of income, capital gain earned on the sale of immovable property has not been offered for taxation by the assessee. Therefore, the property sale transactions made by her during the financial year 2009-10 are unexplained/undisclosed. In view of the above facts, the AO had reason to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the IT for A.Y. 2010-11 by an amount of Rs.39, 65,000/-and it is a fit case for reopening the assessment for A.Y. 2010-11." The Honourable Court observed that "11. In this context, we have noted that the reasons proceeded on two fundamental grounds. One, that the property in question was sold for a sum of Rs.1,18, 95, 000/- and two; the assessee has not filed the return that therefore his one 3rd share out of the sale proceeds was not offered to tax. Both these factual grounds are totally incorrect as is now virtually admitted by the Revenue. It is undisputed that the assessee had actually filed the return of income for the said assessment year and income also offered his share of declared sale consideration to tax as capital gain. The Assessing Officer may have dispute with respect to the computation of such capital gain, he cannot simply dispute the fact that the assessee did not file the return. Importantly, even the second factual assertion of the Assessing Officer in the reasons recorded is totally incorrect. He has referred to said sum of Rs.1,18,95,000/-as a sale price of the property. The Assessee had produced before the Assessing Officer, the sale deed in which, the sale consideration disclosed was at Rs. 50 lakhs." The Hon`ble High Court, in view of the foregoing, observed that reasons recorded, in fact, ignored that fact that the sale consideration as per the sale deed was Rs. 50 lakhs and that the assessee had by filing of the return offered his share of such proceeds by way of capital gains. Accordingly, the Hon`ble High Court has quashed the impugned notice for reopening of assessment. Similarly, in the case of the assessee, the assessee filed the return of income and comment figures of cash deposits were not before the AO. Hence, facts of said case are squarely applicable to the case of the assessee"

12. We also note that the AO had not examined the cash deposits in bank account on the basis of which reopening of assessment has been made as the said bank account were not in his possession at the time of issue of notice under section 148 of the Act. Hence, the reasons recorded for reopening of assessment are not valid in the light of ratio laid down in the case of ITO & Ors v. Lakshmani Mewal Das [1976] 103 ITR 437 (SC) wherein it was held that the powers of ITO to reopen the assessment, though wide, are not plenary. The words of statute are "reason to believe" and not "reason to

suspect" From the copy of acknowledgement of return of income placed at Paper Book Page No. 29-32, we are satisfied that the assessee has did file return of income for the assessment year under consideration whereas the AO has proceeded on the wrong premises that the assessee had never filed return of income for the relevant assessment year. Thus, respectfully following the ratio of judgement of Hon`ble Jurisdictional High Court in the case of Sunrise Education Trust v. Income Tax Officer [2018] 92 Taxman 74 (Gujarat) (supra) wherein it was held that when the AO in the reasons recorded proceeded on the erroneous footing that the assessee has not filed return of income at all and when it is not in dispute that the assessee did file the return of income for the assessment year under consideration, which was duly acknowledged by the department, then, it has to be held that the entire reasoning thus proceeded on the wrong premises that the assessee had never filed the return. This, itself would be sufficient to annual the notice of reopening the assessment. In view of the above and in the light of ratio laid down by the Hon`ble High Courts of Gujarat as quoted above and respectfully following the same, we hold that entire reasoning recorded by the AO for initiation of reassessment proceeding and issuance of notice under section 148 of the Act was on the wrong and incorrect facts that the assessee has never filed the return of income, and in fact, it was filed. This view is further supported by decision of Co-ordinate Bench of Surat Tribunal in the case of Vishal Dilip Rai v. ITO Valsad [I.T.A.No. 1863/Ahd/2016/SRT dated 26.09.2018] in which following the decision of Hon`ble High Court of Gujarat in the case of Sunrise Education Trust v. Income Tax Officer [2018] 92 Taxman 74 (Gujarat) quashed the reopening of assessment as the reasons mentioned that the assessee has not filed return whereas the assessee did file the return of income. Therefore, are we are inclined to hold that the initiation of reassessment proceeding u/s.147 of the Act and notice under section 148 of the Act of the Act and all subsequent proceedings and orders have been issued, conducted, passed without having valid jurisdiction, and therefore, the same are bad-in-law and hence, we quash the same. Accordingly, legal ground no. 1 above of the assessee is allowed and notice under section 148 of the Act with impugned reassessment proceeding of the AO /CIT (A) are quashed."

14. On the similar facts, the reassessment proceedings was quashed by the Co-ordinate Bench in the case of Shri Hashmukhbhai B. Patel (in ITA No. 193/SRT/2019 for AY.2012-13) order dated 24.07.2019 wherein it was held as follows:

"3. We have heard the Learned Representatives of both the parties.

4. Learned Counsel for the Assessee referred to PB-9 which is reasons for reopening of the assessment. The same reads as under:

Reason for the brief that the income has escaped assessment:-

As per AIR information, the assessee has deposited cash amounting to Rs.10,07,400/- in his saving bank account during the F.Y. 2011-12 relevant to

the A.Y. 2012-13. On verification of the details in ITD, it is seen that the assessee has not filed his return of income for the A.Y. 2012-13. Therefore a query letter dated 03/02/2017 was issued to the assessee to furnish the copy of return of income filed for the A.Y. 2012-13. The same was duly served upon the assessee by Speed Post on 09/02/2017. The proof of the same has been placed on record. However, the assessee has not furnished any reply in this regard. Thus, it is noticed from details available on records that the assessee has deposited cash of Rs.10,07,400/- from his undisclosed income and the assessee has not offered the same for tax.

In view of the above, the assessee's case falls within the explanation 2(a) of the section 147 of the I.T. Act, i.e. "where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax," As such, I have a reason to believe that an income of Rs.10,07,400/- as stated above has escaped assessment in the hand of the assessee for the year under consideration. I am satisfied that the case of the assessee is a fit case for action u/s. 147 of the Act by reason of assessee's failure to disclose fully and truly all the material facts necessary for assessment.
Place : Navsari
Date : 07.03.2017.

Sd/- S.D. Parmar
Income Tax Officer, Ward-2,
Navsari."

4.1. He has submitted that mere cash deposit in the bank account would not disclose escapement of income. He has submitted that there was no taxable income in the case of assessee, therefore, no return was filed. No proceedings were pending before A.O, therefore, query letter dated 03.02.2017 could not have been issued to the assessee. It was, therefore, illegal and there is no application of mind by the A.O. Similar issue have been considered by the ITAT, Delhi SMC-Bench in the case of Mahavir Prasad vs. ITO in ITA.No.924/Del./2015 for the A.Y. 2007-2008 in which reopening of the assessment have been quashed vide Order dated 09.10.2017. The relevant finding in para-9 of the Order is reproduced as under:

"9. After going through the reasons recorded by the ITO, Ward-2, Rewari, I am of the view that there is no nexus between the prima facie inference arrived in the reasons recorded and information; the information was restricted to cash deposits in bank account but there was no material much less tangible, credible, cogent and relevant material to form a reason to believe that cash deposits represented income of the assessee; that even the communication dated 24.1.2012 could not be made a basis to assume jurisdiction in view of the fact that such an enquiry letter is an illegal enquiry letter and thus cannot be relied upon; that the proceedings initiated are based on surmises, conjectures and suspicion and therefore, the same are without jurisdiction; that the reasons recorded are highly vague, far-fetched and cannot by any stretch of imagination lead to conclusion of escapement of income and there are merely presumption in nature; that it is a case of

mechanical action on the part of the AO as there is non-application of mind much less independent application of mind so as to show that he formed an opinion based on any material that such deposits represented income. Keeping in view the facts and circumstances of the present case and the case law applicable in the case of the assessee, I am of the considered view that the reopening in the case of the assessee for the asstt. Year in dispute is bad in law and deserves to be quashed."

5. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that A.O. received information that assessee made cash deposit in the bank account which is not explained, therefore, reopening of the assessment is valid in the matter.

6. We have considered the rival submissions and perused the material on record. It is well settled Law that validity of the re-assessment proceedings is to be determined with reference to the reasons recorded by A.O. for reopening of the assessment. The reasons for reopening of the assessment are reproduced above in which the A.O. has mentioned that as per AIR information assessee made cash deposit of Rs.10,07,400/- in his S.B. Account. A.O. has issued query letter dated 03.02.2017 asking the assessee to furnish copy of the return of income and explanation of cash deposit. Since the assessee did not respond to the query letter of the A.O, A.O. presumed that there is escapement of income. It is an admitted fact that no return of income was filed for the assessment year under appeal and at the time of issue of query letter by the A.O. no proceedings were pending before A.O, therefore, there was no justification for the A.O. to issue query letter to the assessee asking the explanation of assessee. Since query letter was illegal, therefore, assessee was not bound to reply to the same. It may also be noted here that cash deposit per se would not be income of the assessee. An identical issue has been decided by the ITAT, Delhi SMC Bench in the case of Mahavir Prasad (supra). Thus, the A.O. in the absence of reply from the side of the assessee which assessee was not bound to reply, merely presumed that there is escapement of income. There is, thus, no application of mind on the part of the A.O. to record reasons as per Law. The initiation of re-assessment proceedings are beyond the jurisdiction of the A.O. into the matter. We, therefore, do not subscribe to the view of the Ld. D.R. that reopening of the assessment is valid into the matter. We, accordingly, set aside the Orders of the authorities below and quash the reopening of the assessment under section 147/148 of the I.T. Act. Resultantly, the entire additions stand deleted. Appeal of assessee allowed."

15. It is abundantly clear from the above noted precedents that Assessing Officer in the reasons recorded proceeded on the erroneous footing that the assessee has not filed return of income at all and when it is not in dispute that the assessee did file the return of income for the assessment year under consideration, which was duly acknowledged by the department, (That is, the assessee has filed the return of income which is placed on paper book page

no.7), then, it has to be held that the entire reasoning thus proceeded on the wrong premises that the assessee had never filed the return. This, itself would be sufficient to annual the notice of reopening the assessment. Besides, mere cash deposit in the bank account would not disclose escapement of income. The assessee might have deposited the cash out of his sale of capital asset, sale of property and sale of investment, agricultural income etc. Therefore, we are inclined to hold the reassessment proceedings under section 147 of the Act as bad in law and hence, we quash the reassessment proceedings.

16. As the reassessment itself is quashed, all other issues on merits of the additions, in the impugned assessment proceedings, are rendered academic and infructuous.

17. In the result, the appeal of the assessee is allowed.

Order is pronounced on 19/04/2021 by placing result on Notice Board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सूरत /Surat
दिनांक/ Date: 19/04/2021
SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS
ITAT, Surat