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

BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos. 6418 & 6419/Mum/2019
(A.Ys. 2011-12 & 2012-13)

Shri Hitesh Chhatwal 201, Silver Beach Apt, AB Nair Road, Juhu, Mumbai – 400049	Vs.	DCIT,CC-5(4) 1927, Air India Bldg, Nariman Point, Mumbai - 400021
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: ADSPC4388E		
Assessee	..	Revenue

ITA Nos. 6420 & 6421/Mum/2019
(A.Ys. 2011-12 & 2012-13)

Smita Chhatwal Plot No. 2, Krishani, New India CHS, JVPD Scheme, Juhu, Mumbai – 400049	Vs.	DCIT, CC-5(4) 1927, Air India Bldg, Nariman Point, Mumbai - 400021
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: AALPC3125D		
Assessee	..	Revenue

ITA Nos. 6703 & 6350/Mum/2019
(A.Ys. 2011-12 to 2012-13)

DCIT, CC-5(4) 1927, Air India Bldg, Nariman Point, Mumbai - 400021	Vs.	Smt. Smita Chhatwal Plot No. 2, Krishani, New India CHS, JVPD Scheme, Juhu, Mumbai – 400049
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: AALPC3125D		
Revenue	..	Assessee

ITA Nos. 6714 & 6328/Mum/2019
(A.Ys.2011-12 & 2012-13)

DCIT, CC-5(4) 1927, Air India Bldg, Nariman Point, Mumbai - 400021	Vs.	Smt. Krishani Chhatwal Plot No 2, Krishani, New India CHS, JVPD Scheme, Juhu, Mumbai – 400 049
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: ALQPC6753K		
Revenue	..	Assessee

ITA No. 6715/Mum/2019
(A.Y. 2012-13)

DCIT, CC-5(4) 1927, 19TH Floor, Air India Bldg, Nariman Point, Mumbai - 400021	Vs.	Shri Hitesh Chhatwal 501 Magan Villa, 4th Sanman Road JVPD Scheme, Juhu, Mumbai - 400056
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: ADSPC4388E		
Revenue	..	Assessee

C.O.Nos. 78 & 79/Mum/2021
(A.Ys. 2011-2012 &2012-13)

DCIT, CC-5(4) 1927, Air India Bldg, Nariman Point, Mumbai - 400021	Vs.	Smt. Krishani Chhatwal Plot No 2, Krishani, New India CHS, JVPD Scheme, Juhu, Mumbai – 400 049
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: ALQPC6753K		
Revenue	..	Assessee

Assessee by :	Mani Jain
Revenue by :	Vinay Sinha

Date of Hearing	04.04.2022
Date of Pronouncement	28.06.2022

आदेश / O R D E R

PER AMERJIT SINGH (AM):

All the appeals filed by the revenue and cross objection are based on identical facts and similar issue, therefore, for the sake of convenience all these appeals are adjudicated together in this order by taking the ITA No. 6715 & 6419/Mum/2019 as a lead case and its finding will be applied to the other cases.

ITA No. 6715/Mum/2019 (Revenue's Appeal)

"1. On facts and circumstances of the case, the Ld. CIT(A) erred in facts and in law, in treating only 5% of the income earned on account of sale of shares of M/s. Viraj Profiles Ltd, on ad-hoc basis as non-compete fees under the head business and profession income despite upholding the finding of the AO that the specific clause for non-compete fees is for the long period of 7 years and various judicial decisions supports the splitting of consideration towards non-compete fees as a composite one and hence to be treated as business and profession income.

2. On facts and circumstances of the case, the Ld. CIT(A) erred in facts and in law in holding that there was no justification for the AO to have summarily rejecting the valuation as per DCF thereby ignoring the fact that the figures adopted by the assessee while working out the DCF valuation such as growth rate of 2% per annum, was based on self-serving assumptions which were not supported by the fact and was high pitched. The Ld. CIT(A) erred in facts and in law ignoring the analysis of the data of actual financials as on date which indicated that the assumptions of the accountant were high pitched and the shares were overvalued.

3. On facts and circumstances of the case, the Ld. CIT(A) erred in facts and in law by giving inconsistent finding with regard to the valuation of shares and their allocation between non-compete fees and other. On the one hand, the Ld. CIT(A) agreed that "there is a specific clause for non-compete fees which is for a long period of 7 years. Further, Id. CIT(A) accepted splitting of consideration towards non-compete fees and other relying on judicial decisions also" but on the other hand, the Ld. CIT(A) arbitrarily rejected the valuation method adopted by the AO which was scientifically arrived at on basis of provisions of rule 11 UA and arbitrarily estimated 5% of the consideration received on sale of shares towards non-compete fee.

4. On facts and circumstances of the case, the Ld. CIT(A) erred in facts and in law in holding that the arbitration award and consent terms as a whole do

not suggest that the main thrust is non-compete fees and that the share transfer is incidental thereby arbitrarily considering only 5% of the consideration received on sale of shares towards non-compete fee on an ad-hoc basis.

5. *Whether on facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the deduction of Rs. 11.55 Crores u/s 54F of the IT Act, by ignoring the findings of the AO made in assessment order that capital gain component on sale of shares is only Rs.9.4 Crores and hence the deduction u/s 54F has to be restricted to Rs. 9.4 Crores ."*

2. The fact in brief is that return of income declaring income of Rs.3,85,61,644/- was filed on 28.09.2012.. The case was subject to scrutiny and assessment u/s 143(3) of the Act was finalized on 30.03.2015 assessing the total income at Rs.3,89,36,834/-. A search and seizure action u/s 132(1) of the Act was conducted in case of Shri Shrem Group and Others. A notice u/s 153A of the Act was issued on 06.02.2019. In response the assessee filed return of income on 23.02.2019 declaring total income at Rs.3,89,36,834/-. The Assessing Officer stated that in the earlier years the assessee was one of the promoter director in the Viraj Group of companies which was held by two different family i.e Chhatwal family and Kochhar family. In the earlier years there was a split between the chhatwal family and Kochhar family as a result the assessee (Chhatwal family) received an amount of Rs.650 crores on the whole in lieu of shares sold by individuals of Chhatwal family. This amount was declared as long term capital gain of Rs.629 crores and it was particularly set off against short term capital loss of Rs.250 crores claimed by the assessee shri Hitesh Chhatwal, Shri Nitin Chhatwal and Smt. Smita Chhatwal & their family members.

During the year the assessee has received a sum of Rs.17,77,77,777/- as long term capital gain. The assessee has also claimed deduction of Rs.11,55,00,000/- u/s 54F of the Act against the capital gains.

During the course of search an arbitration award dated 01.04.2010 along with consent term agreement dated 24.02.2010 was found and seized. After taking into consideration the above referred Arbitration Award, during the course of assessment the A.O has issued show cause notice to the assessee as to why the above said long term capital gain should not be treated as business income under the head profit and gain of business and profession u/s 28(va) of the Act. The assessee explained that original return of income was filed on 28.09.2012 declaring total income of Rs.3,85,61,644/- including net capital gain of Rs.4,20,10,024/- and after thorough investigation assessment u/s 143(3) of the Act was completed on total income of Rs.3,89,36,830/- which also included long term capital gain of Rs.4,20,10,024/-. It was further submitted that assessee was one of the members of Chhatwal Group. Few members of Chhatwal Group and Kochhar Group were shareholder and/or directors and/or having joint control of various companies. Because of dispute between the members of two groups, the matter was referred for arbitration and resolution to Shri Ravindra M. Kadam sole arbitrator. In view of the arbitration proceedings, the dispute between the two groups were settled and consent terms were drown up. In the arbitration proceedings members of the Chhatwal Group and those of Kochhar Group were jointly referred as claimants and Respondents respectively. The main intention behind the sale of shares to Kochhar Group was to arrive at a family settlement and not to transfer the business assets/shareholding. It was also pointed out that the following individuals were not even directors in any of the companies i.e:

(i) Krishani Chhatwal
(ii) Aaryaman Chhatwal
(iii) Ram Prakash Chhatwal
(iv) Satish Chhatwal

After taking into consideration the submission of the assessee, the A.O stated that the assessee shri Hitesh Chhatwal was the brother of Nitin Chhatwal. Mr. Nitin Chhatwal was the key person and founder of Shrem Group. Viraj Profiles Limited was one of the flagship companies of the Viraj Group, which consisted of the joint ownership of Chhatwal & Kochhar. As a result of split with Viraj Group/Kochhar family effected by an arbitration award dated 1.04.2010 and consent term dated 21.02.2010, the individual of Shrem Group (Chhatwal family) received an amount of Rs.650 crores on the whole in lieu of shares sold by individual of the Shrem Group. They declared the long term capital gain of Rs.629 crores, which was set off against the short term capital loss of Rs.254 crores. The A.O was of the view that as per arbitration award the business activities itself was transferred from one group to another group. The A.O stated that the contention of the assessee that the whole transaction attracts only capital gain cannot be accepted since it was evident from the various clauses of arbitration award that there was an element of transfer of business activities by the Chhatwal family to the Kochhar family with respect to Viraj Profile Ltd. The A.O also stated that Chhatwal family was associated with the stainless steel business for more than 20 years, therefore, their experience, knowledge and expertise have to be taken into consideration for holding that they had transferred their business activities in Viraj Profile Ltd. under the settlement. The A.O has referred clause 25 of the arbitration award dated 01.04.2010 which is reproduced as under:

> *"25.* ***For a period of 7(seven) years from the date hereof,*** *[subject to compliance by respondents of their obligations hereunder including making payment of all the decretal amounts, the* ***claimants are restrained from carrying on business*** *of manufacturing & selling the following items which are manufactured or, planted to be manufactured by* ***Viraj Profiles Limited****:*

a. Stainless Steel Billets/ Ingots;
……"

The A.O stated that above clause clearly restrain the Chhatwal family member from carrying on the business of manufacturing and selling of stainless steel products and associated business for 7 years which was the primary business of Viraj Profile Ltd. Therefore, the transfer of shares not only involves long term capital gains but also involves an element of business income in the form of non compete fees which has to be taxed u/s 28(va) of the Act. The A.O stated that Chhatwal family got more consideration over and above the value of shares shows that there was an element of non compete fees and hence the provision of Sec. 28(va) of the Act were squarely applicable to the facts of these cases. The A.O also stated that being a key person of the group Mr. Nitin Chhatwal took major decision in his individual capacity and on behalf of all the family members including that of Mr. Hitesh Chhatwal. The A.O has also stated that as per clause 15 of the consent terms to the arbitration award dated 01.04.2010, the Chhatwal family has executed personal guarantee in respect of financial assistance availed by Viraj profile Ltd. and this activity showed that the Chhatwal family were involved in the business activity and transferred was not a mere transfer of shares and it was a transfer of business activity. The AO was of the view that sole contention was to transfer business and not mere sale of shares and there was an existence of non compete clause in the form of clause 25 in the arbitration award as mentioned above in this order. The A.O stated that assessee had offered the full consideration received as long term capital gain and received the consideration against shares of Viraj Profile Ltd. @ Rs.16 per shares against which the assessee had submitted the valuation report, which was based on certain assumptions. It is also

stated that for arriving at the value of shares of Viraj Profile Ltd. the valuation report had adopted a Discounted Cash Flow method for valuation for valuing shares. As per said working the value of shares comes to Rs.14.56 per share. The A.O stated that while working the DCF Valuation the assessee has assumed terminal growth rate of 2% per annum on assumption basis. The A.O stated that there is other option available to value the shares, as per Rule 11UA of the I.T. Rules 1962 based on book value. The book value method takes into consideration the actual net book value or the net present value of the company. The A.O has computed value of shares of Viraj Profile Ltd. as per book value method to the amount of Rs.8.46. Therefore, the A.O considered the part of income received from the Kochhar family up to the net present value of Rs.8.46 as capital gain and the part of income which was over and above the average and net present value of Rs. 8.46 was considered as profit & gains from business and profession as under:

LTCG

Sr. No.	Qty	Rate	Value	Indexed Cost	LTCG	Name
1	1,11,11,111	8.46	9,40,00,000	0	9,40,00,000	Hitesh Chhatwal
Grand Total	1,11,11,111		9,40,00,000	0	9,40,00,000	

Business Income

Sr. No.	Qty	Rate	Value	Original Cost	LTCG	Name
1	1,11,11,111	7.54	8,37,77,777	0	8,37,77,777	Hitesh Chhatwal
Grand Total	1,11,11,111		8,37,77,7777	0	8,37,77,777	

Accordingly, the A.O has made addition of Rs.8,37,77,777/- as business income of the assessee u/s 28(va) of the Act.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has partly allowed the appeal of the assessee. The relevant part of the decision of the CIT(A) is reproduced as under:

> *5.18. I have considered the facts and submissions carefully. The appellant has offered the consideration received for sale of shares including shares of M/s Viraj Profiles Ltd., as part of taxable long term capital gains. The assessing officer has held a portion of the sale consideration as business income u/s 28(va). This legality of the action of the assessing officer has been disputed by the appellant. It is noted that the Chhatwals and the Kocchars were related by family and were jointly running several companies and business together. Both were more or less equally involved both in terms of ownership as well as management in the various concerns and businesses. M/s Viraj Profiles Ltd. was the flagship company of the group. There were some disputes in the family. The nature of disputes is not relevant to the issue at hand. The fact is that the disputes were referred to a sole arbitrator Shri Ravindra M Kadam, Senior Advocate, and the disputes were settled. The Chhatwals were referred to as "Claimants" and theKocchars along with the companics concerned were referred to ag 'Respondents', A Consent Terms was drawn up. This was signed by the claimants and the respondents, The Arbitration essentially covered the exit of the Chhatwals from the business being run jointly hitherto, both in terms of ownership and management. The Chhatwals were to receive Rs 650 crores from Kocchars for their holdings in the companies. Almost Rs 255 crores is for shares in Viraj Profiles Ltd. Some other assets mainly lands were also sold to the Kocchars. A schedule was drawn up for the payments and transfer of shares and assets. To ensure compliance and to safeguard the interest of the two parties, Dr Justice B.P. Saraf was appointed as an escrow agent. The Chhatwals were to hand over the shares along with transfer deeds to the escrow agent. The Kocchars were to make payments to the Chhatwals as per the agreement. The escrow agent was to release the share certificates only after receiving evidence of the payments from the Kocchars. The genuineness of the reference to the Arbitrator and the Consent Terms have not been questioned by the assessing officer.*
>
> *5.19. From the data of ownership and directorship prior to Arbitration it is clear that both the Chhatwals and Kocchars were promoter/directors in the companies and were jointly running the businesses.*

5.20. The assessing officer has held that only Chhatwal family was associated with stainless steel business. This is not correct as even the Kocchars were holding directorship in M/s Viraj Profiles Ltd. The assessing officer has held that since Smt Smita Chhatwal was a guarantor to loans taken from banks and financial institutions and he was to be released from such liability, this was indicative of his being key management and he was not a simple shareholder. However it is noted that Smt Smita Chhatwal is not the only guarantor to loans taken from banks and financial institutions and the Kocchars are also guarantors. That Smt Smita Chhatwal was to be relieved from the guarantee is merely a consequence of severance and exit of the Chhatwals from the business. It is normal for the banks and financial institutions to take additional collateral security in the form of personalguarantee of the directors and promoters. In the present case, both the xocchars and Chhatwals were promoter/director. The assessing officer has stated that all the members of Chhatwal family were directors of Shrem Group. On query, the appellant has clarified that these are companies formed after the Chhatwals exited from the various companies as per the Arbitration Award. It was re-emphasized that Krishani Chhatwal, Ramprakash Chhatwal and Satish Chhatwal were not directors in any of the companies whose shares were transferred as per the Arbitration Award.

5.21. The Arbiration Award and Consent Terms shows that it predominantly covers the exit of Chhatwals from all companies and businesses for which they were paid by the Kocchars. This implied transfer of shares and the resignation from directorships in all concerns by the Chhatwals. The Chhatwals were also exiting from properties of the group held in their names. Only in one case the Chhatwals have paid to the Kocchars which is in respect of "Magan Villa" at JVPD, Juhu, Mumbai which was being used for residence by Smita Chhatwal and who wanted to retain it. Hence payment was made to Bhoomika Construction P. Ltd. Instead of splitting the business and assets, effectively the Chhatwals exited from the business by transferring their shares in the various companies to the Kocchars. As a consequence, the Chhatwals were relieved of their liabilities such as personal guarantee. It is in this context that the Clause 25 of the Consent Terms has to be considered.
5.22. The AO referred to the clause 25 of the Arbitration Award dated 0104-2010 along with Consent Term Agreement dated 24-02-2010 which is as under :

> *"25. Fora period of 7 (seven) years from the date hereof, subject to compliance by respondents of their obligations hereunder including making payment of all the decretal amounts, the claimants are restrained from carrying on business of manufacturing & selling the following items which are manufactured or, planned to be manufactured by Viraj Profiles Limited ;*

b. Stainless Steel Billets / Ingots ;
……"

Though not explicitly stated, a plain reading shows that this is in the nature of non-compete clause. However, this in my view is incidental to the main thrust of the Arbitration and Consent Terms and cannot be considered as the dominant purpose or the main part of the agreement. This Clause appears to be incorporated to protect the Kocchars for running the business smoothly without fear of any damage from the Chhatwals entering in to similar business.

5.23. It is noted that the Clause 25 restrains all the Chhatwals as Claimants and is not restricted to the directors of M/s Viraj Profiles Ltd. viz. Nitan Chhatwal, Smita Chhatwal and Hitesh Chhatwal.

5.24. The issue to be decided is whether the price received by the Chhatwals including the appellant for the transfer of shares in M/s Viraj Profiles Ltd. is a composite amount for both the value of shares and non-compete consideration. The assessing officer has held that this is a composite payment. At this stage it is noted that the Consent Terms nowhere mentions any intention of ascribing a separate value to the element of non-compete clause nor any separate value is specified. The value of shares is taken uniformly @ Rs 16 per share for all the Chhatwals, irrespective of whether they are in management or not.

5.25. The appellant has considered Rs 16 per share received for M/s Viraj Profiles Ltd. as the consideration liable to be taxed as capital gains. It has contended that the value was determined by a valuer at Rs 14.56 per share as per Discounted Cash Flow Method. However, what is important is the price mutually agreed between the disputing parties which was Rs 16 per share. The assessing officer has rejected this valuation as per DCF and substituted his valuation based on Rule 11UA of the IT Rules at Rs 8.46 per share. He has therefore considered that the amount received above Rs 8.46per share is towards the non-compete fees chargeable as business income u/s 28(va). As a result virtually 50% of the consideration received has been treated as non-compete fees chargeable as business income u/s 28(va). This certainly is exaggerated.

5.26. Rule 11UA is for valuation of unquoted shares in the context of section 56 and not section 28(va). I find that the assessing officer has not strictly followed Rule 11UA in as much as he has used the actual figures of the audited accounts across several years and not the figures for and as on the date of effective transfer. Further, as per Rule 11UA(2) inserted w.e.f. 29.11.2012, the assesse has an option to value the unquoted shares as determined by an accountant as per the Discounted Cash Flow method. Thus the assessing officer is not justified in summarily rejecting the

valuation as per DCF submitted by the appellant. The case laws cited by the appellant do support the contention that the valuation as per DCF cannot be discarded on the basis of actuals in subsequent years.

5.27. It is further noted that there is a similar basis for the prices fixed for shares of the other companies. For those companies also the actual prices fixed are slightly higher than the valuation as per DCF and is much more than that as per Book Value. Thus the price fixed for transfer of shares of M/s Viraj Profiles Ltd. is on similar basis as done for other shares. The assessing officer has only split the value of shares of M/s Viraj Profiles Ltd.

5.28. In the appellate proceedings, the Ld AR also pointed out that book value, which is the basis of Rule 11UA (2)(a) adopted by the assessing officer, does not take in to account the appreciation of land which is reflected at historical value and whose realizable value is several times much more. Perusal of the audited balance sheet of M/s Viraj Profiles Ltd. as on 31.3.2010 shows freehold land at Rs 53.25 crores. While its impact is not computed that can be taken as duly verified, it can be said that it will lead to a higher value of the shares.

5.29. The appellant has pointed out that in two cases of the Chhatwal family viz Ramprakash Chhatwal and Satish Chhatwal, assessments were reopened on similar grounds as in the case of the appellant but no such addition as business income u/s 28(va) has been made. Copy of the assessment order in case of Satish Chhatwal u/s 143(3) rws 147 for AY 2011-12 and Ramprakash Chhatwal u/s 143(3) rws 147 for AY 2011-12 was filed. Copy of reasons recorded for reopening has also been filed in the case of Shri Ramprakash Chhatwal for AY 2011-12. It is noted that the issue was identical as is the case of the appellant and the assessing officer in those cases has finally accepted the capital gains shown by these assesses. It is also noted that they had small quantum of shareholding and between them, the sale consideration received by them for shares of M/s Viraj Profiles Ltd. is only Rs 3.20 crores against total of Rs 255 crores.

5.30. It is further noted that the assessing officer has not made any verification from the Kocchars as to whether there was any intention for making higher payment for non-compete and whether it was quantified.

5.31. The appellant has also argued that as per sub-clause (a) of section 28(va) (which deals with "not carrying out any activity in relation to any business or profession") shall not apply to any sum received on account of transfer of xxxx right to carry on any business or profession which is chargeable under the head Capital Gains. The provisions of 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. A perusal of Clause 25 of the Consent Terms shows that expression used therein is "the claimants are restrained from carrying on business of manufacturing & selling the following items which are manufactured or, planned to be manufactured by Viraj Profiles Limited. "

5.32. The provisions of section 28(va) of the Act, is reproduced hereunder: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*
> *(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 or profession, which is chargeable under the head 'Capital gains'."*

5.33. It is noted that similar issue has come up in other cases decided by higher judicial authorities. The appellant has laid strong emphasis on the case of Hami Aspi Balsara v. ACIT (126 ITD 100) of the ITAT Mumbai Bench. In this case, in the course of assessment, the Assessing Officer found that the purchase price of shares of the target companies was much higher than the book value of shares of the three companies. The Assessing Officer required the assessee to explain as to why the difference between the book value and the purchase price be not considered as non-compete fees received from 'D' Ltd. The assessee explained that no element of noncompete fee was there as transferor was not having any technical knowledge about manufacturing activities. The Assessing Officer, however, restricted the long-term capital gains to the book value of the shares and treated the balance amount towards non-compete fees. He, accordingly, taxed certain amount under section 28(va). The Hon'ble ITAT held that the AssessingOfficer had determined the book value of shares and had treated the difference between the sale price of shares and their 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 Assessing Officer had primarily relied on article 11.1 of the share purchase agreement to infer that the assessee had been said certain amount towards non-compete fees. The said clause clearly showed 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 assessee, non-compete fees was payable primarily with respect to manufacturing company. As regards other two IPR companies, 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 shares of these two companies. The Assessing Officer had computed approximately 80 per cent of the consideration towards non-compete fees which in any case was not in conformity with the settled principles of valuation of shares. Therefore, it was to be held 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. There was no 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 under section 55(2)(a). Admittedly, the assessee on her own was not carrying on business and it was the company in which she was shareholder which was carrying on the business. Thus, it was evident that where capital asset was in the nature of right to carry on business, then the same would come within the ambit of capital gain tax. Section 28(va) would be attracted where the assessee was carrying on business and not where the 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 the Finance Act, 1997 the amendments were made to section 55(2)(a) to bring extinguishment of right to manufacture, produce or processany article or thing or right to carry on any business within the ambit of capital gains tax. Similarly, Circular No. 8 of 2002, dated 27-8-2002 explaining the provisions of the 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. Since, 1n the instant case, the date of transfer of shares was 1/15-4-2005 and the investment in the specified securities had, accordingly, been made within the specified penod in any view of the matter, no tax was payable. [Para 17].

The relevant portion of the decision emphasized strongly by the appellant is as under:

> *"17... 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. This clause clearly shows that in the purchase price of shares, consideration towards Restraint clause was embedded. Xxxxxxxx Admittedly, assessee*

on her own was not carrying on business and it was the company in which she was shareholder was carrying on the business.

... 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."

The appellant has relied on decisions on same issue in the unreported cases of ACIT v Savita Mandhana ITA 3900/Mum/ 2010 dated 7.10.2011 and Govindlal Mandhana ITA 3881/Mum/2010 dated 15.2.2012 which have in turn relied upon the decision in the case of Hami Aspi Balsara.
5.34. Though in a slightly different context, the Delhi High Court in the case of Rohitasava Chand vs. CIT (306 ITR 242) held that where an amount is received by way of compensation under a restrictive covenant or under a non-compete agreement, it would amount to a capital receipt in the hands of the recipient. Similar view has seen taken, by the Calcutta High Court in the case of CIT vs. Saroj Kumar Poddar (279 ITR 573) wherein the High Court, dismissing the departmental appeal held that amount received for agreeing not to engage in competing business is a capital receipt. However these cases are for assessment years prior to incorporation of section 28(va) w.e.f. 1.4.2003.

5.35. It is noted that there are other decisions on this issue which are discussed next. In the case of Anurag Toshniwal v. Deputy Commissioner of Income-tax - 1(3), Mumbai reported in [2013] 30 taxmann.com 383 (Mumbai - Trib.) the decision in the case of Mrs. Hami Aspi Balsara v. Asstt. CIT 2010 126 ITD 100 Mum. [Para 15] has been distinguished. In this case the assesse had claimed non-compete fees of Rs 5 crores received from M/s Termo Electron LLS India P. Ltd. as long term capital gains. It was claimed that assesse was not carrying out any business during the year and so and therefore section 28 is not applicable. The assessee strongly agitated this matter before the Ld. CIT(A) and strongly contended that the assessee himself was not carrying on any business whatsoever and reiterated that it is a basic condition for taxability under the head 'Profit & Gain of business that the assessee must be carrying on business. It was further pointed out by the assessee that Sec. 28(va) does not indicate that the assessee is deemed to be carrying on any business. It only applies when the basic condition is fulfilled, and has no application in the absence of the assessee carrying on business. The assessee placed reliance on the decision of the Hon'ble ITAT in the case of Mrs. Hami Aspi Balsara v. Asstt. CIT 2010 126 ITD 100 Mum. The assessee further pointed out to the Ld. CIT(A) that on a proper interpretation of the agreement between the parties, it will be seen that the fee is not merely a non compete.or a fee for not carrying on an activity in relation to business, rather it is paid for transfer of a right to

carry on business itself. Therefore, it is taxable under the head 'capital gains' u/s. 55(2)(a) of the Act. Since the assessee has transferred its right to carry on business itself, therefore it falls within the proviso of Sec. 28(va) and the amount received brought to tax only under the head 'capital gains'. The Hon'ble ITAT noted that

"The facts giving rise to the entire dispute show that the assessee is one of the Directors of a company called Chemito Technologies Pvt. Ltd. since 1.7.1983. The said Chemito Technologies Pvt. Ltd. is engaged in the manufacture and assembling of various types of laborating equipment. The said company also owned a division called "Technologies and the Environmental Instrumentation Division". Vide agreement dt. 27.5.2008, the company sold this division to M/s. Thermo Electron LLS India Pvt. Ltd. for a consideration of Rs. 58 crores. In this agreement there were Non compete provisions by which the seller for an aggregate period of 4 years shall not, in India , without the prior written consent of purchaser directly or indirectly, whether through affiliates or otherwise :

> *(a) engage in any business, whether for profit or otherwise, involving the production, manufacture, sale or distribution of products that are the same as or similar to the products produced, manufactured, marketed sold or distributed by the acquired business as of date hereof and*
>
> *(b) Assist third parties, whether a consultant, partner, administrator, advisor or otherwise, in carry out the activities of the acquired business as of the date hereof.*

9. It is provided in the said agreement that for an aggregate period of four years for the entire period shall, without the prior written consent of the other party, directly or indirectly, solicit any employee of the other party to work in any way whatsoever for that party or its affiliates or to terminate an existing relations with the employee party.

10. Subsequent to this agreement on 2.6.2008, the purchaser company M/s. Thermo Electron LLS India Pvt. Ltd., entered into a separate Non compete and non Solicitation Agreement with the assessee and also with his some Mr. Anurag Toshniwal and agreed to pay Rs. 5 crores to the assessee and Rs. 2 crores to his son. The entire dispute relates to this receipt of Rs. 5 crores by the assessee.

The ITAT Hyderabad Special Bench had the occasion to deal in sinilar issue in the case Of Dr. B.V. Raju (supra) wherein the Tribunal was seized with the situation which was prior to the amendment of Sec. 28. Therefore, the Tribunal has held that prior to the amendment, Non compete fee was regarded us capital receipt. However, the Tribunal at para-38 of its order has emphatically made it clear that w.e.f, 1.4.2003, a new sub-sec (va) is inserted in Sec. 28 to bring in the Non compete fees within the purview of Sec. 28 to make it taxable in the hands of the recipient of such income. Hon'ble Supreme Court in the case of Guffic Chem. (P.) Lid. (supra) held that payment received as Non Compete fee under a negative covenant was

always treated as a capital receipt till the assessment year 2003 04. It is only vide Finance Act, 2002 w.e.f. April 2003 that receipt by way of Non compete fee was made taxable u/s. 28(va) of the Act. The Hon'ble Supreme Court was dealing with the situation wherein it was to be decided whether Non compete fees could be charged under the head profits and gains of business or profession prior to amendment brought w.e.f. 1.4.2003 to which the Hon'ble Supreme Court held that liability cannot be created retrospectively therefore the said section 28(va)} is amendatory and not clarificatory, which observation fortifies our view that w.e.f. 1.4.2003 Non compete fees is taxable under the head "profits and gains of business or profession" as a revenue receipt.

13. Hon'ble Jurisdictional High Court of Bombay in the case of John D'Souza (supra) has also held that any payment for not carrying out any activity or for refraining from carrying out activity in relation to business which otherwise was being allowed to be carried out by the assessee, by the erstwhile owner was assessable u/s. 28(va}, squarely applies. The Hon''bie Jurisdictional High Court further held that question of capital gains did not arise as the assessee was not owner of any asset in the first place and there is no transfer of such alleged capital asset during the previous year.

Before parting, the assessee has placed reliance upon the decision of the Tribunal in the case of Mrs. Hami Aspi Balsara (supra). The facts of that case are clearly distinguishable from the facts of the instant case inasmuch as in that case, for the difference in the sale consideration vis-a-vis book value of the shares, the AO was of the opinion that the difference is nothing but a Non Compete fees and therefore the Tribunal rejected the contention of the AO holding that there was no such mention in the agreement between the purchaser and the seller of the sharestherefore the difference cannot be said to be Non compete fee. However, in the present case, there is a separate agreement termed as 'Non compete and Non solicitation agreement'. Further in the case of Mrs. Hami Aspi Balsara (supra), the transaction was clearly covered by the exemption provided u/s. 28(va) wherein it has been provided that receipts for transfer of right to manufacture, produce or process any article or thing or right to carry on business, which are chargeable to tax under the head 'capital gain' would not be taxable as profits and gains of business and since in that case, the transfer of shares were subjected to tax under the head capital gains. Therefore, the Tribunal held that Sec. 28(va) is not applicable. <u>However in the resent case there is no transfer of an capital asset therefore there is no question of the applicability of the exemption provided in sec.28(va) therefore the receipt is rightly being taxed under the head capital gains."</u>

5.36. A related case went up before the Hon'ble Bombay High Court. In the case of Arun Toshniwal, Mumbai v Deputy Commissioner of Income-tax

1(3) reported in [2015] 59 taxmann.com 274 (Bombay) the question of law referred to by the assesse were as follows:

> *"I. Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that the amount received by the Appellant from Thermo was taxable as business income under the provisions of section 28(va) of the Act, despite the fact that the Appellant was not carrying on any business in the relevant previous year ?*
>
> *II. Whether the Appellate Tribunal is correct in holding that carrying on of business is not a pre-condition was chargeability under the head 'profits and gains of business' ?*
>
> *III. Whether on the facts and in the circumstances of the case and in law the ITAT erred in failing to appreciate that the amount received by the Appellant does not fall within S.28 (va) and amounts at best to a transfer of a right to manufacture or a right to carry a business taxable under the head capital gains?"*
>
> *The Hon'ble High Court noted that*
>
> *«1. Non-compete: In consideration of Thermo paying a sum of Rs.50,000,000/(Rupees Fifty Million only) on the Completion Date, Mr. Toshniwal hereby undertakes for himself and on behalf of their Affiliates that for an aggregate period of four (4) years from the Completion Date, Mr. Toshniwal shall not, in any part of the world where Thermo sells the products of the Acquired Business or products similar to those sold by the Acquired Business, without the prior written consent of Thermo, directly or indirectly, whether through Affiliates or otherwise :*
>
> *(i) engage in any business, whether for profit or otherwise, involving the production, development, manufacture, sale or distribution of products that are the same as or similar to the products produced developed, manufactured, marketed, sold or distributed by the Acquired Business as of date hereof and/or during the period of two (2) years prior to the Completion Date; and*
>
> *(ii) assist third parties, whether as a consultant, partner, administrator, advisor or otherwise in carrying out the activities of the Acquired Business as of the date hereof: "*

4. The assessee also agreed that for a period of four years from the appointed date, the assessee shall not without prior consent of Thermo, directly or indirectly engage in any business of the division sold to Thermo for a period of 4 years. In consideration of the said undertaking Thermo would pay to the assessee a sum of Rs. 5 crores and Rs. 2 crores respectively.

In support of his contention, Mr. Chhotaray relied upon the decision in the case of Guffic Chem (P.) Ltd. v. CIT [2011] 332 ITR 602/198 Taxman

78/10 taxmann.com 105 (SC) wherein it is held that prior to 1st April, 2003, a non compete fee would bear the character of property received. However, after the said date, the same amount is revenue receipt.

In the present case, it is evident that had the assessee not entered into an agreement of non-compete, he would have earned the amount from the business carried on out of the division which was sold to Thermo Electron LLS India Pvt. Ltd. It is the sale of the said division that has deprived him of the income and part ofthe sale consideration itself, he was required to execute an agreement of noncompete and the compensation received under the said agreement was relatable on a consideration for sale of the business of the division and, therefore, for these reason also, we are of the view that the amount is taxable under Section 28(va). Furthermore, in the present case, both the assessee have received the amount pursuant to the agreement dated 2nd June, 2008 that is well after 1st April, 2003 and would be covered by the provisions of Section 28(va) of the Act."

Thus the Hon'ble High Court did not uphold the contention canvassed that amounts received was, at best, to a transfer of a right to manufacture or a right to carry a business, taxable under the head capital gains.

5.37. In the case of Ashish Tandon v. Assistant Commissioner of Income tax, Circle-1(1)(2), Vadodara reported in [2019] 103 taxmann.com 315 (Ahmedabad-Trib.), the facts were that the assessee-employee conceptualized a technical concept to safeguard websites from getting infected with malware. It entered into an agreement with his employer, i.e Indusface (Indusface India), for investment in further development of the concept for commercial exploitation. An agreement was entered into between the assessee, the employerIndusface India, Indusface Canada, on one hand, and Trend Micro USA, on the other, for sale of all the rights in the concept so developed. The claim of the assessee was that sum received on transfer of an asset was a capital receipt not chargeable to tax since the asset was a self-generated asset, having no cost of acquisition/improvement and therefore any gains arising on its transfer was not chargeable to tax. The Assessing Officer noted that as per the said agreement, the assessee had 'coined the interesting concept for providing round clock [24 XK 7 XK 365] or daily or on demand malware monitoring of websites in a zero touch and security as a service (SAAS)' basis and had expressed the willingness to provide the said concept to the company and to assist the company to develop the same into a business idea and the Indusface India had incurred expenses on this project. He was of the view that sale consideration was of a developed concept, and, therefore, it could not be said that the asset sold did not have a cost of acquisition and the amount received by the assesseecould not, therefore, be said to be capital gain on sale of an asset without any cost of acquisition. The said amount was as income from other sources. The

Commissioner (Appeals) noted that as per the agreement, the entire business related to the product Indus Guard which had been sold by the sellers, including the assessee and his employer company to Trend Micro through, Asset Purchase Agreement and the asseessee had received consideration for entering into an Agreement for Non-Competing with the Trend Micro and thus, under such circumstances, the amount received by the assessee was revenue in nature and was taxable as business income under section 28(va), though the Assessing Officer had taxed the same as income from other sources.

The Hon'ble ITAT AHMEDABAD BENCH held as follows:

"5.6. Thus, the question arises as to what was the real intention of the purchaser of the 'Indus Guard' to make the payment to the appellant, which was even higher than that paid to M/s. Indusface. The answers of the same can be found in Section 9.1 of the purchase agreement entered into by the appellant, Indusface Put. Ltd. and Indusface ILC. on one side and M/s. Trend Micro Incorporated on the other side. For ready reference, this clause is reproduced below:

Tandon agrees to execute the Non-Competition Agreement and the other Sellers, on behalf of themselves and their direct and indirect subsidiaries, agrees that they will not directly or indirectly (as an investor, shareholder, advisor, partner, consultant, licensor or otherwise), for a period commencing] on the Closing Date and ending on the third (3rd) anniversary of the Closing Date:

Sellers acknowledge and agree that the restrictions contained in this [1 covenant not to compete are necessary for the protection of the Business and goodwill of] Purchaser and are considered by Sellers and Purchaser to be reasonable for such purpose, Sellers expressly acknowledge the value of the consideration received in-connection with this covenant 1 not to compete.

5.6.3. It may also be mentioned here that in Clause 'd' of Section 9.1, the sellers have expressly acknowledged the value of the consideration received in connection with this covenant not to compete.

18. Continuing with our analysis about the amount being at best in the nature of non compete fees, we find that on an analysis of the business purchase agreement by the Trend Micro, the consideration received by the assessee, if not a fruit of his employment, can at best be treated as a non compete fees. That aspect has been discussed earlier and the factual findings set out in some detail. It is also important to note in the non compete agreement that the assessee entered into with Trend Micro, it is specifically stated that "the restricted party (i.e. including the assessee)

acknowledges that…….(it)...is entitled to receive valuable consideration pursuant to the Master Asset Purchase Agreement and the Indian Asset Purchase Agreement, a portion of which is being paid in consideration of covenants and agreements of the restricted party in this agreement'.
The amount received was held to be covered u/s 28(va).

5.38. In the case of Sumeet Taneja v. Commissioner of Income-tax,Chandigarh reported in [2013] 38 taxmann.com 149 (Punjab & Haryana). In this case the assessee had purchased shares in a company in 2002 and which was sold in 2005. The gains were offered as capital gains. The assessing officer assessed it as business income u/s 28(va). The Hon'ble High Court referred to the decision of the Hon'ble ITAT and upheld the taxation as business income u/s 28(va).

"A relevant extract from the order passed by the Tribunal reads as follows:

> *"10. The only issue arising in the present appeal is in respect of the treatment of the amount received on sale of equity shares of the private limited company held by the assessee, which were transferred during the year under consideration. The plea of the assessee in respect of the said transaction is that it is a mere sale and purchase of investment held bythe assessee and consequently gain arising on the said transaction is to be assessed under the head income from capital gains."*

The mere fact that the agreement contains a non-compete clause, payment in respect whereof may not be chargeable to tax in accordance with the aforesaid provisions, does not enable us to hold that the agreement between the assessee and the purchaser is anything other than a transfer of the business of the assessee. A cursory perusal of the agreement between the assessee and the purchaser leads to a singular conclusion that the agreement is not an innocent transfer of share holdings that would place it within section 2(14) of the Act read with the Explanation but a transfer of the business with all pervasive control being entrusted to the purchaser to the complete and absolute exclusion of the seller whether as a shareholder or for its management and control. The findings recorded by authorities under the Act that transfer of shares, evidences, a transfer of business, in our considered opinion are based upon a correct factual interpretation or the clauses of the agreement. The impugned orders do not suffer from any error of law or give rise to any substantial question of law as would require interference. As a consequence, the appeal is dismissed with no order as to costs."
5.39. In another case of ANURAG JAIN, IN RE reported in (2005) 195 CTR 0117 a part of the consideration was held to be liable for taxation u/s 28(va).
5.40. In the case of COMMISSIONER OF INCOME TAX vs. CHEMECH LABORATORIES LTD. reported in (2016) 97 CCH 0187 ChenHC the facts were that the assessee entered into three separate agreements with another entity for Brand Acquisition, Consultancy and Non-Compete.

However the consideration was a composite amount of Rs 6 crores. The assessing officer however, held that part of consideration of Rs.6 crores would be attributable to non-compete as well CIT((A)) agreed with view of AO that part of cost of Rs.6 crores was attributable to non-compete. He however modified amount attributing 50% of total consideration, Rs.3 crores to non-compete, justification being that non-compete and brand acquisition were equally
important components in the transfer of an undertakingAssessment was enhanced to this effect In appeal ITAT reversed orders of CIT(A) as well as the assessing authority holding that entire sum of Rs.6 crores would only constitute a capital receipt not liable to tax in year under consideration and that no portion of consideration would be attributable to negative covenant of non compete—Held, activity of non compete was incidental or dominant was irrelevant, and tribunal mis-directed itself in addressing itself to sameParties themselves agree, in Article 3.6 (extracted above) of Non-compete Agreement, that total consideration of Rs.6 crores. shall include consideration towards negative covenant as well.
The Hon'ble High Court held that the apparent intention of parties to attribute some amount of total consideration towards Non-compete, Assessee suggested that a sum of Rs.1 crore might be adopted as a reasonable valuation towards non-compete fee, sum of Rs.1 crore towards non-compete appears to be proper and would serve ends of justice.
5.41. The Ld AR was made aware of these decisions and allowed an opportunity to put forward its contentions. The Ld AR drew distinction from these cases to his case as follows.

1. Sumeet Taneja (Punjab High Court 261 CTR 494)
In the above case, the assessee sold 47,000 shares to a third party, namely, Pugmarks Interweb Pvt. Ltd. Further, as noticed by the Hon'ble Tribunal in the case of Sumeet Taneja, which has been extracted in paragraph 12 of the decision, the transfer of shares were coupled with transfer of employee database, product database, customer support, new client proposals and a series of other information, none of which was involved in our assessee's case. It may be noted that even the Hon'ble Tribunal, whose findings were approved by the Hon'ble High Court, had held in that case that if it were a mere sale of investment by way of shareholding then transfer of such database was not required. As against this, in assessee's case, sale of shares had taken place to members of Kochhar group who were already part of the management. There was no transfer of any asset, unlike in the case before the Hon'ble High Court. Thus, the facts are completely different.
Further, the observations of the Hon'ble Punjab & Haryana High Court in respect of transfer of employee data base, product data base, customer support, new clientele proposal, etc. are not applicable in the facts of the present case as, unlike in the case of Punjab & Haryana High Court, the purchaser of the shares were already the shareholders of the companies

and very much a part of the management of the companies of which the shares were transferred. Also, in the above case, there was a bar on usage of brand, name, domain, etc. which is not in our case.

It is true that in the facts of the case before Hon'ble Punjab & Haryana High Court, the resignation from the directorship and non-compete covenant have been given importance while arriving at the decision. However, in assessee's case, the same is not true and may not be much relevant in deciding the issue. The resignation from the directorship has to be seen as necessary consequences of sale of shares. After selling all the shares, one need not be a director of the company. Similarly, the non-compete covenant is merely a necessary consequences of sale of shares and not a separate right in itself.
Accordingly, the above decision is clearly distinguishable on facts.

2. Arun Toshniwal and Anurag Toshniwal Bomba Hi-h Court ITA No. 1257 & 1295 of 2013*)*

In the above case, the company M/s. Chemito Technologies P. Ltd. has sold its business of a particular division of the company in which both the assessee's were directors. Along with the sale agreement, a separate agreement was entered into for non-compete fees with the directors which were separate and distinct to sale agreement of the company. The Tribunal clearly held that since the assessee were not holding any asset in the sale, the amount received on account of non-compete fees cannot be linked to any asset. Further, Tribunal clearly held that a separate agreement had been entered into for non-compete clause. Moreover, the Tribunal has distinguished decision of Hami Aspi Balsara in para 15 stating that in that case, there was transfer of asset and there was no separate agreement entered for non-compete fees.
Further, decision of Tribunal has been upheld by Bombay High Court stating that when a separate agreement has been entered into by the assessee, then the consideration received was to be treated as non compete fees u/s 28(va) of the Act.
Coming to our case, the facts of the assessee are clearly distinguishable since there was a transfer of a capital asset being shares which had a right attached to it and the same was taxable as capital gains. Whereas, in above case, the assessee had not transferred any capital asset and there was a plain receipt of non-compete fees. Moreover, in our case, no separate agreement was entered into for non compete fees. Also, in the above case, the transfer of case was to a third party whereas in our case, the transfer of shares was to an existing share holder. Moreover, in the above case, there was a business transfer to a third party whereas in our case, there is only a share transfer amongst existing shareholders.
Accordingly, the above decision is clearly distinguishable on facts.

3. Anurag Jain AAR 277 ITR 1

In the above case, an Indian company and its shareholders including assessee had entered into an agreement to transfer its entire business and

share capital in favour of some foreign companies. The agreement included certain contingent payments which were to be paid on achieving certain level of EBITDA. The assessee has also entered into non-competition agreement/employment agreement under which he would receive a portion of purchase price in respect of his ownership interest and will also receive substantial and indirect benefits from transaction contemplated under agreement which is for his employment for five years as CEO. On-going through the above facts, AAR held that a combined reading of employment agreement, non-competition agreement and share purchase agreement leaves no doubt to conclude that contingent payments payable under share purchase agreement, are in substance and reality payments for ensuring performance under employment agreement to achieve desired object in exceeding EBITDA and have no real nexus to consideration for sale of shares, etc. Accordingly, AAR held that the same is taxable under the head salaries.

The above facts are clearly distinguishable from the facts of the appellant case wherein there was no separate agreement and moreover, there was no conditional payment to achieve certain profits. Also, there was no separate agreement in our case for the assessee to be holding a managerial post in the company for which payment would be received. In any case, the dispute in the above case was whetherthe payment would be taxable as salaries or business whereas in our case, the issue relates to capital gains.

Accordingly, the above decision is clearly distinguishable on facts.

4. Ashish Tandon 103 taxmann.com 315 Ahd Trib.

In the above case, the assessee sold his software to a company and received a consideration against the same. The agreement for sale stipulated that the assessee would be prevented from engaging into similar business for a certain period. The Tribunal held in para 19 that the Commissioner (Appeals) was right in holding that 'a perusal of the Asset Purchase Agreement clearly showed that the dominant intention of the purchaser for making payment to the assessee was to prevent him from engaging in any business which could have competed with the business purchased by that company from the assessee. Hence, it is held that the amount received by the assessee is revenue receipt in his hands and is taxable as business income under section 28(va)'.

As against the above facts, in our case, the dominant intention of the agreement was sale of shares and non-compete fees was only a incidental clause in the agreement. It is pertinent to mention here that in the above case, the transfer was on account of highly technical self generated software which was developed by the assessee. As against this, in our case, the transfer was merely of shares and noncompete clause could hardly contain any weight since the entire business of M/s. Viraj Profiles Ltd. would be operational only when the assessee has huge machineries for manufacturing.

Accordingly, the above decision is clearly distinguishable on facts.

5……Chemech Laboratorites Ltd. 1492 of 2007 Mad HC
In the said case, the agreement contained specific terms that the consideration paid to the assessee would also include payment towards non-compete clause. This aspect has been heavily considered by the High Court in holding that the consideration paid to the assessee contained an element on account of non-compete fees and therefore an estimate was done by the High Court.
Against the above, there are no such conditions in our case, The arbitration award doesn't contains any clause that the consideration paid on account of sale of shares also contains consideration towards non compete fees.
Accordingly, the above decision is clearly distinguishabic on facts.

5.42. After considering the ratio of the judicial decisions discussed above and analysing the facts of the case before me, I find that the following factors support the contention of the appellant.
i) Section 28(va) of the Act starts with'any sum, whether received or receivable, in cash or kind, under an agreement' ~ In the case here, there is no explicit quantification of any amount towards non-compete fees. The appellant has neither received nor any sum is receivable specifically towards non-compete fees. The assessing officer has not brought on record any explicit or direct evidence of any part of the consideration being towards non-compete obligations. The assessing officer has neither obtained nor made any efforts to obtain any confirmation from Koochars to substantiate his assumption that a part of the consideration is towards non-compete fees.
ii) Had the appellant received non-compete fees, the other shareholders such as Ramprakash Chhatwal and Satish Chhatwal should have received a lower price/share, as they were not directors or involved in management of M/s Viraj Profiles Ltd.
iii) In similar facts, in the cases of Ramprakash Chhatwal and Satish Chhatwal who also received consideration for transfer of shares held in M/s Viraj Profiles Ltd. @ Rs 16 per share to Kocchars as per the same Consent Terms, the entire gains has been accepted as capital gains and no part has been taxed as non-compete fees.
iv) Similar basis has been adopted for valuation of shares in other companies such as M/s Bhoomika Financial Services P. Ltd. and Bhoomika

Construction P Ltd. by using DCF and prices finally taken as slightly higher. The book value was much lower.
v) The assessing officer has ignored to take note of the fact that Kocchars were also equally involved in management and ownership of M/s Viraj Profiles Ltd.. They continued to be in management and ownership. Thus the Chhatwals have not transferred the business and management to the the Kocchars. The Chhatwals have actually exited from co-ownership and management of M/s Viraj Profiles Ltd.

5.43. On the other hand the following factors support the case of the assessing officer.
i) There is a specific clause for non-compete which is for a long period of 7 years.
ii) There are judicial decisions that support splitting of consideration towards non-compete fees and other when the consideration is a composite one.
5.44. I find that there is no justification for the assessing officer to have summarily rejected the valuation as per DCF when the assessee has an option to do so even as per Rule 11UA adopted by the assessing officer. The assessing officer was incorrect in comparing the actuals of subsequent years to assail the valuation of share price based on DCF, as held by Courts in several decisions.
5.45. The Arbitration Award and Consent Terms as a whole do not suggest that the main thrust is non-compete and that share transfer is incidental. It is also not transfer of business. But for a single clause for non-compete, the focus is on settling of dispute between the parties and arriving at a fair compensation for exiting the entities. In fact it is the other way with share transfer and exit from management being the main thrust and non-compete clause being incidental or consequential.
5.46. The assessing officer has computed the element of consideration towards non-compete at about 50% of the consideration received. In my view, 5% of the consideration received would be reasonable to attribute to non-compete clause. This would be applicable only to the persons who were holding management position or were directors. This excludes Ram Prakash Chhatwal, Satish Chhatwal, Krishani Chhatwal and Aaryaman Chhatwa,
5.47. For AY 2012-13, the appellant has received Rs.17,77,77,777/as consideration for sale of shares of M/s Viraj Profiles Ltd. Hence an amount of Rs.88,88,888/only is treated as towards non-compete fees as against Rs.8,37,77,777/considered by the assessing officer. It is also held that the assessing officer is not justified in rejecting DCF method applied for valuation of shares. Grounds of appeal nos. 3 to 6 are partly allowed as above.

4. During the course of appellate proceedings before us the ld. D.R referred para 8 of the assessment order stating that during the course of search action arbitration award dated 01.04.2010 was found and seized which contain the clause no. 25 as per which Chhatwal family was restrained from carrying on the business of manufacturing & selling of stainless steel products for 7 years which was the primary business of the Viraj Profile Ltd. The ld. D.R referred the decision of ld. Bombay High

Court in the case of Arun Toshniwal Vs. DCIT(3), (2015) 59 taxman 274 (Bombay HC).

On the other hand the ld. Counsel relied on the order of CIT(A) and contended that shares were transferred as a result of the settlement of dispute instead of transfer of the business assets of the company.It is also submitted that non compete clause in the consent terms were confined to the activity undertaken by M/s Viraj Profiles Ltd. only and not in relation to any other company. The ld. counsel has also submitted that in the group cases of the assessee on the similar issue and identical facts in the case of shri Nitin Chhatwal i.e ITA No. 6351 & 6704, 6422 & 6423/Mum/2019 dated 25.10.2021 the coordinate bench of ITAT bench has decided the issues in favour of the assessee.

5. Heard both the sides and perused the material on record. During the course search action in the case of Shrem Group and Others it was noticed from the arbitration award that there was split between the Chhatwal family & Kochhar family as a result, the assessee (Chhatwal family) received an amount of Rs.650 crores in lieu of shares sold by the individuals of Chhatwal family to Kochhar family. The amount was declared as long term capital gain of Rs.629 crores by the individual of Chhatwal family which was set off against short term capital loss of Rs. 254 crores. Out of the amounts received by the Chhatwal family, during the year under consideration i.e F.Y.2011-12, the assessee had received a sum of Rs.17,77,77,777/- and after reducing the indexed cost of acquisition of Nil, the assessee has offered the net amount of Rs.17,77,77,777/- as long term capital gains. The assessee had also claimed deduction of Rs.11,55,00,000/- u/s 54F of the Act against the entire capital gain. The assessee was one of the members of the

Chhatwal Group and the other members were Shamita Chhatwal, Nitin Chhatwal and other members. During the course of assessment the A.O had referred the clause 25 of the Arbitration Award dated 01.04.2010 as discussed supra in this order and observed that this clause clearlyrestrained Chhatwal family from carrying out the business of manufacturing and selling of Stainless Steel Products and Associated business for 7 years which was the primary business of Viraj Profile Ltd. During the course of appellate proceedings before us the ld. D.R placed reliance on the decision of Hon'ble Bombay High Court in the case of Arun Toshniwal Vs. DCIT (2015) 59 taxmann.com 274. With the assistance of Ld. Representative we have perused this decision and found that its facts are distinguishable from the case of the assessee. In this case there was sale of one division of the company and there was specific agreement of non-compete and non-solicitation under which the assessee agreed to not engaged in activity similar to division sold. Whereas in the case of the assessee there were transferred of shares of the assessee group to the Kochhar group in order to exit the management of the companies. The essence of the transactions was only transfer of shares and the other clauses mentioned in the award were only incidental to the same. The A.O opinedthat Chhatwal family got higher consideration of over and above the value of shares which included an element of non compete fees. The A.O observed that assesse had received price for the shares sold of Viraj Profile Ltd. @ Rs. 16 per share as per the valuation of report submitted by the assessee. As per the valuation report the value of shares was computed at Rs.14.56 per shares against which the assessee received Rs.16 per shares. The A.O observed that pricing of shares were overvalued. The A.O had not accepted valuation report valuing the shares at Rs.14.56 per shares. The A.O rejected the Discounted Cash

Flow method adopted by the assessee for valuation the shares. The A.O adopted the Rule 11UA of the I.T. Rule for valuing the share as per book value. As per book value method the A.O determined the value of shares of Viraj Profile Ltd. at Rs.8.46 per shares. The A.O has taken the consideration for shares up to Rs.8.46 per share as capital gain and balance amount was treated as non compete fees as business income u/s 28(va) of the Act. The assessee submitted that main intention behind the entire arrangement on sale of shares was to reach a family settlement and not to transfer the business asset/shareholding. The said settlement primarily contains transfer of shares of the assessee and his group members to Kochhar Group in order to exit the management of the companies. All the attached right with the shares were also transferred such as management rights, directorship etc. The said transfer also attached a non-compete clause which was only incidental to the transfer of shares. There was no separate consideration paid to the assessee on account of non-compete fees. It was also submitted that only a capital asset and management rights attached to such capital assets was transferred, therefore, the consideration received on account of the same has been shown under the head capital gain. During the course of appellate proceedings before us the ld. Counsel at the outset contended that similar issue on identical fact has been decided by the coordinate bench in the group of cases of the assessee i.e Nitesh Chhatwal vide ITA No. 6351 & 6704/Mum/2019 and ITA No. 6422 & 6423/Mum/2019 dated 25.10.2021. With the assistance of the ld. Representative we have gone through the above referred decision of the coordinate bench of the ITAT. The relevant part of the operating para of the decision is reproduced as under:

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:-*
> *"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."*
>
> *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 . 3900 and 3878/Mum/2010 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 ITA No. 3900 and 3878/Mum/2010 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. ....."

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 ITA No. 3900 and 3878/Mum/2010 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.

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 are, 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.

"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."

Respectfully, following the decision of coordinate bench of the ITAT, Mumbai, on similar fact and identical issue in the group cases of the assessee as discussed supra. We do not find any merit in the appeal of the revenue, therefore the grounds of appeal of the Revenue from 1 to 4 are dismissed.

Ground No. 5:

6. The assessee has claimed deduction u/s 54F to Rs.11,55,00,000/-, however, the A.O has restricted the disallowance to the extent Rs.9,40,00,000/- only.

7. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee. The relevant part of the decision of CIT(A) is reproduced as under:

"6.1. Ground of appeal no.7 relates to the action of the AO in restricting the deduction u/s.54F to the extent of Rs.9,40,00,000/as against Rs. 11,55,00,000/claimed by the appellant.

6.2. This ground arises as the consequence of the AO treating a part of the receipt on sale of shares as business income u/s.28(va). This has been dealt in para 15 of the assessment order. In the assessment proceedings, the AO noted that in the return of income, the assessee had disclosed long term capital gains of Rs.17,77,77,777/from the shares of Viraj Profiles against which the assessee had claimed deduction u/s.54F for a sum of Rs.11,55,00,000/-. In view of the discussions in paras 7 to 14 in the assessment order, the AO recomputed the LTCG at Rs.9,40,00,000/and the amount of deduction u/s.54F was restricted to Rs.9,40,00,000/-.

6.3. As aconsequence and corollary to the decision in this appellate order in respect of grounds of appeal no.3 to 6, the LTCG is recomputed at Rs 16,88,88,889/in respect of sale of shares of M/s Viraj Profiles Ltd. and deduction u/s.54F of Rs.11,55,00,000/is allowed to the appellant. , Ground of appeal no.7 is allowed."

8. Heard both the sides and perused the material on record. On identical issue and similar facts the coordinate bench of the ITAT, vide above referred decision dated 28/07/2021 in the case of Shri Nitin Chhatwal has allowed the appeal of the assessee. The relevant operating part is reproduced as under:

"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."

Therefore, we find that ld. CIT(A) is justified in allowing the deduction u/s 54F to the amount of Rs.11,54,00,000/-. Accordingly, this ground of appeal of Revenue stand dismissed.

ITA No. 6419/Mum/2019 (Assessee's Appeal)

Ground No. 3:

9. The facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6715/Mum/2021.The Coordinate bench of the ITAT in the group case of Shri Nitin Chhatwal vide ITA No.6351/Mum/2019 dated 25.10.2021 has adjudicated the identical issue on similar facts in favour of the assessee. The relevant operating para of the decision is reproduced as under:

> *"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."*

Following the decision of the coordinate bench as supra, these ground of appeal is allowed.

Ground No. 4 & 5:

10. These issues have already been decided in favour of the assessee after fallowing the decision of the coordinate bench in the case of Shri Nitin Chhatwal as supra while adjudicating the appeal of the Revenue vide ITA No. 6715/Mum/2019 as supra in this order, therefore, applying the findings of para 5 these grounds of appeal of the assessee are allowed.

Ground No. 1 & 2:

11. The assessee has raised these grounds of appeal stating that assessment order passed u/s 153A was not based on any incriminating material found during the course of search.

12. Heard both the sides and perused the material on record. The ld. CIT(A) has dismissed this ground of appeal of the assessee. It is

undisputed fact that search action u/s 132 of the Act was carried out in the group cases of the assessee on 9th, January,2018. At the outset the ld. Counsel has brought to our notice that similar issue on identicaol facts has been decided in favour of the assessee by the coordinate bench in the group cases of Shri Nitin Chhatwal vide ITA No. 6423 and 6704/Mum/2019 dated 25.10.2021. The relevant operating para is reproduced as under:

> *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 cannot be made in case of no disallowance can be made in case 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 24 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.

Respectfully following the decision of the coordinate bench as supra these grounds of appeal of the assessee are allowed.

ITA No. 6418/Mum/ 2019

Ground No. 3:

13. As the facts and the issue are involved this ground are the same as discussed above supra in Ground No. 3 vide ITA No. 6719/Mum/2021, therefore, the same applying mutatis mutandis, these grounds of appealare allowed.

Ground No. 4 and 5:

14. As the facts and the issue are involved this ground are the same as discussed above supra in Ground No. 5 vide ITA No. 6719/Mum/2021, therefore, the same applying mutatis mutandis, these grounds of appeal are allowed.

Ground No. 1 & 2:

15. The fact in brief is that assessment u/s 143(3) of the Act was completed on 31.03.2013. Subsequently, search action u/s 132 of the Act was conducted on 09.01.2018 in the case of Shrem Group and Others. Therefore, information was received from the Investigation Wing that there was split between the Kochhar family & Chhatwal family vide arbitration award dated 01.04.2010 and assessee group had received an amount of Rs.650 crores on the whole in lieu of share sold by the individual of the Chhatwal Group. On the basis of information received the case of the assessee was reopened by issuing of notice u/s 148 on 31.03.2018. The assessee objected the reopening stating that all relevant information and material was furnished during the course of regular assessment and no new material was available on record for reopening the assessment after 4 years.

16. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee. The relevant part of the decision of CIT(A) is reproduced 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 since 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. 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 issues. The appellant has not shown that the 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.Vs. ITO (1996) 221 ITR 538 (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.*

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 us. Select Dalurband Coal Company Put. Ltd. (1996) 217 ITR 597, 599 (SC) and Central Province Manganese Ore Company Ltd. vs. ITO (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 assesse 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 Praful Chunilal Patel, 'Vasant Chunilal Patel vs. ACIT (1999) 236 ITR 832, 840 (Guj), Stock Exchange vs. ACIT (1997) 227 ITR 906 (Guj) and ITO vs. Labjmani Mewal Das (1976) 103 ITR 437 (SC).

4.8. In the present case though there is previous order of assessment, there is not 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 opinionrefer ~ 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. 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 omginal 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 1s obtained after proper investigation from the materials on record or from any enquiry or research into facts or law. There 1s 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 Kalyan: Mav): 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 evidence on record itself The reference may be had of ACIT vs Kanga & Company (2010) TIOL 464 ITAT Mumbai: It 1s 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 CP Equipment Lid vs DCIT 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."

17. Heard both the sides and perused the material on record. At the outset the ld. Counsel brought to our notice that identical issue on similar facts in the group case of Shri Nitin Chhatwal has been decided in favour of the assessee by the coordinate bench of the ITAT vide ITA No. 6422/Mum/2019 dated 25.10.2021. The relevant operating para of the decision is reproduced as under:

"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 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 10 (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.

18. Following the decisions of the coordinate bench as supra these grounds of appeal of the assessee are allowed.

ITA No. 6350/Mum/ 2019 (Revenue's Appeal)

19. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6715/Mum/2021, therefore, the same applying mutatis mutandis, all the grounds of appeal stand dismissed.

ITA No. 6328/Mum/ 2019 (Revenue's Appeal)

20. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6715/Mum/2021, therefore, the same applying mutatis mutandis, all the ground of appeals stand dismissed.

C.O No.78/Mum/ 2021(Assessee's Cross Objection)

21. There was delay of 103 days in filing the Cross Objection by the assessee.

22. Heard both the sides and perused material on record. During the course of appellate proceedings before us the assessee has filed request for condonation of delay in filing the cross objection vide submission

dated 21.07.2021. The assessee submitted that she had received the notice of revenue appeal vide ITA No. 6714/Mum/2019 on 18.03.2019. However, due to rise in Covid cases in the month of March and Prevailing of lock down up to 15th June, 2021, assessee could not hold meeting with the tax consultant up to 15th June 2021 and it was only after the situation was relaxed in July 2021 that the matter was discussed with the tax consultant who advised to file the cross objection. The assessee also contended that Hon'ble Supreme Court vide order dated 24th April 2021 had restored the order dated 23rd March 2020 to extend the period of limitation in respect of all judicial or quasi judicial proceedings.

In view of the above facts and circumstances, we consider that there is a bonafide reason for delay in filing the cross objection, therefore, we condone the delay in filing cross objection.

23. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6418/Mum/2021, therefore, the same applying mutatis mutandis, these ground of appeals are allowed.

ITA No.6420/Mum/ 2019(Assessee's Appeal)

Ground No. 1 & 2:

24. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6418/Mum/2021, therefore, the same applying mutatis mutandis, these ground of appeals stand dismissed.

Ground No. 3 to 5:

25. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6715/Mum/2021 & ITA No.6419/Mum/2021 therefore, the same applying mutatis mutandis, these ground of appeals are allowed.

C.O No.79/Mum/ 2021 (Assessee's Cross Objection)

26. There was delay of 89 days in filing the Cross Objection by the assessee.

27. Heard both the sides and perused material on record. During the course of appellate proceedings before us the assessee has filed request for condonation of delay in filing the cross objection vide submission dated 21.07.2021. The assessee submitted that she had received the notice of revenue appeal vide ITA No. 6714/Mum/2019 on 18.03.2019. However, due to rise in Covid cases in the month of March and Prevailing of lock down up to 15th June, 2021, assessee could not hold meeting with the tax consultant up to 15th June 2021 and it was only after the situation was relaxed in July 2021 that the matter was discussed with the tax consultant who advised to file the cross objection. The assessee also contended that Hon'ble Supreme Court vide order dated 24th April 2021 had restored the order dated 23rd March 2020 to extend the period of limitation in respect of all judicial or quasi judicial proceedings.

In view of the above facts and circumstances, we consider that there is a bonafide reason for delay in filing the cross objection, therefore, we condone the delay in filing cross objection.

Ground No. 1 & 2:

28. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6719/Mum/2021,

therefore, the same applying mutatis mutandis, both these ground of appeal are allowed.

ITA No.6714/Mum/ 2019 (Revenue's Appeal)

29. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6715/Mum/2021, therefore, the same applying mutatis mutandis, these ground of appeal stand dismissed.

ITA No.6703/Mum/ 2019 (Revenue's Appeal)

30. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6715/Mum/2021, therefore, the same applying mutatis mutandis, these ground of appeal stand dismissed.

ITA No.6421/Mum/ 2019 (Assessee's Appeal)

Ground No. 1 & 2:

31. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No. 6419/Mum/2021, therefore, the same applying mutatis mutandis, these ground of appeal are allowed.

Ground No. 3 to 5:

32. As the facts and the issue are involved this ground are the same as discussed above supra in this order in ITA No.6715/Mum/2021 & ITA 6719/Mum/2021 therefore, the same applying mutatis mutandis, these ground of appeal stand dismissed.

33. In the result, the appeals of the assessee are allowed while for the appeal of the revenue are dismissed.

Order pronounced in the open court on 28.06.2022

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(AMARJIT SINGH)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated 28.06.2022
PS: Rohit

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. संबंधितआयकरआयुक्त/ The CIT(A)
4. आयकरआयुक्त(अपील) / Concerned CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, अहमदाबाद/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/BY ORDER,
सत्यापितप्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai