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

BEFORE SHRI RAJESH KUMAR, AM AND SHRI RAVISH SOOD, JM

I.T.A. Nos. 6351 & 6704/Mum/2019
(Assessment Years: 2011-12 & 2012-13)

Dy. CIT, Central Circle-5(4) Mumbai	Vs.	Shri Nitan Chhatwal Room No.1927, 19th Floor, Air India Building, Nariman Point, Mumbai-400 021
PAN/GIR No. AAGPC 9892 G		
(**Revenue**)	:	(**Assessee**)

I.T.A. Nos. 6422 & 6423 /Mum/2019
(Assessment Years: 2011-12 & 2012-13)

Shri Nitan Chhatwal Room No.1927, 19th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Dy. CIT, Central Circle-5(4) Mumbai
PAN/GIR No. AAGPC 9892 G		
(**Assessee**)	:	(**Revenue**)

Assessee by	:	Shri Rahul Raman
Revenue by	:	Shri Mani Jain

Date of Hearing	:	28.07.2021
Date of Pronouncement	:	25.10.2021

O R D E R

Per Rajesh Kumar, A. M.:

The above titled appeals and cross appeals have been preferred against the order dated 30.07.2019 & 9.08.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2011-12 & 2012-13

respectively. First we shall take ITA No.6422/M/2019 A.Y. 2011-12 for adjudication.

I.T.A. No. 6422/Mum/2019

2. The issue raised in ground no.1& 2 is against the order of ld.CIT(A), upholding the reopening of assessment proceedings u/s.147 of the Act by ignoring the fact that re-opening was made without satisfaction of the conditions as envisaged in 1st Proviso to section 147 of the Act.

3. The facts in brief are that the assessee is a member of Chhatwal Family, who along with their relatives Kochhar family was running M/s. Viraj Group of Companies for about 20 years. Both the families were having equal shareholding in all the companies of M/s. Viraj Group. Following a dispute and differences between the two families it became difficult to run the business and the matter was referred to a sole arbitrator for resolving the dispute and was finally resolved by way of Consent Terms. It was decided under the consent terms that Chhatwal family will exit from management and ownership in M/s. Viraj group of companies. The total consideration for the sale of all group companies was fixed at Rs.650 crores, out of which Rs.255 crores was paid for sale of shares of M/s. Viraj Profiles Ltd. Accordingly, the income arising by way of capital gain from the sale of shares as per the consent terms in the hands of the assessee and family members was offered to tax as long term capital gain. The assessee filed the return of income on 04.02.2012, declaring the total income of Rs.53,37,10,194/-. The case of the assessee was selected under scrutiny and assessment

u/s.143(3) of the Act was framed vide order dated 31.03.2013 by making the disallowance u/s.14A of the Act. Thereafter, a search action u/s.132 of the Act was conducted on 09.10.2018 in the Shrem Group and others including the assessee. As a result of the search, the Investigation Wing, Mumbai, found that there has been split of Viraj Group vide Arbitration Award dated 01.04.2010 and Consent Terms dated 21.02.2010 and the individuals of Chhatwal family had received an amount of Rs.650 crores, on the whole, in lieu of the shares sold by these individuals. During the year under consideration, the capital gain arising from the sale of shares in M/s. Viraj Profiles Ltd. was offered as long term capital gain by the assesse as per the details below :

No.	Name of the company	No. Of shares sold	Rate (Rs.)	Amount received (Rs.)	Cost of acquisition (Rs.)	Indexed Cost (Rs.	LTCG (Rs.)
1.	Viraj Profiles Ltd.	5,80,39,958	16	92,86,39,28	4,59,63,700	10,34,90,544	82,51,48,784
Total				**92,86,39,28**	**4,59,63,700**	**10,34,90,544**	**82,51,48,784**

4. Thereafter, the case of the assessee was reopened u/s.147 by issuing notice u/s.148 of the Act on 19.03.2018 after recording reasons u/s.148(2) of the Act. The assessee complied with the notice by filing the return of income electronically on 27.04.2018 declaring an income of Rs.55,00,30,779/-. The assessee also filed objections to the reopening vide letter dated 21.12.2018, which was disposed off by the A.O. vide order dated 21.12.2018. The assessee received the sale consideration at Rs.16/- per share. The price of the share was determined on the basis of valuation report according to which, the value per share was Rs.14.56 per share. According to the A.O., the Chhatwal family has separated from Viraj group of companies under

consent terms which provided that Chhatwal family shall not carry out the same business for a certain number of years and, therefore, the A.O. came to the conclusion that the so called sale price per share of Rs.16/- per share was in fact toward the sale consideration of shares as well as towards non compete fee. Accordingly, the A.O. divided Rs.16/- into two parts, namely consideration for the sale of shares and consideration towards not competing with the existing business of M/s.Viraj Profile Ltd. and assessed accordingly as per the details below:

LTCG

Sr. No.	Qty	Rate	Value	Indexed Cost	LTCG	Name
1	5,80,39,958	8.46	49,10,18,045	5,47,20,625	43,62,97,420	Nitan Chhatwal
2	80,44,409	8.46	6,80,55,700	13,08,193	6,67,47,508	Aaryaman Chhatwal
Grand Total	**6,60,84,367**		**55,90,73,745**	**5,60,28,818**	**50,30,44,927**	

Business Income

Sr. No.	Qty	Rate	Value	Indexed Cost	LTCG	Name
1	5,80,39,958	7.54	43,76,21,283	2,16,60,394	41,59,60,890	Aaryaman Chhatwal (Minor income is clubbed)
2	80,44,409	7.54	6,06,54,844	7,08,030	5,99,46,814	
Grand Total	**6,60,84,367**		**49,82,76,127**	**2,23,68,423**	**47,59,07,704**	

5. The A.O. calculated the price per share at Rs.8.46/- and consequently, the gain on sale of shares was calculated at

Rs.50,30,44,927/-. Similarly non compete fee was calculated at Rs.47,59,07,704/-, which was treated as business income u/s.28(va) of the Act and finally the assessment was framed, making all these additions vide order dated 01.12.2018 passed u/s.143(3) r.w.s. 147 of the Act by assessing the income at Rs.55,23,38,900/-.

6. The assessee challenged the order of the A.O. before the ld. CIT(A) on the jurisdictional issue that the reopening has been made invalidly without satisfying the conditions as laid down in 1st proviso to section 147 of the Act. The ld. CIT(A) dismissed the appeal of the assessee on this issue by observing and holding as under:

> 4.5. I have considered the facts on record and submissions carefully. Reasons were recorded and notice u/s 148 was issued after taking approval of the prescribed authority. The reasons recorded for re-opening were supplied to the appellant, and objections filed by the appellant were duly disposed by the assessing officer in writing. Thus the procedural requirements have been met by the assessing officer. The assessment was reopened on four grounds. First, short term capital loss was set off against capital gains which was by way of bonus stripping. Second there was a non compete clause in the arbitration award and consent terms under which shares were sold/transferred by the appellant which made the consideration liable to be taxed as business income as against capital gains claimed by the appellant Thirdly, gains on sale/ transfer of shares by Master Aaryaman, a minor, should have been clubbed with the income of the appellant. Lastly there were sales of immoveable property at consideration which was below the stamp duty value and section 50C was applicable but the appellant had failed to offer the correct income. In this case there was prior scrutiny assessment u/s 143(3) dated 31.3,2013. Perusal of the assessment order shows that none of these facts were verified or examined nor was any view formed regarding any of these issues. The appellant has not shown that trie Arbitration Award was brought to the specific attention of the assessing officer. Full and true disclosure is necessary as held in Sri Krishna P, Ltd. v JTO (1996) 221 ITR 53S(SC). Full and true disclosure of material facts means specific disclosure of each fact as held in The Indian Hume Pipe Co. Ltd. v ACIT 348 ITR 439 (Bom). A perusal of the reasons recorded clearly show that the A.O. has applied his mind on the information received from the investigation wing containing results of investigation.
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> 4.6. It is trite law that for reopening the assessment the A.O has to merely form reason to believe that income has escaped assessment. The reassessment

proceedings allows the appellant to rebut the reasons for reopening of the assessment. The only question to be seen is whether there is relevant material on which *a* reasonable person could have formed requisite belief. Whether those facts stated in material are true or not, is not the concern at this stage. This is so because the formation of belief by the Assessing Officer is within his subjective satisfaction - refer Supreme Court's decision in the cases of *ITO vs. Select Dalurband Coal Company Put. Ltd. (1 996) 21 7 ITR 597} 599 (SC) and Central Province Manganese Ore Company Ltd. vs. JTO (1991) ITR 662, 666 (SC),* In the case of Peass Industrial Engineers (P) Ltd. v CIT (2016) 289 CTR (Guj) 139 information was received from investigation wing regarding bogus entry operators and the assessee being one such beneficiary. It was held that whether assessee is a beneficiary or not is not to be finally adjudicated at the stage of reopening. Reopening was held to be valid. Distinction between validity of an addition and validity of reasons to believe was explained in the case of Pr CIT v Laxmiraj Distributors P. Ltd. (2019) 302 CTR (Guj) 676.

4.7. The action u/s.147 is possible despite complete disclosure of material facts if there is any escapement of income in assessment proceedings-refer *Prafut Chunilal Patel, Vasant Chunilal Patel vs. ACIT (1999) 236 ITR 832, 840 (Guj), Stock Exchange vs. ACJT (1997) 227 YTR 906 (Guj) and JTO vs. Labjmani Mewal Das (1976) 103 ITR 437 (SC).*

4.8. In the present case, though there is previous. order of assessment, there is no question of change of opinion when none is expressed. The assessing officer can form reasons to believe that income has escaped assessment by examining the very return/documents accompanying the return. Refer Indulata Rangwala vs DCIT (2016) 286 CTR (Del) 474, CIT vs Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500(SC), DCIT vs Zuari Estate Development & Investment Co. Ltd. (2015) 373 ITR 661(SC).

4.9. When no finding either positive or negative is arrived at during the course of original assessment proceedings, there is no question of change of opinion- refer - A.L.A. Firm vs, CIT 102 ITR 622 (Madras), Ess Kay Engineering Company (P) Ltd. vs. CIT 247 ITR 818 (SC) and EMA India Ltd. vs. ACIT (30 DTR 82) (Allahabad). Assessment u/s 143(3) vis-a-vis non consideration of an issue-reopening is valid as held in (2013) 89 DTR (Ker) 31 Innovative Foods Ltd. vs UOI.

4.10. Even when an income liable to tax has escaped assessment in the original assessment proceedings due to oversight and inadvertence or a mistake committed by the original Assessing Officer, subsequently, while verifying the records Assessing Officer can start reassessment proceedings for escapement of income. Further, there is a legal proposition accepted by various Courts that reassessment proceeding is permissible even if the information is obtained after proper investigation from the materials on record or from any enquiry or research into facts or law. There is a plethora of judgements that such information need not be from external source- refer CIT and anr, vs. Rinku Chakraborty 56 DTR 227 (Kar) and Kalyanji Mavji and Company vs. CIT 102 ITR 287 (SC). It is also pertinent to mention that for reopening of completed assessment u/s.148, tangible material need not be from outside the

return of income. It can be obtained from the return of income or evidences on record itself. The reference may be had of ACIT vs. Kanga & Company (2010) - TIOL 464 ITAT Murabai. It is also relevant to mention that information obtained in assessment proceedings of subsequent year, can also be utilized for reopening of the completing assessment -refer Raymond Woolens Mills Ltd. vs. ITO and Other 236 ITR 34 (SC) and Revathy C.P/Equipment Ltd. vs. DCIT AND ors. 241 ITR 856 (Mad).

4.11. It is further noted that the reasons recorded were furnished to the appellant on 28.09.2018 no objection was filed against the reopening till after the assessing officer issued final show cause notice dated 18.12.2018 when assessment was getting barred by limitation on 31,12,2018. In the light of these facts and discussions earlier, I do not find merits in the contention of the appellant. The grounds of appeal No.1 and 2 are dismissed and the reopening of the assessment is upheld.

7. The ld. AR submitted before the Bench that the order passed by the ld. CIT(A) upholding the reopening u/s.147 of the Act, is against the provisions of the Income Tax Act as the condition laid down in u/s.147 of the Act have not been satisfied. The ld. AR submitted that admittedly the case of the assessee was reopened after a period of 4 years from the end of the relevant assessment year and, therefore, in order to invoke the provisions of section 147 of the Act, the A.O. has to satisfy the conditions which have been envisaged in the first proviso to section 147 of the Act, which provides that after a period of four years, the reopening of the assessment can only be made if there is a failure on the part of the assessee to disclose truly and fully all the material facts, which are necessary for the purpose of assessment of the income correctly and not otherwise. The ld. AR submitted that in the present case, the assessment has been framed u/s.143(3) of the Act and all the documents pertaining to the separation of the Chhatwal family from Viraj Group of Company were been placed before the A.O in the assessment proceedings. The assessee has produced all the documents and the details as called for by the A.O. in order to verify these

transactions and thus there is no failure on the part of the assessee to disclose truly and fully all the material facts necessary for correct assessment of his income. In fact, the Arbitration Award dated 01.04.2010 and the Consent Terms dated 21.02.2010, were discussed by the A.O. in the original assessment proceedings and, therefore, to reopen the assessment on the basis that the consent terms were not before the A.O. is against the provisions of the Act. The ld. AR in defence of the arguments relied on the decision of the Hon'ble Jurisdictional High Court in the case of *Jashan Textile Mills Pvt. Ltd. vs. Dy. CIT* [2006] 284 ITR 542 (Bom) and *German Remedies Ltd. vs. Dy. CIT* [2006] 287 ITR 494 (Bom). Arguing on the second reason recorded by the AO for re-opening the assessment qua violation of section 50C of the Act in respect of land sold by the assesse, the ld. AR argued that the assessment can not be re-opened on that basis by relying on the decision of *Balasubramanium Mills Ltd.* (in ITA No.1379/Mad/2015), wherein it has been held that no reopening can be made with respect to any violation u/s.50C of the Act wherein all the relevant materials relating to sale of land have been submitted in the original assessment. The ld AR therefore prayed that the re-opening as well as the consequent order is invalid and may be quashed.

8. The ld. DR, on the other hand, relied heavily on the order of the ld. CIT(A) and the A.O. by submitting that the Arbitration Award and consent terms were not brought to the notice of the A.O. in the original assessment proceedings and, therefore, the information *qua* the said transactions have certainly been hidden

and not disclosed truly and fully and, therefore, the case of the assessee was rightly reopened under the first proviso to section 147 of the Act. The ld. DR prayed that the legal ground raised by the ld. AR may kindly be dismissed.

9. Having heard the rival parties and perusing the material available on record, we find that admittedly the case of the assessee was reopened after the end of the four years from the end of the relevant assessment year. We note that in the case of the assessee, assessment u/s. 143(3) dated 31.03.2013 was framed in scrutiny proceedings. We also note that the issue of the capital gain on sale of shares by the assessee in Viraj Profiles Ltd. had been examined by the A.O. and accepted after going through all these documents including arbitration award and consent terms. Therefore, the only possible presumption is that the assessee has filed all the documents as called for by the A.O. during the original assessment proceedings and accepted the long term capital offered by the assessee qua sale of shares of Viraj Profile Ltd. Therefore, in order to re-open the assessment under section 147 of the Act the A.O. has first to satisfy the conditions provided in the first proviso to section 147 of the Act, which in the present case, in our opinion, have not been satisfied. We find that there is no failure on the part of the assessee to disclose any material fact *qua* sale of shares in Viraj Profile Ltd for correct assessment of his income and, therefore, we are not in a position to sustain the order of the A.O. The case of the assessee is supported by the decision of the Hon'ble Jurisdictional High Court in the case of *Jashan Textile Mills Pvt.*

Ltd. vs. Dy. CIT (supra) and *German Remedies Ltd. vs. Dy. CIT* (supra), wherein, the Hon'ble Bombay High Court has held that if there is no failure on the part of the assessee to disclose the true and material fact necessary for assessment of income , then the case of the assessee cannot be reopened after the expiry of four years from the end of the relevant assessment year. We further note that one of the reason recorded for re-opening was that the assessee has not disclosed the full sale consideration in respect of sale of land and, therefore, the same is in violation of section 50C of the Act. We have perused the decision of the co-ordinate bench in the case of *Balasubramanium Mills Ltd.* (supra), wherein it has been held that no reopening can be made with respect to disallowance u/s.50C, wherein all the relevant details relating to sale of land has been disclosed. In view of the facts and ratio laid down in the various decisions as discussed above, we quash the reopening of the assessment as well as the consequent order as being invalid and against the provisions of the Act. Ground no.1& 2 are accordingly allowed.

10. The issue raised in ground no.3 to 5 is on merit and against the bifurcation of the sales consideration received from sale of shares in M/s. Viraj Profiles Ltd. between sale of shares and non compete fee.

11. The facts in brief are that the assessee has disclosed the entire amount of sale consideration received from sale of shares in Viraj Profiles Ltd. and accordingly computed the long term capital gain and offered the same for tax. However, the A.O. recomputed and split the sale consideration into two parts. First

the consideration for sale of shares and second in respect of non compete fee, reasoning that there was a clause in the consent terms to the effect that the assessee shall not carry out the same business for a certain number of years. The Assessing Officer has computed the long term capital gain at Rs.50,30,44,927/- on sale of shares and Rs.47,59,07,704/- as non compete fee u/s.28(va) of the Act and assessed accordingly under the head business.

12. The ld AR submitted that provisions of section 28 (va) of the Act are not applicable to the sale of shares by the assessee in Viraj Profile Ltd. as the said section deals with the taxation of any sum whether received or receivable in cash or in kind under an agreement for not carrying on any activity in relation to any business which the assessee was doing but in the present case assessee is not doing any business but was holding shares in M/s. Viraj Profile Ltd. The Ld. A.R. submitted that proviso to section 28(va) of the Act duly recognizes a situation where the amount is received in relation to transfer of rights in any business as for such a situation a specific provision has been made in section 55(2)(a) of the Act which deals with the taxation of transfer of rights in the business under the head “capital gain”. The Ld. A.R. ,while referring to the provisions of section 28(va) and 55(2)(a), submitted that a conjoint reading of both the sections together makes it amply clear that provisions of section 28(va) of the Act are applicable where assessee is doing business and not in a case where he had only a right in such business through holding shares. The Ld. A.R. submitted that in assessee’s case M/s. Viraj Profile Ltd. was doing business and

assessee was holding only shares in the said company and hence provisions of section 28(va) are not applicable to the assessee's case. The Ld. A.R. submitted that mere fact that there is a clause in the consent terms that assessee shall not carry on any business similar to the business carried on by the company will not ipso facto mean that a part of the consideration is towards non compete fee. The learned counsel submitted that the issue is squarely covered by the decisions of the co-ordinate benches of the tribunal in the cases of *Asst. CIT vs. Savita N. Mandhana* (in ITA No. 3990/Mum/2010 for A.Y. 2006-07 vide order dated 07.10.2011 and others) and *Mrs. Hami Aspi Balsara vs. Asst. CIT* [2010] 126 ITD 100 (Mum), wherein a similar issue has been decided in favour of the assessee by holding that even if there is a clause in the consent terms to the effect that the assessee shall not carry on business for certain number of years, that cannot be construed to mean that the consideration received for sale of shares, is also partly towards non- compete fee. The ld AR also vehemently submitted before the bench that cases of the parents of the assesse namely Satish Chhatwal and Ramprakash Chhatwal were re-opened on identical facts but the proceedings were dropped by the AO after considering the factual matrix thereby accepting the long capital gain resulting from sale of shares in M/S Viraj Profile Ltd as offered to tax .The ld. AR finally prayed that following the said decisions and in view of the fact that similar long term capital gain was accepted in the hands of the parents of the assesse by the department ,the appeal of the assesse may be allowed on merits also.

13. The ld. Departmental Representative, on the other hand, relied on the order of the A.O. heavily by submitting that the A.O. has rightly bifurcated the sale consideration into sale of shares and towards non compete fee however, the ld. CIT(A) has wrongly reduced the addition made towards non compete fee to 5% of the total sales consideration. The ld. DR, therefore, prayed that the order of the A.O. may kindly be restored.

14. Having heard the rival contentions and perusing the material available on record, we find that the decisions cited by the ld. AR are on similar facts and issues which have been decided by the co-ordinate benches in the above two cited decisions in favour of the assesse. We note that the facts of the assessee are similar to ones as involved in the above two decisions. In the assessee's case the AO split the sale consideration received for sale of shares into two parts. One for sale of shares and second towards non compete fee for not carrying on business similar to that as carried on by the Viraj Profiles Ltd. In our opinion the assessee case is squarely covered by the decisions of the coordinate benches. The operating part in the case of *Savita N. Mandhana* (supra) has reproduced as under:

> 2. To adjudicate on these appeals, only a few material facts need to be taken note of. The assessee before us was a shareholder in Mandhana Exports Pvt Ltd - a closely held company owned and managed by Mandhana family for a number of years. In the year 1996, the assessee company entered into a joint venture arrangement with Bornemann and Bick GmbH, Germany, under which 50% of the 50% of Equity shares were allotted to this German company and the name of the company was changed to Mandhana Boremann Industries Pvt Ltd ('Mandhana Boremann', in short) . As this German company was acquired by a Dutch company by the name of Paxar BV, the shareholdings in Mandhana Boremann were transferred to Paxar BV. In the relevant previous year, Paxar BV acquired all the shares held by Mandhana family for a consideration of Rs 570 per share which worked out to Rs 45.60 crores for the shares held by Mandhana family. All the shareholders in

Mandhana family entered into an agreement with Paxar BV for the purpose of this transfer of shares, and one of the clauses in the agreement also provided that the transferor shall not carry on, or be interested in, any business which competes with the business of Mandhana Boremann. On these facts, the Assessing Officer held that a part of the sale consideration of Rs 570, a part of the consideration is attributable to the non compete consideration which is liable to be taxed in the hands of the assessee under section 28(va) of the Act. The Assessing Officer computed the value of shares, by break up method, at Rs 365. Accordingly, the balance amount of Rs 205 per share was treated as towards non compete fee and brought to tax as business income under section 28(va) in the hands of the assessee. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without complete success. Learned CIT(A) upheld the action of the AO in principle, but held that only Rs 41 per share can be attributed to non compete fees. The CIT(A) further held that decision of a coordinate bench in the case of Hami Aspi Balsara Vs ACIT (30 DTR 576) does not help the assessee as there is specific mention of the non compete obligations in the share sale agreement, and, therefore, a part of the sale consideration is to be attributed to the non I TA N o . 3 9 0 0 a n d 3 8 7 8 / M u m / 2 0 1 0 Assessment year: 2006-07 compete obligations. None of the parties is satisfied. While the Assessing Officer is aggrieved of the partial relief given by the CIT(A), the assessee still maintains that no part of the consideration can be attributed to the non compete fees.

3. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

4. We find that, even in the case of Hami Aspi Balsara (supra) there was a specific non compete obligation and yet the coordinate bench was of the view that no part of the sale consideration of shares could be attributed to be taxed in the hands of the assessee as business income under section 28(va)- as is clearly discernable from the following observations made by the coordinate bench:

> The A.O has determined the book value of shares and has treated the difference between the sale price of shares and its book value as consideration towards non-compete fees. Admittedly, in the share purchase agreement no consideration was assigned towards non- compete fees and the parties had entered into the share purchase agreement after mutually settling the price of shares. The A.O. has primarily relied on Article 11.1 of the share purchase agreement to infer that assessee had paid amount towards non-compete fees. Article 11.1 reads as under:-
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> "In consideration of the Purchase price received by the Sellers under this Agreement, the sufficiency of which is hereby acknowledged, the Sellers agree that for a period of 5 years from Completion, the Sellers shall not be engaged in any of the Restricted Business in India."
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> This clause clearly shows that in the purchase price of shares, consideration towards Restraint Clause was embedded. But the same was not specifically mentioned in the Share Purchase Agreement, As rightly pointed by the ld. Counsel for the assessee, non-compete fees I TA N o . 3 9 0 0 a n d 3 8 7 8 / M

u m / 2 0 1 0 Assessment year: 2006-07 could be payable primarily with respect to manufacturing company viz. Balasara Home Products. As regards other two IPR companies viz. Balasara Hygiene Products and Besta Cosmetics, since value of IPR was not reflected in the balance sheet, which constituted major part of the share price, the same had to be determined before arriving at the true book value of share of these two companies. The A.O. has computed approximately 80% of the consideration towards non- compete fees which, in any case, is not in conformity with the settled principles of valuation of shares. Therefore, we are of the opinion that the basis adopted for assigning consideration towards non-compete fees was not correct. Now the question would be how to assign the consideration towards non-compete fees. We really do not need to enter this area particularly because the difference, between the sale price of share and the true book value of the share, if allocated towards non-compete fees, was to be computed u/s.55(2)(a). This would be clear from subsequent discussions. Admittedly, assessee on her own was not carrying on business and it was the company in which she was share holder was carrying on the business. Section 55 2(a) reads as under:-

"Section 55(2)(a) " (a) in relation to a capital asset, being goodwill of a business [or a trade mark or brand name associated with a business] [or a right to manufacture, produce or process any article or thing] [or right to carry on any business], tenancy rights, stage carriage permits or look hours, -"

Thus, it is evident that where capital asset is in the nature of right to carry on business, then the same will come within the ambit of capital gain tax.

Section 28 (va) reads as under:-

Section 28 (va) "any sum, whether received or receivable, in cash or kind, under an agreement for -

(a) Not carrying out any activity in relation to any business; or I TA N o . 3 9 0 0 a n d 3 8 7 8 / M u m / 2 0 1 0 Assessment year: 2006-07

(b) Not sharing any know-how, patent, copy right, trade-mark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services. Provided that sub-clause (a) shall not apply to -

(i) Any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business, which is chargeable under the head "Capital gains", Thus, section 28 (va) would be attracted where the assessee was carrying on business and not where assessee only had right to carry on business in the form of capital asset. Further as per Circular No. 763 dated 18/2/1998 by Finance Act, 1997 the amendments were made in section 55(2)(a) of the Act to bring extinguishment of right to manufacture, produce or process any article or thing or right to carry on any business within the ambit of capital gain tax. Similarly Circular No.8 of 2002 dated 27/8/2002 explaining the provisions of Finance Act, 2002 by which clause (va) was inserted in section 28 of the Act, clarifies that receipts for transfer of rights to manufacture, produce or process any article or thing or right to carry on any

> business, which are chargeable to tax under the head capital gain would not be taxable as profits and gains of business. Thus, the difference between the sale consideration and true value of shares was chargeable as capital gains. .....
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> 5. Respectfully following the esteemed views of the coordinate bench, with which we are in respectful agreement, we hold that the amounts held to be attributable to non compete obligations are taxable as capital gains and not as business income. To this extent, we hold that the order of the CIT(A) is indeed vitiated in law, and, to that extent, that grievance of the assessee must be upheld. There is no dispute that the assessee has already included entire consideration for sale of shares, including what could be attributed to non compete obligations, as capital gains. In this view of the matter, the exercise of bifurcation between consideration attributable to sale of shares and for non compete obligations is rendered academic and infructuous. We may also add that it is not even in dispute that the assessee before us was not actively I TA N o . 3 9 0 0 a n d 3 8 7 8 / M u m / 2 0 1 0 Assessment year: 2006-07 engaged in the business and so far as the assessee actively engaged in the business is concerned, it has been stated at the bar that income attributable to non compete obligations has been offered to tax as business income, but then, given the uncontroverted position that the assessee was not actively engaged in business, it is not really necessary to examine that aspect of the matter any further. The stand of the assessee, in treating entire consideration received on sale of shares as taxable under the head 'capital gains' must therefore be upheld.
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> 6. For the detailed reasons set out above, and respectfully following the coordinate bench in Homi Apsi Balsara's case (supra), we hold that the entire consideration has been rightly offered to tax under the head capital gains. The partial relief granted by the CIT(A), by reducing the quantum of amount attributable to non compete obligations, is thus rendered academic and infructuous. The grievance and the stand of the assessee, on the other hand, is upheld.
>
> 7. In the result, while appeal of the assessee is allowed in the terms indicated above, appeal of the revenue is dismissed as infructuous.

15. Since the issue before us is materially same, vis-a-vis the issue decided by the co-ordinate bench as cited above, we , therefore, respectfully following the decision of the co-ordinate bench, set aside the order of the ld. CIT(A) and direct the A.O. to accept the long term capital gain offered by the assessee. Consequently ground no 3 to 5 are allowed.

16. The issue raised in ground no.6, is against the order of the ld. CIT(A) confirming the action of the A.O. in making the addition of Rs.24,08,125/- u/s. 50C of the Act.

17. The facts of the case in brief are that the A.O. received information that the assessee has disclosed the sale price of immovable property lower than the stamp duty valuation by Rs.24,08,125/- and, therefore, the provisions of section 50C of the Act are applicable. Accordingly, the A.O. issued show cause notice to the A.O., as to why the provisions of section 50C should not be invoked and the addition of Rs.24,08,125/- should not be made to the income of the assessee, which was replied by the assessee by submitting that the land in question, is situated in a very interior place of Lonavala and not easily accessible. The assessee submitted before the A.O. that the land is barren and not suitable for agriculture and, therefore, the value as per the stamp duty valuation, which is on the higher side, cannot be substituted as sale consideration. The assessee submitted that it is only for this reason that the land was sold on a lesser price. The reply of the assessee did not favour with the A.O. and he added the sum of Rs.24,08,125/- u/s.50C of the Act. The ld. CIT(A) in the appellate proceedings also dismissed the appeal of the assessee by holding that the assessee has not given any specific submissions or plausible explanation for selling the land at a lesser price and, thus, dismissed the appeal.

18. Having heard the rival contentions and perusing the material available on record, we find that undoubtedly the land has been sold at a price, which is lesser than by Rs.24,08,125/-

as compared to the stamp valuation, but the assessee has contended right from the beginning that the land is located in the very interior area which is not easily accessible and is also barren. Under these fact and circumstances, we are of the earnest belief that the issue needs to be re-examined at the level of the A.O., to ascertain whether the averments made by the assessee, is carrying weight or not. Accordingly, we are inclined to set aside this issue to the file to the A.O. to examine the issue again after affording reasonable opportunity of being heard to the assessee. This ground no. 6 is allowed for statistical purpose.

ITA No. 6351/Mum/2019

19. The only issue raised by the Revenue is against the order of the ld. CIT(A) restricting the addition on account of non compete fee equal to 5% of the consideration received from M/s. Viraj Profile Ltd. Since, we have already decided the issue in favour of the assessee in ground nos. 3 to 5 in ITA No.6423/Mum/2019, by holding that no part of the sale consideration could be attributed to non compete fee. Therefore , the appeal of the Revenue become infructuous and is accordingly dismissed.

ITA Nos.6423 & 6704/Mum/2019

20. The issue raised in ground no.1 & 2 , is against the order of the ld. CIT(A), confirming the action of the A.O. in framing the assessment u/s.143(3) r.w.s 153A of the Act, by ignoring the fact that there is no incriminating material found during the year.

21. The facts in brief are that the assessee filed the return of income u/s.139 of the Act on 29.09.2012, declaring the total

income of Rs.1,82,82,07,580/-. The return was revised u/s.139(5) on 27.09.2013, declaring the total income of Rs.1,83,82,07,580/-. The case of the assessee was selected for scrutiny and the assessment was framed u/s.143(3) vide order dated 12.11.2014, assessing the total income at the same amount, as was retuned in the return of income. A search action u/s.132 of the Act was conducted on 09.01.2018 in the case of Shrem Group and others including the assessee and a notice u/s.153A dated 06.02.2019 was issued to the assessee, which was compiled by filing a return of income on 23.02.2019, declaring an income of Rs.1,83,82,07,580/-. Finally, the assessment was framed u/s.143 r.w.s. 153A of the Act vide order dated 31.03.2019, assessing the total income at Rs.2,01,02,60,710/-, by making the addition in respect of the non compete fee u/s.28(va) by splitting the sales consideration into two parts one for sale of shares and second towards non compete besides making other additions.

22. The assessee challenged the order of the A.O. before the ld. CIT(A) on legal issue that no addition can be made in the assessment framed u/s.143(3) r.w.s. 153A of the Act in case of unabated assessment, on the date of search, in absence of any incriminating material found during the course of search. However, the ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

> "4.4. I have considered the submissions carefully. The undisputed fact is that search action u/s 132 has been carried out in this case on 9.01.2018. In this case it is noted that in the statement recorded u/s 132(4) of the appellant, issue was examined and questions were asked in respect of the offer of consideration on sale of shares of Viraj Profiles Ltd. and transactions in respect of penny stock M/s India Infotech & Software Ltd.

4.5. As mandated u/s 153A, notices were issued by the assessing officer. In view of this, no fault can be found with the action of the A.O. in issuing notice U/S.153A to the appellant proposing to make assessments for all six A.Ys. Reliance is placed in this regard on the judgement of Hon'ble Delhi High Court in the case of *CIT v. Anil Kumor Bhatia 352 ITR 493 (Del)* wherein on similar facts, action of the Assessing Officer in invoking the provisions of section 153A of the Act and making additions on various grounds was upheld. Reliance is also placed on Canara Housing Dev. Co. vs DCIT (2015) 114DTR (Kar) 162. The further contention of the appellant is that no addition can be made since no incriminating material was found in the course of search. At this stage it is noted that assessment has to be framed for this assessment year falling in the six years as mandated u/s 153 A.

4.6. Section 153A does not specify that assessment must be based on any specific material found in the course of search, much less that it must be *incriminating* in nature. The word *incriminating* itself is nowhere on the statute.

4.7. Harmonious Construction of the section 153A as a 'whole' and its overall congruency with other sections should be there, so as to ensure that interpretation of any one 'word' or 'sub-section' or 'clause' or 'provision' does not result in illogical conclusion or Dis-harmony. Interpretation of statute should not lead to absurdity and illogical conclusion.

4.8. Legislature in its wisdom has made assessment mandatory for 6 assessment years irrespective of any discovery of incriminatory evidences. By restricting the powers of AO and requiring incriminatory evidence, in a large number of assessment years; practically no assessment will take place if apparently incriminating evidence is not found in search. In fact the legislature has overemphasized its intent by again mentioning in 1st proviso to section 153(1) that AO shall assess or reassess the total income in respect of each A.Y. falling within such six A.Ys.

4.9. It is also relevant to point out here that in Sec. 153A the expression "Abated assessment" and "Non-Abated Assessment" has not been used. The second proviso to Sec. 153A only mentions that in case any assessment or reassessment is pending on the date of initiation of search, such assessment or reassessment shall abate. The purpose is to frame a single assessment order after issuance of notice u/s 153A, There is no category of Non-Abated Assessment as per the Statute. Assessment in any case is mandatory u/s 153A, for six years immediately preceding the assessment year relevant to the previous year in which search is conducted, and assessment order will have to be passed for the six assessment years in all cases. Thus, it is fair and logical to conclude that assessment-unfettered - will have to be passed by AO mandatorily. The second proviso to section 153A has a very limited purpose in so far as to restrict the number of assessment orders to be only one, where assessment proceedings are already initiated and is pending on the date of search. It is in this spirit that sub-section(2) of 153A speaks of "Revival[1] of 'abated assessment' to avoid multiplicity of assessment orders. In fact there cannot be any harmonious interpretation of provisions of section 153A as a ‘whole' if hands of AO are tied while

'assessing' or 'reassessing' income for six years. 'Assessment' and 'Reassessment' order u/s 153A is always supposed to have a comprehensive, all encompassing jurisdiction - 'original' as well as based on search findings (which may or may not be there), Without such interpretation, sub section 2 and its proviso cannot be understood and do not harmoniously fit into the first subsection.

4.10. In the section 153A(l)(b), the expression Assess or Re-assess has been used by legislature in its wisdom. In fact, it would be fair and lawful to argue that even where 143(3) assessment has been done prior to search, and no incriminating evidence is found in search, AO has full powers to visit the earlier assessment and 'assess[1] or Veassess' such income. This would be most harmonious interpretation of 153A.

4.11. If assessment is to be limited to incriminating material found in search, then AO already had such powers u/s 148 to assess income that had escaped assessment and there was no requirement for the Legislature to enact section 153A. There cannot be any statute whose interpretation renders it irrelevant. The interpretation of section 153A has to be such that it remains relevant and serves a specific purpose which is not embedded in other sections.

4.12. In this case the Arbitration Award and Consent Terms and enquiries and statements recorded u/s 132(4) in respect of penny stocks are material facts. Whether it is incriminating or not is a subjective assessment. The fact remains that the inquiries made and issues emanating out of search proceedings would definitely come within the scope and form the basis for assessments mandated u/s 153A. Reliance is placed on Pr.CIT vs Nau Nidh Overseas P. Ltd. (2017) 293 CTR (Del) 567.

4.13. Considering that there has been a search action in this case u/s 132, assessment made u/s 153A is valid. The grounds of appeal 1 & 2 are therefore dismissed."

23. The ld. AR submitted before us that the original assessment was framed in this case u/s.143(3) dated 12.11.2014 by JCIT, Mumbai u/s.21(1), wherein the search was conducted on 09.01.2018 u/s.132 of the Act. The notice u/s.153A was issued on 06.02.2019. The ld. AR submitted that since the A.Y. 2013-14 was an unabated assessment year, therefore, any addition could only have been made in the impugned year only on the basis of the incriminating material found during the course of search and not otherwise. The ld. AR submitted that no incriminating material was found in the case of search with respect to Viraj

group of companies as well as capital loss incurred on the sale of Ken Financials Services Ltd and consequently, the addition made in the assessment framed are without jurisdiction. The ld. AR submitted that the objections in this regard were also taken before the A.O. however, the A.O. dismissed the same. The AR submitted that the assessee has duly filed the all documents before the A.O., which was forming part of the record and, therefore, the arbitration award found during the course of search operation, cannot be said to be incriminating material. The ld AR submitted that the issue of the sale of shares of Viraj group of companies, was duly discussed and presented before the A.O. in the original assessment proceedings and AO has examined and discussed the arbitration award and consent terms. Similarly, the details of the shares – purchased and sold were also submitted before the A.O., which included in the transactions of sale of shares of Ken Financial Services Ltd. were also examined The ld. AR in defence of his arguments relied heavily on the decision of the Hon'ble Jurisdictional High Court in the case of *Continental Warehousing Corporation (Nhava Seva)*(374 ITR 645) . The ld. AR also relied on the decision of the *Shri Vijayrattan Balkrishan Mittal Vs DCIT* (ITA No. 3429/Mum/2019) (Mumbai ITAT), wherein it has been held that no disallowance can be made in case in absence of any incriminating material found during the course of search. The ld. DR, on the other hand, relied heavily on the order of the A.O. and ld. CIT(A).

24. We have heard the rival submissions of both the parties and perused the material on record including the orders of authorities below and various decisions cited by the ld AR. In the instant case, the assessee filed the return of income under section 139(1) of the Act on 29.09.2012 which was revised on 27.09.2013 and assessment was framed vide order dated 12.11.2014 passed u/s 143(3) of the Act. We note that search was conducted under section 132(1) of the Act on 9.1.2018 on Shrem group and others including the assessee and there was no pending assessment on the date of search. Since there was no assessment pending for the instant year on the date of search, thus the present assessment year has not abated on that date. Admittedly in the present case no incriminating was found during search qua the sale of shares. Therefore, this is an undisputed position of law that in case of unabated assessment year, no addition can be made in absence of any incriminating material found during the course of search. The case of the assessee is squarely covered by series of decisions which are dealt with as under:

a) In CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), the Honble Bombay high Court has held that no addition can be made in respect of assessments which have become final on the date of search if no incriminating material is found during search and the SLP filed by the revenue against the order of Bombay high in SLP (Civil) Diary Nos.18446/2018 has also been dismissed vide order dated 09.07.2018.

In view of the above facts and circumstances of the case and various decisions as discussed above, we are of the considered

view that the additions made are without valid jurisdiction and accordingly directed to be deleted by setting aside the order of Ld. CIT(A). The ground No.1 & 2 are allowed.

25. The issue raised in ground nos. 3 to 5 is against the order of the ld. CIT(A) holding that the sale consideration received by the assessee and his son on account of sale of shares of Viraj group of company includes non compete fee to the extent of 5% and, thereafter, confirming the addition of Rs.88,18,888/- in the hands of the appellant. We have already decided the similar issue in ground nos. 3 to 5 in ITA No.6422/Mum/2019 for A.Y. 2011-12. Accordingly, our decision in ITA No.6422/Mum/2019, ground nos. 3 to 5 will mutate mutandis apply to ground nos. 3 to 5 in this appeal also and, consequently the ground nos. 3 to 5 are allowed.

26. The ground no. 6 is against the order of CIT(A) confirming the action of the AO in restricting the deduction u/s 54F of the Act to the extent of Rs. 16,88,88,888/- in the hands of the assessee and Rs.17,77,77,777/- in the hands of minor son as against deduction claimed of Rs.35,55,55,554/-. Since, the issue of taxation of sale consideration of shares of M/s. Viraj Profiles Ltd. as capital gains has already been decided in ground No.3 to 5 and this being consequential to the said decision, we direct the AO to allow the entire deduction u/s 54F of Rs.35,55,55,554/- to the assessee. Accordingly, ground no.6 is allowed.

27. The issue raised in ground no.7 is against the order of the ld. CIT(A), confirming the order of the A.O., in disallowing the loss

on sale of shares of Ken Financial Services Ltd., amounting to Rs.5,03,592/-, and also confirming the disallowance of loss on revaluation of the shares of Ken Financial Service Ltd. amounting to Rs.39,73,986/-.

28. The facts in brief are that the assessee purchased 114300 Equity shares of Ken Financial Services Ltd.in A.Y. 2011-12 for a consideration of Rs.1.05 lacs. Out of the said equity shares, the assessee partly sold shares in A.Y. 2012-13 and incurred a loss of Rs.5,23,592/-. The assessee also revalued the shares and debited a loss of Rs.39,73,986/- during the year. The A.O. disallowed the entire loss incurred in respect of Ken Finance Ltd. by holding the same as penny stock used for providing the accommodation entry to the appellant while relying on the report of the Investigation Wing of sudden increase in share price with low fundamentals.

29. In the appellate proceedings, the ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

> "7.5. I have considered the submissions carefully. It is noted that the appellant has claimed losses in the transactions of KFSL of Rs 44,97,578 in AY 2012-13 and Rs 26,23,496/- in AY 2013-14. Thus a total loss of Rs 71,21,074/- is clamed on an investment of Rs.1,05,97,929/- . The loss in the current year of Rs 44,97,578 comprises of valuation loss of Rs 39,73,986 and loss on actual sales of Rs 5,23,592/- The appellant has not substantiated with evidence why it made investments in this company which had such poor fundamentals. The price at which shares were bought was not commensurate with its fundamentals. The appellant claims to be a savvy investor. It also cannot be that the appellant was taking advantage of a sudden rally in price of this scrip since it is noted that it held on to the shares for as much as 15 months and for a large chunk for 22 months. This is not a normal behavior of an investor. If the shares and the company had been flagged by BSE/SEBI and fundamentals were poor, no genuine investor would hold the shares for such a long time. Since the appellant had taxable capital gains of Rs 180 crores on withdrawal of investment u/s 54F and large business income, there was a clear motive to use

bogus loss. The disallowance of such contrived loss is upheld. **Grounds of appeal 9 & 10"**

30. After hearing the rival contentions and perusing the material on record, we note that the assessee is a very high net-worth individual and is a regular investor. We note that during the year he has earned the huge capital gain income of more than Rs.200 crores. We further note that the assessee has submitted the documentary evidences before the AO such as bank statement, broker notes evidencing the share of the transaction in shares of Ken Financial Services Ltd and the A.O. has not doubted the purchase and sale of shares by the assessee. Besides on the basis of records before us we observe that the transactions have been carried out on the stock exchange. Moreover, there is no mention by either of the lower authorities that there is a statement by any broker which suggests that the transactions carried out by the assessee were bogus and non genuine transactions. We also note that a similar addition has been made in the assessee's own case in A.Y. 2014-15, wherein the capital gain was termed as an accommodation entry which has been deleted by the ld. CIT(A) and the order of the ld. CIT(A) has been upheld by the Tribunal in ITA No. 5039/Mum/2018 vide order dated 08.06.2018. We also note that the assessee has revalued the shares at the year end on the market value of the shares and recognised the loss in the profit and loss account in accordance with the accounting standard and therefore we do not find any anomaly in recognising the loss from revaluation of shares. Under these circumstances, keeping in view the assessee's conduct, net worth and also the fact that the assessee

has also filed evidences before the authorities below we are not in agreement with the conclusion drawn by the ld. CIT(A) on this issue. Accordingly, we set aside the order of the ld. CIT(A) and direct the AO to delete the disallowance. Ground No.7 is allowed.

ITA Nos.6422 & 6423/M/2019 (Revenue's appeals)

31. The issue involved in these appeals is against the restriction of non compete fee to 5% of the total consideration. Since we have already decided this issue in assessee's appeal in ground Nos.3 to 5 in ITA No.6422/M/2019 and ITA No.6423/M/2019 by holding that no part of the sale consideration can be treated as non compete fee by allowing the appeal of the assessee on these grounds. Consequently, the appeals of the Revenue become infructuous and are dismissed accordingly.

32. In the result, the appeal of the assessee in ITA No.6422/M/2019 for A.Y. 2011-12 is statistically allowed and the ITA No.6423/M/2019 for A.Y. 2012-13 of assessee is allowed. The Revenue appeals are dismissed.

Order pronounced in the open court on 25.10.2021

Sd/-	**Sd/-**
(Ravish Sood)	**(Rajesh Kumar)**
Judicial Member	**Accountant Member**

Mumbai; Dated : 25.10.2021

Roshani, Sr. 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/Sr. Private Secretary)
ITAT, Mumbai