IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI PAVAN KUMAR GADALE, JM

ITA No.673/Mum/2017
(Assessment Year: 2008-09)

DCIT-6(2)(1) Room No.563, Aaykar Bhawan M.K.Road, Churchgate Mumbai-400 020	Vs.	M/s. Ceat Ltd. RPG House, 463 Dr. Annie Besant Road, Worli Mumbai-400 030
		PAN/GIR No. AAACC1645G
(**Revenue**)	:	(**Assessee**)

&

ITA No.74/Mum/2017
(Assessment Year: 2008-09)

M/s. Ceat Ltd. RPG House, 463 Dr. Annie Besant Road, Worli Mumbai-400 030	Vs.	ACIT, Range-6(2)(1) Aaykar Bhawan M.K.Road, Churchgate Mumbai-400 020
PAN/GIR No. AAACC1645G		
(**Assessee**)	:	(**Revenue**)

Assessee by	:	Shri Vijay Mehta
Revenue by	:	Shri V. Sreekar & Shri Manprit Duggal

Date of Hearing	:	13.08.2021
Date of Pronouncement	:	22.09.2021

ORDER

Per Shamim Yahya, A. M.:

There are cross-appeals filed by the assessee and the Revenue directed against the order of the CIT(A)-12, Mumbai dated 01.01.2016 pertaining to the Assessment Year 2008-09, which in turn has arisen from an order passed by the Assessing Officer dated 31.03.2015 under Section 143(3) r.w.s 147 of the Income Tax Act 1961 (in short "the Act").

2. The ground of appeal in assessee's appeal read as under :-

Ground No. 1:
On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in affirming the action of A.O. of reopening the assessment under section 147 of the Act and holding that it did not find any infirmity in the action of A.O for re-opening the assessment year under consideration. The appellant prays that the reopening of assessment u/s.147 of the Act may be declared as bad in law and the reassessment order may please be cancelled.

Ground No. 2:
On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in affirming the action of the A.O. in making addition of Rs.10,19,80,709/- in respect of interest on income tax refund to the appellant's total income.

3. The assessee has also raised an additional ground. This ground read as under :-

1. On the facts and in circumstances of the case and in law the Ld. CIT(A) ought to have held that the Education cess and higher and secondary education cess paid by the appellant is allowable as deduction while computing income under the head "Profits and Gains of Business or Profession".

4. The ground of appeal in Revenue's appeal read as under :-

1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs. 332,65,62,293/- on account of Capital Gain".

2. 'On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred **in** not appreciating the fact that scheme of Demerger of Investment undertaking business activity has been carried out under the provision of companies Act 1956 and the said Scheme is not as per the provisions of the Income Tax Act, 1961 hence, the demerger of the above activity of the company does not fall within the ambit of Section 47(vib) r.w.s. 2 (19AA) of the I T Act 1961."

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not appreciating that the property in the nature of share transferred on demerger to M/s CHI Investment Ltd. was merely a combination of assets and liabilities and did not constitute a business activity or a unit or a division of an undertaking as envisaged in explanation 1 to section 2(19AA) of the Act."

4. "On the fact and in the circumstances of the case the order relied upon by the CIT(A) in the case of Indo Rama Textile Ltd. (Delhi High Court) the decision was not given in Income tax case."

5. Briefly put, the relevant facts are that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter alia*, engaged in the business of manufacturing and sale of automotive tyres. The assessee filed a return of income on 20.09.2008 declaring a total income of Rs.92,29,76,730/-. The

original assessment was completed vide order passed under Section 143(3) of the Act dated 28.12.2010 assessing the total income at Rs.130,69,49,382/-. Subsequently, a notice dated 08.03.2013 was issued under Section 148 of the Act for reopening the assessment on the ground that interest on income tax refund was not offered to tax. During the pendency of the said proceedings, another notice dated 25.03.2013 was issued under Section 148 of the Act for the reason that assessee is not eligible for benefit of Section 47(vib) r.w.s 2(19AA) of the Act and accordingly, capital gains to the extent of Rs.318 crores had escaped assessment. The reasons for reopening recorded under both the notices were communicated to the assessee vide letter dated 06.12.2013. The assessee filed its objections against the reopening of assessment, however, the Assessing Officer, without disposing off the objections, passed an order under Section 147 r.w.s. 143(3) of the Act dated 03.03.2014. The assessee filed a Writ Petition before the Hon'ble Bombay High Court against the said order and against issuing two notices since the Assessing Officer had passed the order without disposing off the objections of the assessee. The Hon'ble Bombay High Court vide its order dated 14.07.2014 in Writ Petition No. 980 of 2014 set-aside the order passed by the Assessing Officer dated 03.03.2014 and directed the Assessing Officer to pass a fresh order after disposing off the objections filed by the assessee. The assessee filed its objections vide letter dated 25.07.2014 before the Assessing Officer. The same were disposed off by the Assessing Officer vide order dated 19.12.2014. Subsequently, the Assessing Officer passed the impugned assessment order under Section 143(3) r.w.s 147 of the Act dated 31.03.2015 wherein addition on account of interest on income tax refund and long term capital gains, rejecting the demerger under Section 47(vib) r.w.s2(19AA) of the Act, was made. This order is the subject matter of dispute in the captioned proceedings. Before CIT(A), assessee reiterated this objections raised before the Assessing Officer with respect to the validity of reassessment proceedings.. It was further submitted that no fresh material was available with the

Assessing Officer for reopening the assessment and hence, the reopening made by the Assessing Officer was bad in law. The CIT(A) did not agree with the contention of the assessee and upheld the reopening of assessment. The assessee also assailed the addition on merits. The CIT(A) has upheld the addition on account of interest on income-tax refund, while the addition on account of capital gain has been deleted. Aggrieved by the order of the CIT(A), both assessee and Revenue are in appeal before us.

6. We have heard both the parties and perused the records. First, we shall take up the Grounds raised by the assessee pertaining to the validity of assessment initiated u/s.147/148 of the Act. Before us, learned counsel of the assessee Shri Vijay Mehta submitted that reopening of assessment by Assessing Officer by issue of notice under Section 148 of the Act dated 08.03.2013 is bad in law. A perusal of the reasons recorded for reopening show that the Assessing Officer has sought to reopen the assessment on the ground that interest on income tax refund, which was credited to the Profit & Loss Account, was not offered to tax. It is explained that this fact was very much in the knowledge of the Assessing Officer while passing the original order under Section 143(3) of the Act dated 28.12.2010; it was also submitted that the amount of Rs.1503.65 lakhs mentioned in the reasons is available in the financial statements of the assessee for the year ended 31.03.2007. The said amount is the aggregate of excess Provision of income tax refund of Rs.455.23 lakhs and interest on income tax refund of Rs.10,48.42 lakhs appearing in Schedule 20 of the financial statements. It was further submitted that during the course of original assessment proceedings, it was specifically explained to the Assessing Officer, vide letter dated 15.12.2010. In response to a specific query that, the interest on income tax refund has been reduced in the computation of income. Hence, this fact was known to the Assessing Officer while passing the original assessment order under Section 143(3) of the Act. The Learned counsel of the assessee further submitted that for reopening the assessment under Section 148

of the Act, the Assessing Officer must have a reason to believe that income chargeable to tax has escaped assessment. However, reopening on the same set of facts, in absence of any tangible material in possession of Assessing Officer is not valid. It was contended that between the date of passing the order under Section 143(3) of the Act and the date of issuance of notice u/s 148 of the Act, no new tangible material came in the possession of the Assessing Officer, hence the reopening of assessment based on the notice dated 08/03/2013 is bad in law. In support of the above, reliance was placed on the judgment of the Hon'ble Bombay High Court in case of *Asian Paints v. Dy. CIT 308 ITR 195 (Bom.)* and decision of CIT Vs. Jet Speed Audio Pvt. Ltd. (ITA No. 285 of 2013 vide order dated 28.1.2015). At this stage, reference has been made to the reasons recorded for issuance of 1st notice u/s 148 of the Act dated 08.03.2013, which reads as under:-

> "The assessee company, during the year, has credited Profit & Loss Account by Rs.1503.65 lakhs under the head refund & interest on income tax refund. Interest on income tax refund has not been offered to tax. Therefore, I have reason to believe that income chargeable to tax has escaped assessment due to failure on part of the assessee to disclose truly all material facts necessary to assessment."

7. On merits, it was submitted by the learned Counsel of the assessee that interest on income tax refund received by the assessee cannot be taxed in the current year as the assessee follows mercantile system of accounting. It is submitted that in the refund computation the date of grant of refund is 12.03.2007 which falls in assessment year 2007-08, and, thus the income pertains to period up to March 2007. It is submitted that interest on income tax refund is taxable in the year in which it is granted to the assessee. In the present case, the interest was granted on 12.03.2007, i.e. in Assessment Year 2007-08, hence the same cannot be taxed in the current year. In order to support the said contention, reliance is placed on the order of the Tribunal in case of *Hindustan Unilever Ltd v. Addl. CIT in ITA No. 7868/Mum/2010* wherein the Tribunal, after relying on the order of the Special Bench of the Tribunal in the case of *Avada Trading Co. (P) Ltd v ACIT, 100 ITD*

131 (SB)(Mum-Trib), held that interest on income tax refund is taxable in the year in which it is granted.

8. It was next argued that during the pendency of proceedings arising from 1st notice, the Assessing Officer issued another notice under Section 148 of the Act dated 28.03.2013. It is a well-settled position of law and an admitted position that a second notice of reopening during the pendency of first one is non-est in the eyes of law. It is contended that the aforesaid is impliedly accepted by the Department, if one goes by the stand of the Assessing Officer in the Writ Petition filed by the assessee before the Hon'ble Bombay High Court. It was pointed out that the assessee filed a Writ Petition challenging the order passed by the Assessing Officer under Section 143(3) r.w.s. 147 of the Act dated 03.03.2014, wherein the respondent, Department filed an affidavit, wherein the Department has accepted that for making addition in respect to the issue mentioned in the second notice, the Assessing Officer has invoked Explanation 3 to Section 147 of the Act. On this basis, it is canvassed, the validity of the reassessment has to be listed on the basis of this 1st notice issued u/s 148 of the Act, dated 08/02/2013. In other words, as per, learned Counsel of the assessee if the plea of the assessee that reopening on the basis of notice dated 08.03.2013 (1st notice) is bad in law, then the assessment order would not survive since the same is made in pursuance to proceedings arising from the 1st notice. He further submitted that the aforesaid would prevail, even if it is held that the 2nd notice issued under Section 148 of the Act is valid.

9. Insofar as, the 2nd notice issued on 25/03/2013 is concerned, it was explained that the Assessing Officer has sought to reopen the assessment on the ground that the capital gains arising on demerger have not been offered to tax. The reasons for issue of 2nd notice have been referred to which read as under: (as per letter of Assessing officer dated 06/12/2013):-

> "In the A.Y. 2008-09 it is observed that M/s, CHI Investments Ltd. demerged from assessee company. It resulted in capital gains arising to the tune of Rs.318 crores in the hands of the assessee company which have not been offered to tax. M/s. Ceat Ltd. (demerged company) had demerged its investments to M/s. CMS Investments Ltd., then a scheme of arrangement approved by Hon'ble Bombay High Court w.e.f 1/7/2007. As per the scheme, shares of non-tyre business were hived off from M/s, Ceat Ltd. to M/s. HI Investments Ltd. As per annual reports Of the assessee company for F.Y. 2005-06 and 2006-07, it is seen that M/s. Ceat Ltd. is engaged in one segment "tyre business". No specific/dedicated employees were earmarked to look after investment portfolio. No fresh investment/sale was made in investment portfolio between F.Y. 2005-06 to 2008-09. In a survey conducted by the Investigation Wing, statement of Mr. Paras Kumar Choudhary, M.D. of M/s. Ceat Ltd. was recorded. Also statement of Mr. Harsh Goenka was recorded. From the same it transpired that nature of shares which was demerged to CHI Ltd, was merely a combination of assets and liabilities and did not constitute a business activity or a unit or division of an undertaking as is envisaged in Explanation 1 to Section 2(19AA) of the I.T. Act. Even though the order of the Hon'ble Bombay High Court dated 23.11.2007 sanctioning this demerger under the Companies Act has mentioned about demerger of an investment undertaking the reference to the term 'undertaking' made by the Hon'ble Bombay High Court is under the provision of the Companies Act, 1956 and not as per the provisions of the Income Tax Act, 1961. Hence, this demerger does not fall within the ambit of sec.47(vib) r.w. section 2(19AA) of the I.T. Act.
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> Hence, transfer of shares of M/s. Ceat Ltd. to M/s. CHI Investments Ltd. attracts the provisions of Capital Gains. Therefore, I have reason to believe that income chargeable to tax has escaped assessment due to failure on part of the assessee to disclose fully all material facts necessary for assessment.

10. It was submitted that the fact that demerger took place in the current year was mentioned in the Annual Financial Statements of the assessee as well as in the Director's report for the year ended 31.03.2008 which were available with the Assessing Officer at the time of original assessment proceedings. The assessee had claimed demerger expenditure under Section 35DD of the Act and the said fact was mentioned in the Tax Audit report that was available with the Assessing Officer. It was further submitted that during the course of original assessment proceedings, the assessee vide letter dated 15.12.2010 furnished details to the Assessing Officer regarding allowability of claim of expenses relating to demerger. Hence, the Assessing Officer was aware about the fact that demerger had taken place during the year at the time of original assessment proceedings. It was also submitted that the decision of the Hon'ble Bombay High Court approving the scheme of demerger of investment undertaking of the assessee was available with

the Assessing Officer. No new material came to the knowledge of the Assessing Officer subsequent to the order passed under Section 143(3) of the Act dated 28.12.2010. In the absence of any new tangible material, reopening on the same set of facts is not permissible, and reliance in this regard was placed on the decision of the Hon'ble Bombay High Court in case of Asian Paints (supra) and Jet Speed Audio (supra).

11. The learned Counsel of the assessee further argued that the so-called fresh information like investment division not having employee, etc. are neither relevant nor contrary to information already available on record. The Assessing Officer in the reasons recorded has stated that the company formed after demerger was merely a combination of assets and liabilities and did not constitute business activity or a unit or division as envisaged in Explanation 1 to Section 2(19AA) of the Act. In this regard, it was submitted that the Hon'ble Bombay High Court vide their order dated 23.11.2007 approved the scheme of demerger and held that investment undertaking would be demerged from the assessee. It has further submitted that the business of assessee comprises of two undertakings i.e. tyre undertaking and investment undertaking, as noted by the Hon'ble High Court in the order dated 23.11.2007 (supra). It was submitted that the scheme of demerger is approved by the Hon'ble High Court after ensuring that same is not prejudicial to the interest of its members or public interest; that a notice was duly given to the Central Government, and it had a right to make objections to the scheme. Hence, it was submitted that if there was any objection of the Income-tax Department regarding the scheme, the same ought to have been raised prior to sanction of scheme by the Court. It was submitted that in the present case no objection was taken by the Income-tax Department regarding the scheme of demerger before the Hon'ble Bombay High Court and even against the order passed by the Hon'ble Bombay High Court. The Assessing Officer now cannot have a belief contrary to the order of the Hon'ble Bombay High Court. In order to support the said

contention, reliance was placed on the order of Kolkata Bench of the Tribunal in case of *Electrocast Sales India Ltd v. Dy. CIT [170 ITD 507 (Kol)]*. It was submitted that the Assessing Officer cannot entertain a belief that investment undertaking was not a separate undertaking of assessee, especially when no objection has been taken by the Department before the Hon'ble High Court at the time of approval of scheme of demerger.

12. It was further submitted that while reopening the assessment there was complete non-application of mind by the Assessing Officer. In the affidavit filed before the Hon'ble Bombay High Court in response to the Writ Petition filed by the assessee, the Department has stated in para no. 13 that information was received from Deputy Director of Income Tax (Inv.) Unit - VII(1), Mumbai vide letter dated 25.03.2013 that capital gains amounting to minimum of Rs.328 crores has arisen in hands of assessee and the same has not been offered to tax. It was submitted that on the very same day, the Assessing Officer issued notice under Section 148 of the Act and in the reasons, stated that capital gains of Rs. 318 crores has not been offered to tax by the assessee. It was submitted that the assessee repeatedly sought details from the Assessing Officer as to how he arrived at the figure of Rs.318 crores, however, the Assessing Officer has never clarified the basis on which he came to the belief that an income of Rs.318 crores has escaped assessment. Thus, reopening has been made in complete haste and without independent application of mind on the part of Assessing Officer while reopening the assessment.

13. The learned counsel submitted that in the scheme of demerger there was no transfer of assets by the company. The shareholders of the company decided to part with their rights in the company and hence, there was no transfer of capital asset by the assessee. It was further submitted that on account of demerger, no consideration has accrued to the assessee, hence it would not be possible to compute capital gain tax in absence of any consideration received by the assessee.

It was submitted that on these set of facts, no reasonable person would come to a belief that capital gain tax has escaped assessment.

14. The learned counsel submitted that in the order disposing-off the objections raised by assessee, the Assessing Officer has indeed recorded the objection taken by the assessee that no consideration accrued to the assessee under scheme of demerger However, the said objection of the assessee was not disposed off by the Assessing Officer. It was submitted that if the objections are not disposed off by the Assessing Officer, the reopening notice issued by the Assessing Officer is bad in law. In order to support the said contention, reliance was placed on the decisions of the Hon'ble Bombay High Court in case of *Shivalik Ventures (P) Ltd v. Dy. CIT (247 Taxman 226)* and *KSS Petron Pvt. Ltd. v. Asst. CIT in ITA No: 224 of 2014 dated 03.10.2016*. Accordingly, it was argued that the reopening by the Assessing Officer is bad in law.

15. Per contra, learned Departmental Representative submitted that the Assessing Officer has duly responded to all assessee objections. That assessee has already gone in Writ before High Court and the Assessing Officer has duly acted upon the order of High Court. Hence, he submitted that there is no infirmity in the reopening.

16. The facts with respect to Department's appeal in ITA No.673/Mum/2017 are that during the previous year, the assessee demerged its investment division to M/s CHI Investments Ltd. through a scheme of arrangement approved by the Hon'ble Bombay High Court w.e.f. 01.07.2007. The investment in shares was a non-tyre business of assessee having a book value of Rs.126.20 crores which had been hived off from assessee to M/s CHI Investments Ltd. The Assessing Officer was of the view that the investment in shares transferred by assessee to M/s CHI Investments was merely a combination of assets and liabilities and did not

constitute a business activity of the assessee or a unit or division or undertaking as envisaged in Explanation 1 to Section 2(19AA) of the Act. The Assessing Officer held that since the investment was not a separate undertaking of assessee, provisions of Section 2(19AA) were not satisfied and hence, the assessee was liable to pay capital gain tax on the said demerger.

17. Before the CIT(A), assessee submitted that the investment activity was a separate undertaking of the assessee and hence the provisions of Section 2(19AA) of the Act were satisfied. It was further submitted that the fact that investment unit was an undertaking of the assessee has also been accepted by the Hon'ble Bombay High Court vide order dated 23.11.2007. It was further submitted that M/s CHI Investments Ltd has earned profits in the first year of its operations. It was further submitted that no objection had been raised by the Regional Director, under the Companies Act, 1956 in respect of the scheme. In this context, reliance was placed on the decision of the Hon'ble Delhi High Court in case of *Indo Rama Textiles Ltd (212 taxman 462).*

18. The CIT(A) accepted the contention of the assessee that the investment undertaking was a separate undertaking of the assessee as envisaged in Explanation to Section 2(19AA) of the Act; and accordingly, the CIT(A) concluded that no capital gain tax liability would arise on account of demerger and deleted the addition made by the Assessing Officer.

19. Before us, ld. DR relied on the order of the Assessing Officer to contend that the assessee's case does not fall under Section 2(19AA) of the Act and, therefore, benefit of Section 47(vib) of the Act was not available to the assessee and the capital gain arising out of this transaction was chargeable to tax in the hands of the assessee. With regard to the order of the Hon'ble Bombay High Court, the ld. DR stated that term 'undertaking' referred to by the Hon'ble High Court is under the

provisions of Companies Act, 1956 and not Income-tax Act. He also referred and reiterated the various objection raised by the Assessing Officer in the assessment order. He submitted the same stands unrebutted.

20. In response, Learned counsel for the assessee defended the decision of the CIT(A) and submitted that the assessee filed a petition before the Hon'ble Bombay High Court for demerging its investment unit from the tyre business. It was submitted that the Hon'ble Bombay High Court in its order dated 23.11.2007 approved the scheme of arrangement of demerger wherein it was stated that existing business of assessee consists of two undertakings i.e. tyre undertaking and investment undertaking. It was submitted that the Hon'ble Bombay High Court has recognized the fact that assessee was having an independent investment undertaking. As per provisions of Section 394A of the Companies Act, 1956, before a scheme of demerger is approved, notice is to be given to the Central Government, wherein the Central Government can raise objections, if any, against the sanction of the scheme. It was submitted that the Central Government includes Income-tax Department, and if it had any objections to the scheme, the same could have been raised prior to sanction of scheme by the Court. Once the scheme is approved, it is implied that the same has been approved after considering the representations from the Government. In the present case, no objection was raised either by the Regional Director or Central Government against the scheme of demerger. Once the scheme is approved, the Department cannot contend that investment was not a separate undertaking of the assessee, especially in light of the fact that the same has been treated as a separate undertaking by the Hon'ble Bombay High Court. Reliance was placed on the decision of the Kolkatta bench of the Tribunal in case of *Electrocast Sales India Ltd v. Dy. CIT [170 ITD 507(Kol)]*.

21. It was submitted that in any case 'undertaking' is not defined under the Companies Act, 1956 or the Income-tax Act, 1961. It is submitted that the word

'undertaking' used in Explanation 1 to Section 2(19AA) of the Act includes part of undertaking and combination of assets and/or liabilities if it constitutes a business. There is no requirement regarding period of existence of undertaking prior to demerger. It was submitted that *'part of undertaking*' means newly set up undertaking can also be an undertaking which can be demerged. Therefore, the only requirement is that the resulting undertaking should be cohesive, self-contained and independent business unit. In the present case, post-demerger M/s CHI Investment Ltd was having an independent business unit, i.e. investment undertaking and, hence, it satisfies the condition of 'undertaking' as envisaged in Explanation 1 to section 2(19AA) of the Act. It was further submitted that the company has made profit in the first year of existence itself.

22. The learned Counsel of the assessee further countered the various aspects of Assessing Officer's order. The Assessing Officer has raised various objections in the assessment order to contend that investment unit of assessee is not a separate *'undertaking*'. First objection was that no separate employees or office or accounts of expenses with regard to the investment unit etc. In this regard, it was submitted that having an employee is not a legal requirement. It was submitted that even M/s CHI Investment Ltd. does not have any employees. It was submitted that all the investments are looked after by the Board of Directors before and after demerger. His next objection was no fresh investments made during financial year 2005-06 to 2008-09. It was submitted that major investments are in the nature of holding company. Further, it is not necessary that to constitute an investment undertaking one must make investments every year. It was submitted that managing the investments, which are in the nature of holding company, is also very important for an investment company. Third objection was no separate segmental reporting of investment segment. It was submitted that Assessing Officer has merely relied upon Note 21 in Schedule 20 to the financial statements of the assessee to contend that investment segment was not a separate activity of the assessee since the same

was not specifically mentioned. In this regard, it was submitted that Note 21 in Schedule 20 was based on AS-17 (segment reporting) wherein it is clearly stated that it is only essential to disclose "*reportable segments*" in the financial statements. It was submitted that the condition of reportable segment was not met for investment activity and hence, the same was not disclosed as a separate segment. Hence, it was submitted that investment activity was not shown as a separate segment. Forth objection was Scheme of demerger is an arrangement amongst family members of Goenka group. It was submitted that the Assessing Officer has not alleged that the transactions are unlawful. Merely because the transactions are within the same group, it cannot be concluded that the same are undertaken with a motive to evade tax unless some material is brought on record by the Assessing Officer. It was argued that, in any case, the said scheme has been approved by the Hon'ble Bombay High Court wherein no such objection has been raised.

23. The learned counsel made without prejudice argument that even if it is held that the demerger is not in accordance with the provisions of Section 2(19AA) of the Act, the capital gain tax would not arise in the hands of the company. It is submitted that detailed submissions were made in this regard before the Assessing Officer, which have been even noted by the Assessing Officer, however he has not dealt with this issue in his order. Further, submissions in this regard were also made before the CIT(A).

24. We have carefully considered the rival submissions and perused the materials on record. Firstly, we shall deal with the learned counsel challenge to reopening of assessment initiated vide notice u/s 148 of the Act dated 08.03.2013. Since the facts of the case are discussed in detail in earlier part of the order, the same are not again discussed for sake of brevity. Admittedly, the original assessment was completed under Section 143(3) of the Act vide order dated

28.12.2010. In the course of assessment proceedings, the assessee had submitted its financial statement to the Assessing Officer wherein at Schedule 20, the interest on income tax refund was reflected at Rs.10,48.42 lacs. Further, in response to the query raised in the course of original assessment proceedings, the assessee vide letter dated 15.12.2010 at Q.3. replied that interest on income tax refund has been reduced from income in the computation. Thus, this issue was very much considered by the Assessing Officer at the time of original assessment proceedings and it is not the case where the issue was not at all raised by the Assessing Officer. Nothing new has happened between the date of passing of original assessment order and the date of issuing notice under Section 148 of the Act as can been seen from the reason supplied by the Assessing Officer which categorically states that assessee has credited its Profit & Loss Account by Rs.1503.65 lacs under the head 'refund and interest on income tax refund' and since interest on income tax refund has not been offered to tax, he had reason to believe that income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose truly all material facts necessary for assessment. On a perusal of the reasons for reopening, it emerges that the Assessing Officer has gathered the information from the financial statement of the assessee and undisputedly the financial statement of the assessee was very much before the Assessing Officer at the time of original assessment and more so he had also inquired on this issue and assessee had replied to the same. Thus, no tangible material has come in position of the Assessing Officer which can lead to the inference that there is escapement of income due to the fault of the assessee. The action of the Assessing Officer, thus, clearly amounts to forming of new opinion on the very same set of facts which was already available on records, which is not permissible in law. The 'change of opinion' is not allowed. It is well settled law that the Assessing Officer cannot review his own order under the garb of reassessment. In this regard, it is pertinent to refer to the

decision of the Hon'ble Bombay High Court in case of *Asian Paints v. Dy. CIT 308 ITR 195, 198* wherein the Hon'ble Bombay High Court held as under:

> *"It is further to be seen that the Legislature has not conferred power on the Assessing Officer to review its own order. Therefore, the power under section 147 cannot be used to review the order. In the present case, though the Assessing Officer has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the Assessing Officer, nothing new has happened, therefore, no new material has come on record, no new information has been received, it is merely a fresh application of mind by the same Assessing Officer to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion.* The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator [2002] 256 ITR1 *referred to above, has taken a clear view that reopening of assessment under section 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under section 148."*
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> (underlined for emphasis by us)

25. It may also be gainful here to refer to the exposition of Hon'ble Bombay High Court in the case of Jet Speed Audio Pvt. Ltd. (supra) as under :-

> "We find that the impugned order of the Tribunal has rendered a finding of fact on the basis of material before it, in particular the fact that during original assessment proceedings a query was made with regard to the same issue which was responded to by the respondent - Assessee and on satisfaction of the same, the Assessing Officer had passed an assessment order. Therefore, reopening of assessment on an issue in respect of which a query was raised and responded to by the assessee would amount to a change of opinion. The tangible material being urged before us by Mr. Chhotaray, is the audit objections received by the Assessing Officer. However, as would be clear from the reasons reproduced hereinabove, there is no mention of any tangible material in the reasons recorded for issuing reopening notice under Section 148 of the Act. Thus, we find no fault with the findings of the Tribunal that there is no tangible material mentioned in the reasons recorded by the Revenue which would warrant a different opinion being taken then which was taken when the original order of assessment was passed. It is a settled position in law that a reopening notice can be sustained only on the basis of grounds mentioned in the reasons recorded. It is not open to the Revenue to add and/or supplement later the reasons recorded at the time of issuing reopening notice.
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> Mr.Chhotaray, learned Counsel for the Revenue urged on merits of the Revenue's case to charge Rs.1.34 crores allowed as bad debts, has to be

appropriately brought to tax as capital loss. We pointed out to Mr.Chhotaray, learned Counsel for the Revenue that the scope of the present proceedings is only with regard to reopening notice under Section 148 of the Act and we are not dealing with the merits of the assessibility of the income alleged to have escaped assessment. On this Mr.Chhotaray submitted that the issue which he seeks to urge is that merely because the Assessing Officer has been careless in bringing to tax a particular amount which is chargeable to tax, the Revenue should not be precluded from issuing notice under Section 148 of the Act. This submission of Mr.Chhotaray overlooks the facts that power to reopen is not a power to review an assessment order. At the time of passing assessment order, it expected of the Assessing Officer that he will apply mind and pass an order.

An assessment order is not a mere scrap of paper. To accept the submission of Mr.Chhotaray, would mean to negate the well settled position in law as stated by the Supreme Court in the case "CIT Vs. Kelvinator of India Ltd., [(2002) 256 ITR 1 (Delhi)(FB)]" that the concept of 'change of opinion' brought in so as to have in built test to check abuse of power. In view of the above, we find no substance in the submissions raised by Mr.Chhotaray. 11. The decisions cited by Mr.Chhotaray, learned Counsel on behalf of the Revenue in support of his submissions that oversight in passing assessment order will give Assessing Officer jurisdiction to issue notice, placed heavy reliance upon the case "Kalyanji Mavji & Co." (supra). However, on the above aspect it has been held to be no longer good law by the subsequent decision of the Supreme Court in the case of "Indian and Eastern Newspaper Society Vs. Commissioner of Income Tax, New Delhi, (119 ITR 996)" wherein the Supreme Court has observed thus:-

> "Now, in the case before us, the ITO had, when he made the original assessment, considered the provisions of S.9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The revenue contends that it is open to him to do so, and on that basis to reopen the assessment under s.147(b). Reliance is placed on Kalyanji Mavji & Co. V. CIT (1976) 102 ITR 287 (SC), where a Bench of two learned Judges of this court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the ITO must fall within S.34(1)(b) of the Indian I.T.Act,1922. It appears to us, with respect that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kumar Kamal Singh V. CIT (1959)35 ITR 1 (SC), CIT V. A.Raman and Co.

> (1968)67 ITR 11 (SC) and Bankipur Club Ltd. V. CIT (1971) 82 ITR 831 (SC) and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji & Co. V. CIT (1976) 102 ITR 287(SC) suggesting the contrary do not, we say with respect, lay down the correct law." (emphasis supplied)

12. The aforesaid view on the above proportion has been reiterated by the Apex Court in A.L.A.Firm vs Commissioner of Income Tax 183 ITR 285 wherein the Court held that change of opinion where opinion was formed earlier does not give the Assessing Officer jurisdiction to reopen an assessment. The Apex Court interalia on the above issue held as under:

> "Even making allowances for this limitation placed on the observations in Kalyanji Mavji (1976) 102 ITR 287 (SC) the position as summarised by the High Court in the following words represents, in our view the correct position in law (at p.620 of 102 ITR) :
>
> > "The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income tax Officer subsequent to the original assessment. If the income Tax Officer had considered and formed an opinion on the said material in the original assessment itself then he would be powerless to start the proceedings for reassessment. Where, however the Income Tax Officer had not considered the material and subsequently came by the material from the record itself, the such a case would fall within the scope of section 147 (b) of the Act" (emphasis supplied)".

26. In light of our above discussion, the reopening of the assessment on above reasons is bad in law and *void ab initio*.

27. On merits of the issue raised in assessee's appeal, we find that as per the refund computation form the date of grant of refund was 12.03.2007 i.e. Assessment Year 2007-08. It was argued by the learned counsel that the interest on income tax refund is taxable in the year of grant of refund, which in the present case is Assessment Year 2007-08. The year under consideration for which reopening is made is Assessment Year 2008-09. Thus, even if the interest income would have escaped assessment, it would be for Assessment Year 2007-08 and not

Assessment Year 2008-09. In this regard, the learned Counsel of the assessee placed reliance on the decision of our co-ordinate bench in the case of *Hindustan Unilever Ltd v. Addl. CIT* (supra) wherein the Tribunal, after relying on the order of the Special Bench of Tribunal in case of *Avada Trading Co. (P) Ltd v ACIT* (supra), held that interest on income tax refund is taxable in the year in which it is granted. The relevant observations of the Tribunal are as under:

> "66. *Briefly stated, AO granted interest on Rs. 589,81,740 under section 244A on processing of return for assessment year 2005-06 on 31.3.2006. As assessee received the amount in April 2006 this amount was taken as income in that year. AO was of the opinion that assessee should have offered the amount for taxation in assessment year 2006-07 as having been granted on 31.03.06. Accordingly, he brought to tax an amount of Rs. 589,81,740 in addition to the interest on Income Tax refunds already offered by assessee of Rs. 6.03 crores. Since the same was confirmed by the DRP, assessee is aggrieved.*
>
> *67. After considering the rival submissions, we are of the opinion that this issue has crystallized by the Special Bench of the ITAT in the case of Avada Trading Co. (P) Ltd vs. ACIT, 100 ITD 131 (Mum)SB, wherein in was held as under:*
>
> > *"According to the charging provisions of sections 4 and 5, the income is chargeable in the year in which it either accrues or is received as the case may be. The issue regarding accrual of income is concluded by the judgment of the Supreme Court rendered in the case of E.D. Sassoon & Co. Ltd. v. CIT [1954] 26 ITR 27, wherein it has been held that income accrues when right to receive is acquired and such right can be said to have been acquired when an enforceable debt is created in favour of the assessee. A bare look at the provisions of sub-section (1) of section 244A reveals that as soon as any refund becomes due under any provisions of the Act, the assessee becomes entitled to receive the interest in respect of such refund calculated in the manner provided in clauses (a) and (b) of such provisions. Therefore, the moment the refund is granted, an enforceable debt is created in favour of the assessee in respect of interest due on such refund. Consequently, income can be said to accrue on the date of refund itself. Therefore, when such interest is actually granted along with the refund, then the requirements of sections 4 and 5 are fully satisfied and the same can be taxed in the year of receipt. There was no*

merit in the contention of the assessee that such right was contingent as the interest so received could be varied or withdrawn after the assessment under section 143(3). According to the dictionary meaning, a right or an obligation can be said to be contingent when such right or obligation is dependent on something not yet certain. According to section 244A, the only condition for grant of interest is that there must be a refund due to the assesse under any provision of the Act. There is no other condition in the said provision affecting such right. Therefore, the moment a refund becomes due to the assessee, an enforceable debt is created in favour of the assessee and the assessee acquires a right to receive the interest. Sub-section (3) of section 244A only affects its quantification under certain circumstances and not the right of interest. The Supreme Court in the case of CIT v. Shri Goverdhan Ltd. [1968] 69 ITR 675 has observed that once a debt is created, then the liability cannot be said to be contingent merely because it is to be quantified at later date. Under section 244A, even the interest is quantified immediately whenever a refund is issued. Hence, the right to grant interest is absolute since existence of such right is not dependent on any event. It is well settled from the judgment of the Supreme Court rendered in the case of Kedarnath Jute Mfg. Ltd. v. CIT [1971] 82 ITR 363 that if an enforceable debt is created under a statute, then any subsequent event would not affect the existence of such right/obligation despite the fact that such debt is subject-matter of appeal. The right to interest under section 244A is not dependent upon any assessment inasmuch as there is no compulsion or obligation upon the Assessing Officer to make an assessment under section 143(3). The moment the return is processed under section 143(1)(a) and refund is issued on the basis of intimation under section 143(1)(a), an enforceable legal right is created in favour of the assessee under section 244A and simultaneously the Assessing Officer is under legal obligation to grant the interest. Merely because quantum of such interest may vary on assessment made under section 143(3), it cannot be said that legal right was not acquired on the date of refund. The effect of assessment under section 143(3) would be that interest on refund under section 244A would get substituted in terms of sub-section (3) of section 244A without affecting right already accrued.

Further, the judgment of the Supreme Court rendered in the case of CIT v. Chunilal V. Mehta & Sons (P.) Ltd. [1971] 82 ITR 54 clearly shows that once a right accrues under an agreement, then such accrual is not affected by dispute between the parties. Further, in case of dispute, the

final outcome would ultimately relate back to the year of accrual. It was also contended by the assessee that it would be without remedy if the interest was reduced by virtue of assessment under section 143(3). That apprehension was unfounded. If interest is reduced by virtue of sub-section (3) of section 244A on account of assessment under section 143(3), the interest granted in earlier year gets substituted and it is the reduced amount of interest that would form part of income of that year. Thus, it would amount to mistake rectifiable under section 154. If the basis on which income was assessed is varied or ceases to exist, then such assessment would become erroneous and can be rectified. Similarly, anyincome assessed may become non-taxable by virtue of retrospective amendment and, consequently, erroneous assess–ment can be rectified. Therefore, if the interest granted under section 244A(1) is varied under sub-section (3) of such section, then the interest originally granted would be substituted by the reduced/increased amount, as the case may be. Thus, income on account of interest if assessed can be rectified under section 154. Therefore, interest on refund under section 244A(1) granted to the assessee in the proceedings under section 143(1)(a) would be assessable in the year in which it is granted and not in the year in which proceedings under section 143(1)(a) attain finality."

68. Therefore, while upholding in principle that the amount is to be taxed in the year of granting the refund, AO is further directed to examine whether assessee was entitled for any interest under the same provisions after an order under section 143(3) was passed and if so modify the order to the extent assessee's quantum of interest to be brought to tax. In case the entire interest granted was withdrawn by any order subsequently, the relief to the extent has to be provided to assessee. With these directions, the ground 32 is partly allowed."

(underlined for emphasis by us)

28. From above, it is evident that date of grant of interest and non-receipt of interest is relevant to determine the year of taxability of the same. Undisputedly, the interest has been granted in Assessment Year 2007-08 and, therefore, the interest was not chargeable to tax in the current year, and thus, the Assessing Officer cannot have a reason to believe that in the current year, any income has escaped assessment.

29. Accordingly, on merits also, qua the issue in assessee's appeal following the ratio laid down by the Special Bench of this Tribunal in case of *Avada Trading Co. (P) Ltd v ACIT* (Supra) and followed in the case of *Hindustan Unilever Ltd.* (supra), we find that interest on income tax cannot be said to be chargeable to tax in current year as the same was granted in Assessment Year 2007-08 and thus, the reopening initiated by the Assessing Officer was bad in law.

30. Coming to the next reason recorded by the Assessing Officer while issuing second notice u/s 148 of the Act dated 25.03.2013, which states that demerger of the assessee company's investment business to M/s. CHI Investments Ltd. does not fall under the definition of demerger specified in Section 2(19AA) of the Act and, therefore, the said transaction was not eligible to benefit u/s 47(vib) r.w.s. 2(19AA) of the Act. In this regard, we find that the fact that demerger took place in the current year was mentioned in the financial statements of the assessee as well as in the Directors report for the year ended 31.03.2008 which were available with the Assessing Officer at the time of original assessment proceedings. It was further pointed out that the assessee had claimed demerger expenditure u/s 35DD of the Act and the said fact was mentioned in the Tax Audit report that was available with the Assessing Officer. It was further submitted that during the course of original assessment proceedings, the assessee vide letter dated 15.12.2010 furnished details to the Assessing Officer regarding allowability of claim of expenses relating to demerger. Hence, the Assessing Officer was aware about the fact that demerger had taken place during the year at the time of original assessment proceedings. The decision of the Hon'ble Bombay High Court approving the scheme of demerger of investment undertaking of the assessee was available with the Assessing Officer. Thus, no new material came to the knowledge of the Assessing Officer subsequent to the order passed u/s 143(3) of the Act dated 28.12.2010. In the absence of any new tangible material, reopening on the same set of facts is not permissible. As

discussed in earlier para of this order, following the ratio laid down by the Hon'ble Bombay High Court in the case of *Asian Paints* (supra) and Jet Speed Audio Pvt. Ltd. (supra), we hold that the second reopening notice issued by the Assessing Officer is invalid and bad in law.

31. It was further pointed out by the learned counsel that the Assessing Officer cannot have reason to believe that income has escaped assessment, which in fact is amounting to challenge the finding of the Hon'ble Bombay High Court. The transaction of demerger cannot be said to be for the purpose of evasion of tax. The objection, if any, could have been raised by the Assessing Officer at the time when the Scheme was pending with the Hon'ble Bombay High Court. No such objection was raised by the Department, and nor the decision of Hon'ble Bombay High Court approving the Scheme of Demerger was challenged before the Hon'ble Supreme Court. The Assessing Officer cannot now form an opinion to the contrary and object to the scheme of demerger. In this regard, reliance was placed on the decision of Kolkata Bench of the Tribunal in the case of *Electrocast Sales India Ltd v. Dy. CIT [170 ITD 507 (Kol)]*. The relevant observations of the Tribunal are reproduced as under:-

> *"4.7 It would be relevant to note that the scheme of amalgamation was approved on 6.10.2010 and intimation to this effect was sent by the assessee to the income tax department in January 2011 (copies of letters enclosed in pages 33 to 37 of paper book). The same was acted upon by the assessee assuming acceptance from the income tax department since no appeal against the said judgement of the Hon'ble High Court was filed before the Hon'ble Supreme Court Thus, at this juncture if the revenue is allowed to challenge the same u/s 391(7) of the Companies Act 1956 then it would be clearly barred by the doctrine of acquiescence and estoppel. In law, acquiescence occurs when a person knowingly stands by without raising any objection to the infringement of his or her rights while someone else unknowingly and without malice aforethought act in a manner inconsistent with their rights. As a result of acquiescence, the person whose rights are infringed may lose the ability to make a legal claim against the infringer or may be unable to obtain an*

injunction against continued infringement. The doctrine infers a form of permission' that results from silence or passiveness over an extended period of time. Applying this principle to the instant case before us, the assessee probably paid a consideration for the set off of accumulated losses taken over from the amalgamating companies and accordingly the share exchange ratio (as approved under the scheme) was acted upon assuming acceptance from the income tax department. Thus by applying the Doctrine of acquiescence, the department would be now barred from raising an objection to the scheme. Further a claim of estoppel arises when one party gives legal notice to a second party of a fact or claim, and the second party fails to challenge or refute that claim within a reasonable time."

32. In view of the above, we find that the Assessing Officer cannot have a reason to believe that the investment undertaking was not a separate undertaking of assessee, especially when no objection has been taken by the Assessing Officer before the Hon'ble High Court. Hence, reopening is invalid on this account also.

33. It also pertinent to note here the observation made by the Hon'ble Bombay High Court in the case of *Casby CFS(P) Ltd. In re [2015] 231 taxman 89 (Bombay)*. The relevant portion of the *catch note* is reproduced as under:-

"Section 143, read with section 139(5), of the Income-tax Act, 1961 and section 232 of the Companies Act 2013/section 394 of the Companies Act, 1956- Assessment General (Protective assessment) - Whether if Regional Director nurtures any doubt qua any of clauses in a scheme of amalgamation, including date chosen as appointed date, and finds that same is contrary to law or apprehends that on strength of such a clause contained in scheme, company, after obtaining sanction from Court, may use or misuse same for contravention of any law including provisions of Income-tax, he is entitled to voice his doubt/apprehension before Court, at time Court considers grant of sanction to scheme and it is always open to Court to consider doubt/apprehension expressed by Regional Director and pass necessary orders either rejecting scheme or sanctioning same with/or without necessary clarifications - Held, yes Whether since Court is required to ensure that a scheme of amalgamation does not contravene any provision of law, Regional Director is not only entitled to but is duty bound to bring to attention of Court any provision in scheme which may contravene/circumvent provisions of any

law including law pertaining to Income-tax legislature intended that Regional Director will examine a scheme from all aspects and place his observations and views before Court and Court will consider same before sanctioning scheme-Held, yes Whether merely because a protective assessment is made, it does not mean that Income-tax Department has accepted a scheme of amalgamation - Held, yes."

34. It is evident from the above decisions that Income-tax Department has a chance to object to the scheme prior to sanction of scheme by Court when notice is sent to Central Government in accordance with the provisions of Section 394A of the Companies Act, 1956. The Regional Director is empowered and duty bound to bring to the attention of the Court if he feels that the scheme, after obtaining sanction from the Court, would be misused for contravention of any law including provisions of Income tax Act. In the present case, no objection was taken by the Regional Director or the Central Government before the sanction of the scheme. Hence, to reiterate the fact that the investment unit was a separate *'undertaking'* of the assessee cannot be disputed by way of reopening of assessment as in such case the Assessing Officer cannot be said to have a valid belief that income has escaped assessment.

35. It was further argued that the second reopening notice u/s 148 of the Act dated 25.03.2013 was issued even when the proceedings under the first reopening notice u/s 148 of the Act dated 08.03.2013 were pending and, therefore, the same is invalid. It was pointed out that while issuing second reopening notice, the Assessing Officer relied on Explanation 3 to section 147 of the Act. It was further argued that if the reopening pursuant to the first reopening notice dated 08.03.2013 is held to be invalid, it will automatically render the entire reopening proceedings as void as the assessment order has been passed pursuant to the first notice u/s 148 of the Act.

36. We find substance in the argument of the learned counsel of the assessee. At the outset, we find that when the reassessment proceeding were already ongoing, there was no need to issue fresh notice u/s 148 of the Act as the Assessing Officer had sufficient power under Explanation 3 to section 147 of the Act to make addition on other ground if the addition on the ground stated in the reason for reopening is made. Further, mere issuance of notice u/s 148 of the Act is not sufficient. There should be an assessment order pursuant to the notice issued u/s 148 of the Act. Section 153 of the Act provides for time period of nine months from the end of the financial year in which the notice u/s 148 of the Act is issued for passing the order u/s 147 of the Act. Admittedly, no separate assessment order has been passed by the assessing officer pursuant to the second reopening notice as required u/s 153 of the Act. As such, the second reopening notice, even if treated as valid, loses its importance as no separate assessment order has been passed pursuant to the said notice.

37. Since we have already held that the reopening pursuant to the first reopening notice is invalid, the entire reassessment proceedings will be treated as invalid. The Hon'ble Bombay High Court in the case of *CIT vs. Jet Airways (I) Ltd. (2011) 331 ITR 0236* has held that if no addition is made on the reasons recorded for reopening, the Assessing Officer is not free to make addition on the other grounds. Following the ratio laid down by the Hon'ble Bombay High Court also, we hold that the addition made by the Assessing Officer on the other ground of denial of benefit of demerger, which was not forming part of the original reasons for reopening of assessment, is invalid and bad in law. On this ground alone, we hold that the addition made on second ground shall not survive. We make it clear that the addition pursuant to the second reopening notice is bad in law in view of the fact that no separate assessment order has been passed by the Assessing Officer

even after recording the separate reasons for reopening and issuing separate notice u/s 148 of the Act.

38. As regards the additional ground we note that it is the plea that the education cess and higher and secondary education cess paid by the appellant is deductible while computing income under the head Profits and Gains of Business or Profession ('PGBP') of the assessee which was inadvertently omitted to be raised. That the CIT(A) has passed the order on 1.11.2016 against which the appellant has field the present appeal before the Tribunal. That further, in the grounds of appeal filed before the ITAT, a ground stating that the education cess and higher and secondary education cess paid by the-appellant is deductible while computing income under the head PG8P was inadvertently omitted to be raided. That it shall be noted that the appellant has recently come across the order of the Hon'ble Bombav High Court in the **c**ase of Sesa Goa Ltd Vs. CIT (117 taxmann.com 96 dated 28.2.2020) wherein a similar contention was raised by the assessee and the Hon'ble Bombay High Court adjudicated the matter in favour of the assessee. That given the factual matrix in the instant case pending before your Honorand the favorable decision of the Hon'ble Bombay High *Courtsupra* clarifying the intent of the legislature, the appellant is now filing an additional ground of appeal wherein the appellant pleads that the education cess and higher and secondary education cess paid by the appellant is deductible while computing income under the head PGBP. That it is stated that the additional ground of appeal raises purely question of law and no new facts are required to be brought on record. It is therefore humbly prayed that the additional ground of appeal may kindly be admitted and adjudicated by your Honor. That in this regard, reliance is placed on the following decisions:

a. National Thermal Pozver Corporation v, CIT (229 ITR 383)(SC)
b. Jute Corporation of India Ltd v. CJT[187 ITR 688 (Supreme Court)
L. Ahemdabad Elect rid I y Co. Ltd v. CIT [199 ITR 351 (Bom) (FB).

d. Maruti Suzuki India Ltd Vs. Dy. CIT 16(1), New Delhi [ITA No: 961/Del/20151 in interim order dated 31.10.2019
f. Grasim Industries Ltd (successor to the Aditya Birla Nuvo Ltd) v. Addl. CIT (LTU/I.T.A 2525/Mum/2014 dated 20.12 2019.

We find that this issue is duly covered in favour of the assessee by the decision of Hon'ble Bombay High Court in the case of Sesa Goa Ltd. (supra). Accordingly,this ground stands allowed.

39. Now coming on the merits of the case for which Department has challenged the action of the CIT(A) in allowing the appeal of the assessee, we find that the CIT(A) has allowed the appeal of the assessee, and aggrieved by the same, Department has filed the appeal before us. In this regard, we may refer to the relevant observation of the CIT(A) while allowing the appeal of the assessee. The relevant para of the CIT(A) order are reproduced hereunder:-

> *"12.16 I have considered the submissions of the appellant and perused the materials available on record, including copies of judicial decisions relied upon by the appellant as well as the order of Hon'ble Mumbai High Court dated* 23.11.2007*, approving the Scheme of Arrangement of Demerger. The issue for determination before me is, whether capital gain has accrued / arisen in the hands of the appellant due to of the appellant's business by virtue of Mumbai High Court decision dated* 23.11.2007*, approving the demerger of the appellant's business.*
>
> *12.17 It is seen that the AO's contention regarding the long term capital gain was on account of transfer of shares by the appellant to the demerged company. The appellant Company had demerged its investments activity to M/s.CHI Investments Ltd. through a Scheme of Arrangement approved by the Hon'ble Mumbai High Court w.e.f.* 01.07.2007*. It was seen by the AO that investment in shares by the appellant is a non-tyre business of the appellant having book value of Rs.126.20 crores which had been hived off from appellant company to CHI Investment Ltd, but such demerger does fall within the purview of section 2(19AA) of Act. Accordingly, the investment in shares is in the nature of capital assets and the transfer of the said investments by the appellant to CHI Investment Ltd. attracts provisions of capital gains.*

12.18 It is seen that the demerger of the appellant's business was w.e.f. 01.07.2007. *The ARs of the appellant have drawn attention to the provisions of section 2(19AA) of the Act which are relevant in the matter. As per these provisions when a demerger takes place in relation to the company certain conditions are to be fulfilled. The ARs therefore while drawing attention through the provisions of section 2(19AA) have contended that the appellant have fulfilled all the requirements as per the provisions of section 2(19AA) of the Act, namely, all the properties pertaining to Investment Undertaking are transferred to the resulting company at their book value. All the liabilities relating to the investment undertaking are transferred to the resulting company at their book values. Shares of the resulting company are issued to the shareholders of the demerged company on proportionate basis. Shareholders holding not less than 75% in value of shares of the demerged company become shareholder of the resulting company. The demerged company has transferred the unit, division or business activity on a going concern basis as is evident from the financials of CHI Investments Ltd. post demerger.*

12.19 It is therefore seen that the appellant has fulfilled all the conditions stipulated u/s 2(19AA) of the Act inasmuch as that as per the Scheme of Demerger of the Investment undertaking/ business activity as approved by the Hon'ble Mumbai High Court that the appellant company has transferred all the assets as well as liability pertaining relatable to the investment activity to CHI Investment Ltd. Assets and Liabilities pertaining/relatable to the investment undertakings have been transferred to CHI Investment Ltd. at book value. On account of demerger of investment activity/undertaking, the shareholders of the appellant have been issued shares in CHI on a proportionate basis. As a result shareholders having not less than 75% in value of shares of appellant becomes shareholder of CHI. The investment activity/ undertaking has been transferred on a going concern basis. It is also seen that the demerged investment activity/ undertaking was an independent revenue generating activity.

12.20 It is seen that the AO was of the view that the phrase 'undertaking referred in the order of the Hon'ble Mumbai High Court i.e. 23.11.2007, *approving the scheme of demerger is under the provisions of Companies Act, 1956 only and not as per the Income Tax Act 1961, I find that this view of the A.O. is not tenable. It is seen that the term undertaking has not been defined either under Companies Act or under Tax Act. However, the Courts have interpreted the phrase under both these laws to mean physically separate*

viable independent unit which can be existent on its own as viable unit. Investment undertaking of the appellant company, which got demerged into CHI Investment Ltd, in my view, is an independent Unit, viable profit making unit.

12.21 It is further seen that as per the scheme of demerger, the investments activity/undertaking consisted of all specified investments in quoted and unquoted shares, securities, debentures, loans and advances and receivable as shown in the books of account of the appellant immediately before the appointed date along with all debt liabilities, duties and obligations of the appellant, if any, pertaining to any or arising out of investment activities stands transferred. In a composite business, all business activities are equal and deserve the similar attention and focus so that whole business is flourished. In this regard, the provisions of section 2(19AA) of the Act defines the term' demerger to mean any transfer of a unit, division or business activity of a company to another company pursuant to the scheme of arrangement u/s.391 to 394 of the Companies Act. Thus, in my view, as per the provisions of section 2(19AA) what has been demerged from the appellant company to the resulting company was a unit division or a business activity as per the provisions of section 2(19AA) of the Act.

The appellant has thus met all the conditions laid down in section 2(19AA) of the I.T Act, 1961.

12.22 It is seen that the AO has contended in the assessment order that before demerger no separate staff was allocated for investments activity and no separate office ,area or floor was demarcated for this activity. It is seen that it is not essential to earmark separate staff or separate area for Investment Activity. The appellants business i.e. tyre business and investment activities had common asset and common staff working for both the business. What is essential under demerger is the transfer of assets and liabilities which constitute a running business and the business can be carried on uninterruptedly with such assets and liabilities alone. This has been done in the appellant's case. Hon'ble Delhi High Court judgment in the case of Indo Rama Textile Ltd., New Delhi, vs. ITO relied upon by the appellant has also held the same view and the ratio of the judgment of this case is squarely applicable to the facts of the appellant's case here.

12.23 It is further seen that the CHI Investments Pvt. Ltd. had earned profits in the first year of its operation itself. It is therefore quite clear that what has

been transferred by the appellant to CHI under the scheme of demerger is an independent revenue generating activity or undertaking and hence, the conditions stipulated u/s.2(19AA) of the Act have duly been fulfilled. Section 47(vib) of the Act provides that any transfer of capital asset by the demerged company to the resulting company by virtue of demerger is exempt from capital gain tax. The assets/liabilities are transferred under a scheme of demerger as defined in section 2(19AA) of the Act i.e. if the scheme satisfies all the conditions mentioned in section 2(19AA) of the Act then the transfer of the capital assets would not attract liability to capital gain tax. It is seen that the appellant has fulfilled all the conditions laid down u/s.2(19AA) of the Act and therefore, in my view, the transfer of assets by the appellant to resulting company under the scheme of demerger is exempt u/s.47(vib) of the I.T. Act, 1961.

12.24 Looking at the facts and legal position of the matter, it is seen that the appellant has fulfilled the conditions laid down u/s. 2(19AA) of the Act at the time of demerger of its Investment Undertaking. The appellant's case is duly covered under the provisions of section 47(vib) of the Act and therefore, there is no question of computing any capital gains in the matter. Accordingly, the capital gains computed by the AO atRs.3,32,65,62,293/- is deleted.

12.25The appellant has raised another issue without prejudice that in case demerger is not considered as valid and pursuant to provisions of section 2(19AA) of the Act, it had incurred capital loss of Rs.1,82,55,27,144/- on this account and not earned any capital gain. This issue raised without prejudice to the above issue becomes irrelevant as the addition of capital gain has been deleted. The issue is therefore not adjudicated and is therefore dismissed."

40. As is evident from the above, the CIT(A) has made detailed observations on various objections raised by the Assessing Officer while allowing assessee's claim of demerger and has also considered the fulfillment of requirement of Section 2(19AA) of the Act. Here we note that assessee has clearly raised the objection without prejudice that even if it is held that the demerger is not in accordance with the provisions of section 2(19AA) the capital gain tax would not arise in the hands of the assessee. Detailed submissions were made in this regard before the Assessing Officer, which have been noted by the Assessing Officer in his order

however, he has not dealt with this issue in his order. Further, submissions in this regard were also made before the CIT(A). Learned Counsel of the assessee submitted that in fact assessee has suffered a loss, in this regard in place is capital gain which has been assessed by the Assessing Officer.

41. Upon careful consideration we are of the opinion that we have already held that reopening in this case is not justified on several counts. Hence, this aspect of departmental claim of capital gain and the counter claim made by assessee that in fact assessee has suffered a loss are only of academic interest. Moreover, the claim of the assessee regarding loss would also need reference to various factual details which are not available on record. Adjudication of this aspect would call for a remand also from the Assessing Officer. When we have already held that reopening is invalid for a plethora of reasons, we are of the opinion that there is no need to initiate multiplicity of proceedings. Hence, we are not engaging into adjudication of these aspects and treat them as infructuous.

42. In the result, appeal of the assessee is allowed, and departmental appeal is treated as infructuous.

Order pronounced in the open court on 22.9.2021

Sd/-	Sd/-
(Pavan Kumar Gadale)	(Shamim Yahya)
Judicial Member	Accountant Member

Mumbai; Dated : 22.09.2021

Thirumalesh, Sr. PS/PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai

6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai