IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI

Before Sh. Saktijit Dey, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 3903/Del/2006 : Asstt. Year : 2002-03
ITA No. 3901/Del/2006 : Asstt. Year : 2003-04
ITA No. 3902/Del/2006 : Asstt. Year : 2004-05

ACIT, Circle-2, New Delhi	Vs	M/s NIIT Online Learning Ltd., 234, Okhla Industrial Area, Phase-I, New Delhi-110020
(APPELLANT)		**(RESPONDENT)**
PAN No. AAABCN1113B		

CO No. 264/Del/2010 : Asstt. Year : 2002-03
CO No. 265/Del/2010 : Asstt. Year : 2003-04
CO No. 266/Del/2010 : Asstt. Year : 2004-05

M/s NIIT Online Learning Ltd., 234, Okhla Industrial Area, Phase-I, New Delhi-110020	Vs	ACIT, Circle-2, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAABCN1113B		

Assessee by : Sh. Ajay Vohra, Sr. Adv. &
Sh. Rohit Jain, Adv.
Revenue by : Sh. G. C. Srivastava, Special Counsel,
Sh. Karlav Mehrotra, Adv.

Date of Hearing: 10.05.2022		**Date of Pronouncement: 05.08.2022**

ORDER

Per Bench:

The appeals filed by the Revenue and the Cross Objections by the assessee are directed against the orders ld. CIT(A)-III, New Delhi dated 20.09.2006.

2. Since, the issues involved in all these appeals are identical, they were heard together and being adjudicated by a common order.

3. The present appeal has been filed by the Revenue on the following grounds:

> *"On the facts and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 2,89,41,731/- which was made on account of disallowance of depreciation on claim of purchase of software from M/s Hi-Tech Software Ltd., the genuineness of which was not established."*

4. NIIT Online Learning Ltd. ("Assessee") has also filed a cross-objection on the following ground:

> *"That on the facts and circumstances of the case, the disallowance of depreciation amounting to Rs. 2,89,41,731/- in respect of software purchased from Hi-Tech Software Ltd. in the assessment completed under Section 153A of the Income-Tax Act, 1961 is not sustainable since the said disallowance is not based on any material/document found during the course of search."*

5. NIIT Online Learning Limited ('the assessee'), a limited company, was engaged in the business of providing online computer education. On 10th November 2004, search and seizure operation under section 132 of the Income Tax Act, 1961 ('the Act') was conducted in the case of NIIT Ltd., NIIT Technologies Ltd., NIIT CIS Ltd. and other individuals forming part of the diversified NIIT group.

6. The Assessee has also filed an additional ground of appeal under Rule 11 on the jurisdictional issue, claiming that no search had taken place at their premises.

Admission of Additional Grounds:

7. With regard to the filing of additional evidence, it was the primary contention of Revenue that the additional ground raised by the Respondent cannot be heard and adjudicated unless the CO filed by the Respondent is admitted by the Bench after condoning the delay. The Respondents cannot be given the liberty to beat a judicial process by suggesting that since the additional ground raised by them raises a jurisdictional issue, that should be heard first and all other issues would then become only academic. This is a blatant attempt to bypass a statutory judicial process under which they have to plead for the admission of additional ground of appeal. What the Respondent are trying to do is to evade their explanation about condonation of delay and seeking to persuade the bench that the entire proceedings are without jurisdiction and therefore the bench need not go into the question of the admission of the CO or into the merits of Revenue's appeal. It is submitted that such a plea is wholly untenable.

8. On the other hand, the ld. AR argued that admittedly, the assessee did not take any specific ground challenging the validity of the order passed on the ground that in absence of any search being carried out in the case of the assessee, the order passed under section 153A of the Act is illegal and bad in law. It was submitted, under a misconception of law regarding

the correct legal position and imperfect legal understanding about the distinction between search being assessee specific *vis-a-vis* premises specific more particularly, considering the fact that the common premises occupied by the assessee with its other occupants was subjected to search in case of Mr. R.S. Pawar, the Chairman of NIIT Group, without there being any search in the case of the assessee.

9. It was argued that the aforesaid order of the CTT(A), the Revenue filed captioned appeals for assessment years 2002-03 to 2004-05 before the Tribunal. The assessee filed cross-objections in Form 36A on 24.08.2010, along with application for condonation of delay of three years, three months and eleven days, on the ground that the impugned disallowance was beyond the scope of assessment under section 153A, since the same was not based on any incriminating material/ document found during the course of search. It was argued that the assessee challenged the validity of the assessment made under section 153 A of the Act, by way of additional ground of appeal(s) filed on 19.08.2017 for each year, on the ground that since no search was conducted in the case of the assessee, the invocation of the said section and framing of assessment thereunder was beyond jurisdiction, bad in law and *void ab initio*.

10. Having heard the contentions of both the parties, keeping in view the judgment, keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the additional ground filed by

the assessee is accepted. The relevant portion of the judgment is as under:

> *"5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.*
>
> *6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of*

assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

Merits of Additional Grounds:

Absence of Search U/s 132:

11. Since, the issue of authorization and execution of warrant of authorization at the premises of the assessee is to be

examined, this Tribunal vide interim order dated 29.08.2018, directed the Revenue Authorities to furnish details of authorization under section 132 of the Act issued by DIT(Inv.), copy of panchnamas and any other material which may indicate search in the case of the assessee.

"3. Without entering into the written submissions made by the Revenue as well as assessee as it may cause pre-judice to the parties on merit, we are of the considered view that when the entire case of the Revenue is based upon the primary documents viz. search warrant and panchnama, etc., prima facie no findings can be returned on the secondary documents relied upon by the parties viz. appraisal report. Moreover, to arrive at the logical conclusion and to decide the controversy, once for all, we are of the considered view that Revenue should come up with complete facts as to the alleged search, by filing affidavits that search warrants were issued in case of the assessee and pursuant thereto, panchnama was prepared with complete details of the officers issuing the search warrants and detail of the panchnama prepared. Moreover, it is settled principle of law that since jurisdictional issue can be raised by any party to the litigation at any stage of the proceedings, there is no need to admit the cross objection first, rather filing of the details of the search conducted at the premises of the assessee in the shape of affidavit would facilitate the Bench to decide the issue in entirety. Consequently, question framed is accordingly answered, by directing the Revenue to file the affidavit before the next date of hearing i.e. 10.12.2018. The matter is now listed for 10.12.2018."

12. There has been no reply from the Revenue for a period of more than three years. Subsequently, the Bench of Tribunal had, vide order dated 18.01.2022, passed the following directions:

"6. In these circumstances, we deem it just and proper to have the presence of DIT(Inv.), New Delhi and PCIT-4, New Delhi to appraise them of the need of the document available at the command of the revenue but not produce inspite of repeated adjournments and efforts put in by the Id. Special Counsel and the mandatory requirement of drawing an adverse interference against the case of revenue on the failure of production of such document. For this purpose, we call upon DIT (Inv.), New Delhi and PCIT-4, New Delhi to present before the bench on 22nd February 2022 at the bench so as to enable us to understand the difficulty in production of the documents."

13. On 22.02.2022, a letter was filed by the Special Counsel appointed by the Revenue enclosing the communications dated 21.02.2022 received from Pr. DIT (Inv.)-1, New Delhi and PCIT-4, New Delhi wherein it was stated that the records are old and difficult to track and the warrant is not available.

14. The ld. Sr. Counsel argued that no search warrant was executed in the name of the assessee company meaning thereby its stands confirmed that no search was conducted in the case of the assessee. It was argued that that as per section 132 of the Act, in order to conduct a valid search on a (specific) person, the 'competent authority' should, in consequence of

'information' in his possession, have 'reasons to believe' that either of the following three conditions have been fulfilled:

(i) Such person to whom summons under section 131(1), or notice under section 142(1) of the Act to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice; or

(ii) Such person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Act; or

(iii) Such person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Act.

15. It was argued that on perusal of the aforesaid, it is pertinent to note that search under section 132 of the Act is authorized on satisfaction of either of the aforesaid three jurisdictional conditions in the case of a particular person normally called searched person. Once search under section 132 of the Act is authorized on satisfaction of either of the jurisdictional conditions in the case of a particular person, such search may be authorized to be conducted at any premise where the authorizing authority has reason to suspect that undisclosed

asset/ books/ documents, etc., belonging to such person may be concealed. It was argued that search is 'person specific' and not 'premises specific'. Therefore, it was argued that merely because search is carried out on a particular premises, where a non-searched person may also be located and/ or residing, it does not imply/ follow that all the persons occupying the premises searched can be regarded as persons in whose case search is conducted under section 132 of the Act.

16. The ld. AR placed reliance on the judgment delivered the case of CIT vs. Smt. Priyanka Sjnghania in ITA No. 163/2015, wherein proceedings under section 153A had been initiated against the assessee without issuing any search warrant in her name u/s 132 of the Act. In that case, the search warrant was issued and panchnama was drawn in the name of the father of the assessee for search of residential premise and the latter was unmarried at that time. During the course of search, key pertaining to a locker was found which was in the name of the assessee. Thereafter, another panchnama was drawn in the joint name of the assessee and her father. The issue before the Court was regarding validity of the order passed under section 153 A in the case of the assessee without a separate search warrant being issued in her name in terms of section 132 of the Act read with Rule 112 of the Income Tax Rules 1962 ('the Rules'). During the course of the hearing, the High Court directed the Revenue to produce the search file including the search warrant issued in the name of the assessee. Considering that the Revenue was unable to produce the search warrant issued in the name of the assessee, the Court proceeded on the basis that no search warrant was issued in the case of the

assessee and held that as per Rule 112 of the Rules read with Form No. 45. Search warrant has to be issued in the name of the person and will also have to indicate the place of search. Thus, in absence of a separate search warrant in the name of assessee, the proceedings under section 153A of the Act were held to be invalid. The relevant observations of the Court are as under:

"*7. It is seen that even on the first date of hearing i.e. 2nd March 2015, the Revenue had produced from the Assessing Officer's file a copy of the vanchnama drawn on 7th July 2006 and not the warrant of search, if any issued in the name of the Respondent. The Court therefore proceeds on the basis that there is no search warrant issued in the name of the Respondent.*

8. It is evident front Rule 112 read with Form 45 that the search warrant has to be issued in the name of the person. The search warrant will also have to indicate the place of search. The documents placed on record by the Respondent Assessee shows that while there was search warrant in the name of Mr. Raj Kumar Singhania, the father of the Respondent, there was no separate search warrant in the name of the Respondent. The panchnama dated 7th July 2006 with reference to search of locker No. Ill of the Respondent, refers to the said proceedings being in continuation of the earlier search proceedings which took place on 23rd June 2006. The search proceedings on 23rd June 2006 was on the basis of the search warrant issued in the name of the father of the Respondent and not the Respondent. As already noted, the Revenue has been unable to produce till date any record to show that there was any search warrant issued in the name of the Respondent.

9. This Court is of the view that the Respondent's contention is correct that with the Department not having proceeded to search the locker No. 111 on 23rd June 2006 itself and having completed the search proceedings on that date by 5.15 pm, if it thereafter proposed to search locker No. Ill belonging to the Respondent, it ought to have issued a separate search

warrant in her name, specifying the place of search that was undertaken on 7th July 2006. Alternatively, if the Department wanted to continue with the search warrant issued on 23rd June 2006 in the name of Mr. Raj Kumar Singhania and proceed to open locker No.lll, then they could not havefnstituted separate proceedings against the Respondent under Section 153A without there being any separate search warrant in her name.

10. It is another matter that if anything incriminating had been found against the Respondent when the locker was opened on 7th July 2006, the proceedings could have been initiated against her under Section 153C of the Act. However, there was no occasion in the present case to do so since nothing was found in the locker.

11. Consequently, the Court is satisfied that apart from other reasons mentioned in the impugned order of the IT AT, the proceedings under Section 153A against the Respondent was itself without the authority of law.

12. No substantial question of law arises from the impugned order of the 11AT. The appeal is dismissed. " (emphasis supplied)

17. With regard to the merits of additional grounds of appeal, the ld. Counsel for the Revenue argued vehemently objecting of the additional grounds. The salient points of the arguments are as under:

- that the Assessee has acquiesced to the assessment proceedings under Section 153A and therefore it cannot challenge the jurisdiction of the Ld. A.O. and contend that no search was carried out by the Appellant therefore the assessment under Section 153A is bad in law.

- that the Assessee did not raise any factual jurisdictional objection i.e., any objection regarding the non-existence of

search being conducted at its premises, during the course of assessment proceedings. In fact, the Assessee co-operated with the Ld. A.O. and submitted necessary documents to help complete the assessment. Accordingly, once the Assessee has participated in the assessment proceedings under Section 153A, without any protest or objection, it cannot be allowed to contend that no search took place, at a belated stage.

- Reliance in this regard is placed on the order of the Hon'ble Supreme Court in the case of Gunjan Girishbhai Mehta v. Director of Investigation, SLP(C) 30282/2015 wherein it was held that:

"3. Notice under Section 132 of the Income Tax Act, 1961 (for short "the Act") was issued in the name of a dead person. The said notice was duly received by the present petitioner as the legal heir of the dead person. Notice of assessment under Section 158BC of the Act was issued and in the assessment proceedings, where the income was declared to be 'nil', the present petitioner as the legal heir had participated. Thereafter, notice under Section 158BD of the Act was issued to the present petitioner on the basis of information coming to light in the course of search. Aggrieved, the petitioner moved the High Court and on dismissal of the writ petition filed, the present Special Leave Petition has been instituted.

4. The point urged before us, shortly put, is that if the original search warrant is invalid the consequential action under Section 158BD would also be invalid. We do not agree. The issue of invalidity of the search warrant was not raised at any

point of time prior to the notice under Section 158BD. In fact, the petitioner had participated in the proceedings of assessment initiated under Section 158BC of the Act. The information discovered in the course of the search, if capable of generating the satisfaction for issuing a notice under Section 158BD, cannot altogether become irrelevant for further action under Section 158BD of the Act."

18. It was argued by the ld. Revenue Counsel that this fact of absence of warrant having not been disputed before the AO or even before CIT(A) in a formal manner, it is not open to raise it for the first time before ITAT claiming it to be a pure question of law disregarding the fact that the ground entails enquiry into facts and particularly the circumstance that the facts are in dispute.

19. Against the arguments of ld. Counsel for Revenue, the ld. Senior Counsel for the assessee argued that, no search was initiated/ conducted in the case of the assessee, as is evident from the fact that name of the assessee is not mentioned in any of the panchnamas prepared by the search team and that the assessee, in its letter dated 8.02.2006 filed before the assessing officer, stating that "there is no separate Panchnama in the name of the assessee. The main contention of the assessee was that inspite of the fact that no search was conducted in the case of the assessee, Assessment proceedings were concluded under section 153A of the Act, for assessment years 2002-03 to 2004-05, after making disallowance of depreciation on software imported from Hi-Tech Software Ltd. in assessment year 2002-03.

20. The aforesaid order was challenged in appeal before the CIT(A). In the statement of facts filed along with Form 35 before the ld. CIT(A) on 14.06.2006, it was stated, as a fact, that no search was carried out in the case of the assessee nor any panchnama drawn in the name of the assessee.

21. While allowing relief to the assessee on merits, in para 7 of the common appellate order passed for assessment years 2002-03 to 2004-05, the CIT(A) recorded/ observed as under:

"7. … However, on perusal of statement of facts and submission made in the appellate proceedings, it is noticed that according to appellate company there was no search and Panchnama in the case of appellant company but admittedly there were certain documents found during the course of search in the case of associate companies of the appellant company which were pertaining to the appellant company, since no formal ground of appeal has been taken either at the time of filing of appeal or during the course of appellate proceedings challenging the validity of proceedings u/s 153A and otherwise also on merit the relief has been given to the appellant company on the one and only issue involved in the aforesaid three appeals, therefore, it is not considered necessary to address this issue while disposing these appeals."

22. The ld. AR has also relied on the judgment in the case of Smt. Dhiraj Suri vs. ACIT: 98 ITD 187 a search was conducted in the case of the assessee's husband. Thereafter, in continuation of that search, locker in the joint name of the assessee and her husband was opened and a Panchnama was

prepared in their joint names. The Assessing Officer completed the block assessment in the case of the assessee and also initiated and levied penalty under section 158BFA of the Act which is held to be not sustainable.

23. On the other hand, the ld. Special Counsel appointed by the Revenue has argued on the issue of mixed question of law and facts and also succinctly tried to prove with corroborative evidences that a search has been conducted and the assessment u/s 153A is legally valid.

24. The written submission of the ld. Counsel for the Revenue is as under:

"B. PROCESS ADOPTED TO REACH A CONCLUSIVE FINDING ON THE QUESTION WHETHER OR NOT A SEARCH WAS CONDUCTED IN THIS CASE

5. Vide interim order dated 29.08.2018, the Revenue was called upon to file an affidavit in this regard.

6. It needs to be appreciated by the Hon'ble Bench that any affidavit in this case from the Revenue, would not be based on personal knowledge, as the officers who conducted the search operation on the group are no longer on the scene. The present Director of Investigation ("DIT") has made attempts to trace the relevant records pertaining to the search, but, from whatever records could be made available to him, he has not been able to lay hands on the search warrant/panchanama in this case. The observations of the Principal DIT-1, Investigation, New Delhi is as under: -

"The search was conducted on 10.11.2004. Since then the department has undergone restructuring three times, hence tracking of records was a difficult task. On verification of available search records, it is informed that no warrant/panchanamas in the name of the assessee company i.e. NUT Online Learning Ltd. is available. As per the records, the registered address of NIIT Online Learning Ltd. is 8, Balaji Estate, Kalkaji, New Delhi. This premise was covered under search operations and warrant was issued in the name of Sh. R.S. Pawar, the chairman of NIIT Group."

7. Therefore, the said averment of the Principal DIT-1, Investigation, New Delhi is neither conclusive nor to the effect that the warrant/panchanama was not at all issued/drawn in this case. All that it is said that after 17 years and after the Department has gone re-structuring three times, he has not been able to lay hands on the warrant/panchanama. This may be a relevant fact but is certainly not the conclusive averment.

8. In this regard, it needs to be appreciated that non-availability of a document does not conclusively establish the non-existence of the document. In other words, absence of an evidence is not the evidence of its absence, (especially when there are other facts which go to show the existence of document and more so when the issue is sought to be ascertained after a lapse of 17 long years.).

C. ISSUE INVOLVES A MIXED QUESTION OF LAW AND FACT

9. The issue raised in the additional ground is not a pure question of law. While it is admitted that it does raise a

jurisdictional Issue and goes to the root of the matter, but at the same time it entails an enquiry into facts to find out whether or not a search was conducted in this case. This enquiry into facts assumes significance for the following reasons:

a. *The notice was not challenged before the AO all through the assessment proceedings and there was not even a whisper to the effect that they were not subjected to search operation. The AO had, therefore, no occasion to go into this aspect of the matter.*

b. *No such ground was raised before the Commissioner of Income Tax ("CIT(A)"). In the Statement of Facts, a mention was made that there is no Panchanama etc., but the CIT(A) did not consider this aspect as no ground of appeal to that effect was raised and the CIT(A) gave relief on merits. Once again, this jurisdictional issue was neither raised nor enquired nor adjudicated during the appellate proceedings.*

c. *The Assessee did not file any appeal against the refusal of the CIT(A) to go into this question and even the CO filed after such delay did not raise this issue.*

d. *In 2017, the Respondents, for the first time, raised this issue in a formal manner by filing an additional ground to the CO. As a necessary fall out, the ITAT is called upon to render a finding of fact as to whether or not, a search was conducted in this case. This finding would be*

reached, without the AO having any opportunity to enquire into this factual aspect.

10. It is submitted with great respect that the additional ground involving enquiry into facts cannot and should not be admitted as a pure question of law. These questions may also not be decided on the basis of affidavit from the officers who have no personal knowledge of happenings some 17 years back. The available records only raise doubts, but do not conclusively demonstrate that no search had taken place, more so when this claim is being advanced only in the case of the Assessee, out of the searches conducted on all other entities of the group, a fact which is not a normal event.

D. OTHER FACTS WHICH GO TO SHOW THAT THE SEARCH WAS CONDUCTED

11. A copy of the Appraisal Report dated 08.06.2005, which is a contemporaneous record, records that the warrant was issued in the case of the Assessee.

[Kindly refer relevant extracts of the Appraisal Report dated 08.06.2005 which are annexed herewith and marked as Annexure-1].

12. Admittedly, the address of the Assessee was 8, Balaji Estate, Sudarshan Munjal Marg, Kalkaji, New Delhi-110019, India, which was a common premises of group companies. The Appraisal Report also records the place/premise where the search was conducted.

13. The Appraisal Report dated 08.06.2005 also contains allegations of evasion of tax on imports by the Assessee through M/s Hitech Software Ltd. Hong Kong.

14. Notice under Section 153A of the Act was issued to the Assessee on 06.09.2005, and there is every reason to presume in the normal course of events that the A.O. would not issue any notice under Section 153A, unless he has a record of search proceedings.

15. The Assessee has, in fact, co-operated with the Ld. A.O. during the course of assessment proceedings under Section 153A and there is no whisper that they were not subjected to search operation and hence the notice under Section 153A was invalid.

16. On 08.02.2006, during the course of assessment proceedings under Section 153A of the Act, the Assessee has written to the Ld. A.O. stating that:

"In this connection we have to state that there is no separate Panchanama in name of the assessee. However, if any paper concerning assessee has been seized the contents thereof will be explained in the case of NIIT Ltd."

[Kindly refer Page 72 of the Paper-book filed by the Assessee on 26.04.2007 which is annexed herewith and marked as Annexure-2].

When the Assessee states that there is no separate panchanama, in response to notice under Section 153A, it could

have as well said that they were not subjected to search operation, instead of pointing out that the panchanama was not separate from other group entities.

17. The Ld. A.O. in his show-cause notice dated 10.02.2006 had asked the Assessee to clarify the contents of the seized documents as per Annexures 53 to 57. The Assessee in reply dated 27.02.2006 has not denied that the documents pertained to them and has gone on to explain the nature and contents thereof.

[Kindly refer Pages 73-76 of the Paper-book filed by the Assessee on 26.04.2007 which is annexed herewith and marked as Annexure-3].

18. Subsequent to the Income Tax Appeals ("ITAs") filed by the Revenue bearing ITA No. 3901-3903/Del/2006 for A.Y.s 2002-03 to 2004-05, a Cross Objection ("CO") has been filed by the Assessee on 24.08.2010 before the Hon'ble Income Tax Appellate Tribunal ("ITAT") raising the following ground: -

"(i) That on facts and circumstances of the case, the disallowance of purchase amounting to Rs. 3,55,64,739/- in respect of software purchased from Hi Tech Software Ltd., in the assessment completed u/s 153A of the Income Tax Act, 1961 is not sustainable since the said disallowance is not based on any material document found during the course of search."

19. That, as per the objections raised by the Registry, the CO has been filed after a delay of 3 years, 3 months and 11 days i.e., 1198 days for which an application for condonation of delay

has been filed by the Assessee. The Hon'ble ITAT is yet to condone the delay of 1198 days in filing the CO.

20. In the letter of request for condonation of delay in filing the CO before the Hon'ble ITAT, Sh. P. Rajendran, Director of the Assessee, has stated that:-

"subsequently, search under Section 132 of the Act was conducted at the business premises of the Respondent on 10.11.2004."

[The letter for condonation of delay in filing the CO is annexed herewith and marked as Annexure-4],

This is a clear admission by the Director of the Assessee that they were subjected to search under Section 132 of the Act. This is an unequivocal statement and coming from a person who has the personal knowledge of the fact whether or not search had taken place. Such a categorical statement cannot be brushed aside merely on the ground that after 17 years, the Warrant/Panchanama is not traceable from available records.

21. The Assessee has filed an additional ground of appeal only on 19.08.2017, where for the first time a legal and formal ground is raised which reads as follows:-

"(i) That the Assessing Officer erred on facts and in law in completing assessment under Section 153A vide order dated 01.06.2006, without there being any search conducted upon the appellant under Section 132 of the Act."

22. The additional ground of appeal challenging the jurisdiction dated 19.08.2017, has been filed more than 12 years after the search took place (which has been disputed by the Assessee) and nearly 10 years after the order of the CIT(A).

23. The non-availability of the search warrant and the panchanama after 17 years and the existence of facts/circumstances/documents on record, pointed out hereinabove, indicate that there are other material/evidence on record which go to prove that the search warrant was issued in this case.

24. The additional ground entails enquiry into facts and therefore it may not kindly be admitted at this stage. Reference is kindly invited to the decision in the case of Phool Chand Gajanand v. CIT, (1966) 62ITR 232 (All) wherein it was held that:-

"... This shifting of the onus from the assessee to the department does not mean that the question is not one of fact. It does not cease to be a question of fact merely because the onus, lies upon the department to show that another period of twelve months is the relevant previous year. It would be a question of law only if, regardless of all circumstances, the previous financial year were the relevant previous year. If a question requires investigation of facts, it is not a question of law. The assessee itself conceded that the new question sought to be raised by it could be decided on the basis of the facts appearing on the record; this confirms that it is not a pure question of law. The provision in rule 12 applies to a ground of law as much as to a ground of fact and an appellant is not

entitled absolutely to the leave if the ground is of law. Therefore, the mere fact that the ground is of law did not entitle the assessee as a matter of right to the leave; if had still to show any; when it did not show any additional facts and when the Tribunal found that the new ground was not absolutely a ground of law, it meant that no case was made out by the assessee for the grant of leave and this was full justification for the Tribunals refusing the leave."

E. EXISTENCE OF A FACT CAN ALSO BE PROVED BY THE EXISTENCE OF OTHER FACTS (THE BURDEN REMAINING STATIC)

25. In the case of Tulsiram Sahadu Suryawanshi v. State of Maharashtra, (2012) 10 SCC 373, the Hon'ble Supreme Court while examining the scope of Section 106 of the Indian Evidence Act, 1872 ("Evidence Act") held as follows: -

"23. ...We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference...."

26. In light of the above-mentioned legal principle, even if these are in relation to criminal cases, it is respectfully submitted that conduct of search can be inferred from other

facts which are stated above. Even in the wake of non-availability of search warrant/panchanama, these pieces of evidence are good enough to draw the inference that the search had, in fact, taken place.

27. It is relevant to note that the Assessee in this case, who is also in the special knowledge of the fact (as much as the Revenue is), has never asserted by way of affidavit or otherwise, that they were not subjected to search operation under Section 132 of the Act. The Assessee does not discharge the burden of proving the fact that search had not taken place, by merely raising the same as an additional ground. The conduct of the Assessee, on the other hand, raises serious doubts on the genuineness of the additional ground filed at this stage of proceedings and thereby ensuring that rigours of other provisions are escaped.

28. In this regard, it is necessary to advert to Section 106 of the Evidence Act which states that:-

"106. Burden of proving fact especially within knowledge. - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

29. The term 'especially' used in this section refers to facts that are 'pre-eminently or exceptionally within the knowledge of a person'. Accordingly, this Section applies to a case where any fact is 'exceptionally' within the knowledge of a person, the burden of proof shifts to that person.

30. Having said that, it is pertinent to note that while the Evidence Act does not apply to proceedings under the Act, however, the Hon'ble Supreme Court has held that on first principles and on general law, the principles contained in Evidence Act can be applied to proceedings under the Act.

31. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Chuharmal v. CIT, (1988) 172ITR 250 (SC) wherein it was held that: -

"10. ...There a contention was raised that the provision in Section 110 of the Evidence Act where a person was found in possession of anything, the onus of proving that he was not the owner was on the person who affirmed that he was not the owner, was incorrect and inapplicable to taxation proceedings. This contention was rejected. The High Court of Bombay held that what was meant by saying that the Evidence Act did not apply to the proceedings under the Act was that the rigour of the rules of evidence contained in the Evidence Act, was not applicable but that did not mean that the taxing authorities were desirous in invoking the principles of the Act in proceedings before them, they were prevented from doing so. Secondly, all that Section 110 of the Evidence Act does is that it embodies a salutary principle of common law jurisprudence which could be attracted to a set of circumstances that satisfy its condition."

F. AVAILABLE PRESUMPTION IN LAW REGARDING CERTAIN FACTS WHERE A JUDICIAL OR AN OFFICIAL ACT HAVE BEEN PERFORMED

32. The legal principles emerging from Section 114 of the Evidence Act is that when an authority entrusted with an official or judicial act performs certain acts, it needs to be presumed that the act would have been performed lawfully and in the normal course of events, unless the contrary is proved. Section 114 of the Indian Evidence Act, 1872 reads as follows: -

"114. Court may presume existence of certain facts. - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(e) that judicial and official acts have been regularly performed;

…………."

33. The scope of this provision is explained in The Law of Evidence, Ratanlal & Dhirajlal, 25th Edition in the following terms:-

"It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. (Page 570)"

34. Here the Ld. A.O. has issued a notice under Section 153A of the Act, which has not been objected to by the Assessee during the course of entire proceedings. Therefore, a presumption lies that the said notice was validly issued after going through the panchanama etc. No material has been brought on record by the Assessee to show that the A.O. issued a notice under Section 153A notice without having a copy of the panchanama.

35. Thus, the Assessee is calling upon the Hon'ble Bench to draw a presumption of illegal issue of notice under Section 153A merely on the basis that the said panchanama which would have formed the basis for the issue of notice under Section 153A, is not available after 17 years.

36. Reliance on the decision of the Hon'ble Supreme Court Churharmal (Supra) is placed to submit that on first principles and on general law, the principles contained in Evidence Act can be applied to proceedings under the Act.

G. <u>ADMITTED FACTS NEED NOT BE PROVED</u>

The CO filed by the Assessee challenges the disallowance of purchase, made by the Ld. A.O, on account of the fact that it is not based on any material/document found during the course of search. This is an admission by the Assessee of the fact that search in fact took place. Moreover, the letter of request for condonation of delay in filing the CO before the Hon'ble ITAT mentions in express terms that search under Section 132 of the Act was conducted at the business premises of the Assessee. There cannot be greater evidence than an admission of the Assessee that search in fact took place.

38. In this regard, it is relevant to advert to Section 58 of the Indian Evidence Act, 1872 ('Evidence Act") which reads as follows: -

"58. Facts admitted need not be proved. - No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings;

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

39. It is respectfully submitted that the Assessee has clearly admitted in its pleadings that search under Section 132 was conducted. Therefore, once such a fact is admitted by the Assessee itself, it need not be proved. In fact, once admitted, the Assessee is estopped from contending to the contrary that no search took place. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Union of India v. Ibrahim Uddin, (2012) 8 SCC 148 wherein it was held that: -

"32. In view of the above, the law on the admissions can be summarized to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor can it reverse or discharge the burden of proof of the plaintiff."

40. Therefore, the admission by the Assessee that the search took place, need not be proved in view of Section 58 of the Evidence Act.

41. Reliance on the decision of the Hon'ble Supreme Court Churharmal (Supra) is placed to submit that on first principles and on general law, the principles contained in Evidence Act can be applied to proceedings under the Act.

H. <u>THE ASSESSEE HAS ACQUIESCED TO THE ASSESSMENT PROCEEDINGS</u>

42. It is respectfully submitted that the Assessee has acquiesced to the assessment proceedings under Section 153A and therefore it cannot challenge the jurisdiction of the Ld. A.O. and contend that no search was carried out by the Appellant therefore the assessment under Section 153A is bad in law.

43. In this regard, it is respectfully submitted that the Assessee did not raise any factual jurisdictional objection i.e., any objection regarding the non-existence of search being conducted at its premises, during the course of assessment proceedings. In fact, the Assessee co-operated with the Ld. A.O. and submitted necessary documents to help complete the assessment. Accordingly, once the Assessee has participated in the assessment proceedings under Section 153A, without any protest or objection, it cannot be allowed to contend that no search took place, at a belated stage.

44. Reliance in this regard is placed on the order of the Hon'ble Supreme Court in the case of Gunjan Girishbhai Mehta v. Director of Investigation, SLP(C) 30282/2015 wherein it was held that: -

"3. Notice under Section 132 of the Income Tax Act, 1961 (for short "the Act") was issued in the name of a dead person. The said notice was duly received by the present petitioner as the legal heir of the dead person. Notice of assessment under Section 158BC of the Act was issued and in the assessment proceedings, where the income was declared to be 'nil', the

present petitioner as the legal heir had participated. Thereafter, notice under Section 158BD of the Act was issued to the present petitioner on the basis of information coming to light in the course of search. Aggrieved, the petitioner moved the High Court and on dismissal of the writ petition filed, the present Special Leave Petition has been instituted.

4. The point urged before us, shortly put, is that if the original search warrant is invalid the consequential action under Section 158BD would also be invalid. We do not agree. The issue of invalidity of the search warrant was not raised at any point of time prior to the notice under Section 158BD. In fact, the petitioner had participated in the proceedings of assessment initiated under Section 158BC of the Act. The information discovered in the course of the search, if capable of generating the satisfaction for issuing a notice under Section 158BD, cannot altogether become irrelevant for further action under Section 158BD of the Act."

45. While Revenue is not seeking to debate a fairly well-understood principle of law that consent of an assessee cannot confer jurisdiction to an assessing officer who otherwise lacked jurisdiction, however, it is the contention of the Revenue that the Ld. A.O. had valid jurisdiction to complete the assessment under Section 153A of the Act, in view of the search conducted on the premises of the Assessee. This fact having not been disputed before the AO or even before CIT(A) in a formal manner, it is not open to raise it for the first time before Hon'ble ITAT claiming it to be a pure question of law disregarding the fact that the ground entails enquiry into facts

and particularly the circumstance that the facts are in dispute Accordingly, the acquiescence by the Assessee is a bar to raising any factual, jurisdictional grounds at a later stage.

25. The ld. Counsel for the Revenue further relied on the judgment of Hon'ble High Court of Orissa in the case of Shiva Cement Ltd. and Ors. v. Director of Income Tax (Inv.), Bhubaneswar & Ors., (2013) 439ITR 92 (Orissa) wherein it was held by C.J. Muralidhar that:

"...*As rightly pointed out by the Department, search is qua a 'place' and not necessarily qua the 'Assessee'. Survey by its very nature could be of the entity and any place from where such entity may operate.*

It is perfectly possible that while conducting survey and search of the premises of an entity, for which an authorisation has been issued, the Department can come across some material pertaining to some other person or entity. The provisions like Section 153C of the Act deal with such contingencies. However, that is not to say that a survey or a search cannot happen in two different premises simultaneously. Further, is search is qua the place, the Court sees no reason why if there are two entities in one premises, there cannot be a common search operation "

26. It was argued that the reliance by the Assessee in the case of CIT v. Smt. Priyanka Singhanaia, ITA No. 163/2015 is unfounded for the reason that in that case, it was proved as a matter of record that there was no search warrant in the name of the assessee. In the present case, however, the Revenue is not able to produce the search warrant or panchanama after a lapse of 17 years and moreover, the Department has also undergone restructuring thrice (as pointed out by the DIT (Inv.) in his letter), thereby leading to upheaval of records. It was submitted that the moot question is whether the failure to

produce search warrant after 17 years (post the search) can lead to a conclusive belief that warrant was not issued, specifically when the surrounding circumstances indicate otherwise.

27. In none of the cases referred to by the Assessee, the fact situation exists that the Revenue is being called upon to produce the search warrant after 17 years, it is submitted that the issue of non-existence of search was neither agitated by the Assessee before the A.O. nor seriously contested before the CIT. In fact, no appeal was even filed before the Hon'ble ITAT by the Assessee in the first instance. Even before the Hon'ble ITAT, the Assessee took nearly 12 years to get the right legal advice to raise a fact specific ground that they were not subjected to any search operation. This raises a big question mark on the bona fides of the ground itself.

28. The additional ground filed by the Assessee questioning the existence of the action of search, entails inquiries into facts in order to reach a conclusive finding as to whether or not any search was conducted in this case. It is submitted with utmost respect that such factual determinations should not be done on the basis of mere assertions of the Assessee (that too after 17 years of search) or the letters of the revenue authorities (which again are inconclusive as to the true facts on account of non-traceability of the relevant records). It was submitted that the A.O. had absolutely no opportunity to examine the correctness of such a claim of the Assessee, and he has therefore been deprived of the opportunity to make relevant enquiries and reach a finding of fact.

29. It was argued that the Revenue makes reference to Section 114 of the Indian Evidence Act, 1872 only because the particular facts as to the existence of the search were never challenged by the Assessee before the authority who issued the notice under Section 153A of the Income Tax Act, 1961 ("Act"), despite having full opportunity to challenge the action. Merely stating that there is no separate panchanama does not amount to conclusive establishment of the fact that no search operation took place since 'absence of evidence is not the evidence of absence'.

30. The ld. Senior Counsel for the assessee argued that placing reliance in the case of Shiva Cement Ltd. & Ors. Vs. DIT(Inv.) & Ors. 439 ITR 92 is totally misplaced and argued that in that case, two writ petitions were filed before the Hon'ble High Court by two group companies operating from the same premises. Pursuant to a common search warrant issued in the name of the two assessees, search was conducted at the common premises of the two companies.

31. Heard the arguments of both the parties and perused the material available on record.

32. While the arguments of the assessee were that the issue of non-execution of warrant of Authorization under section 132 of the IT Act, the matter was brought before the Assessing Officer and as well as the ld. CIT(A), the revenue argued that non-availability of the warrant of authorization cannot be treated as non-issue of warrant of authorization. From the examination of the entire facts and circumstances, it can be concluded that

non-availability of the copy of the warrant of authorization doesn't necessarily lead to a conclusion that the warrant has never been executed. The appraisal report which is prepared collating the warrants, documents, material, cash and other valuables found & seized and encompassing the entire search proceedings reveals the name of the assessee which can be considered as corroboratory in nature. The existence of a fact can also be proved by the existence of other facts. As the department has undergone the restructuring twice and the records have been shifted from one jurisdiction to another jurisdiction over a period of 18 long years, the non-availability of warrant, at this juncture, cannot be construed as non-existing. Reliance is being placed on the judgment of Hon'ble Supreme Court in the case of Tulsiram Sahadu Suryawanshi Vs. State of Maharashtra, (2012) 10 SCC 373, while examining the scope of Section 106 of the Indian Evidence Act, 1872 canvassed by the revenue wherein it was held as under:

"23……..We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference...."

33. Thus, keeping in view the process of issue of warrant of authorization by the revenue authorities and taking into

consideration, all other materials available on record, the Cross Objections of the assessee are hereby dismissed.

On merits of the issue: (Revenue Appeal)

34. The only issue involved in these appeals pertains to treatment of transaction of "acquisition of software" from an overseas company namely "Hi-Tech Software Ltd." and claim of depreciation thereof.

35. The main points alleged by the Assessing Officer while treating the "acquisition of software" as bogus are as under:

i. The Hitech Software Ltd. (HSL) does not have its own website.
ii. The Hitech Software Ltd. does not even have its own office.
ii. The agreement entered was brief and doesn't mention the origin of State
iv. The software imported by the appellant company was earlier exported by NIIT Ltd. i.e. a group concern.
v. The import of software has already been referred to FEMA

36. With regard to the above points, the detailed analysis of the Assessment Order is as under:

The Assessing Officer has doubted the existence of HSL and its office. Owing to the absence of any website, the AO came to a conclusion that the company HSL is bogus and non-existing. The AO has further alleged that the software imported from HSL was earlier exported by NIIT Ltd. It was alleged that the same

software which was hitherto exported has been re-imported and an amount of Rs.18.99 Cr. has been paid to a non-existing entity. Hence, it was held that the deprecation claimed is not allowable. For the sake of ready reference, the entire part of the Assessment Order relevant this issue is reproduced as under:

"The assessee company is engaged in the business of providing Online Computer Education. It is alleged that during the year the assessee imported software from Hi-Tech Software Limited , Hong Kong amounting to Rs. 18,99,20,640/-. The assessee has filed details of above transactions of import of software. The agreement with Hi-Tech software Limited is brief and does not state origin of state. Further, it is stated that Hi-tech Software Ltd. does not have its own website. The exporter does not even have its own office. It was further alleged that the software imported was earlier exported by NIIT Ltd.

The above allegations were confronted to the assessee during assessment proceedings. During assessment proceedings the assessee has filed documents relating to imports from Hi-Tech Software Limited like software download report, licensee to use software, intimation to custom authorities, CA Certificates, instructions for payment. Further assessee has also filed revenue generated during the year and thereafter by usage of software imported from Hi-Tech Software Limited.

Further assessee has filed confirmation from NIIT Ltd that they never exported any material to Hi-Tech Software Limited.

Further assessee has furnished evidence regarding address of Hi-Tech Software Limited.

The assessee has stated that it is not necessary that company should have its own website. It is further stated that the agreement with Hi-Tech Software Limited, is brief but precise and includes all key terms and conditions. On the issue of origin of state, it is not mandatory to mention the origin on import documents. The assessee has further clarified that purchase order was generated manually as the SAP system was in initial stages of implementation. It is also denied by Mr. Vijay Kumar Thadani, Director NIIT Limited, that he has any connection with Hi-Tech Software Limited. An affidavit to this effect has also been filed by him. Further, the assessee has explained that the titles of educational contents imported bearing identical resemblances with the title of educational contents exported by NIIT Ltd., is on account of reference to the contents which is required in case of educational courseware materials. For example contents related to networking will always referred as networking as title no matter who is the author/developer and what are the contents. For example window based software will always referred to as "windows……….."

I have examined replies and explanations given by assessee.

The import of software from M/s. Hi Tech Software Ltd., has already been referred to FEMA. The genuineness of the purchase cannot be accepted till the order from FEMA is received, especially in view of the fact that a company dealing in computer software does not even have a website. Moreover the

overall circumstances seems to be abnormal and the assessee's submissions are weak. Therefore, the total value of the software is being disallowed amounting to Rs. 18,99,20,640/-. Depreciation on this software amounting to Rs. 3,55,64,739/- is disallowed. An addition of Rs.3,55,64,739/- is made. Penalty proceedings u/s 271(1)(c) have been initiated separately."

37. Aggrieved, the assessee appealed before the ld. CIT(A). Before the ld. CIT(A), refuting the allegations of the Assessing Officer, the assessee put forwarded the following arguments and evidences:

38. The main allegation of the AO was that the exporting company HSL has no website and the software has been exported earlier. The Corollary allegation for making the disallowance was that the issue of import of software from HSL has been referred to FEMA.

39. It was argued that there is no requirement to have a website to do the business and the disallowance on this basis is totally unacceptable. It was submitted that HSL is incorporated and located in Hong Kong and the Director of HSL, Shr. Rajesh Malik visited the assessee company on May 29, 2001 for business discussions. It was argued the content of software to be purchased was to be used to facilitate the customers by blending them so as to be used as composite library to deliver learning services to the customers and in this connection some of the content was procured from HSL.

40. The assessee has submitted record certificate from Indian Overseas Bank certifying receipt of import documents/bills from

M/s HSL, through bank for payment and the perpetual license to use the software before the ld. CIT(A). It was argued that download of software through the internet from countries outside India is permitted under the Customs Act and is, to be reported to Customs authority in accordance with Circular No. 9 -AP (Dir. Series) of Foreign Exchange Management Act, 2000 ('FEMA'), issued by Reserve Bank of India. The assessee has duly intimated the details of all the softwares purchased/imported from M/s HSL, Hong Kong in accordance with above Circular, to customs authorities, which have been examined by the ld. CIT(A). Similar certificate certifying import of software through Internet was made available to the bank before release of payment to the foreign supplier. On the strength of the same, the bank has also released payment to M/s HSL, Hong Kong. The assessee also submitted that they have generated substantial revenue by offering various courses to the students, for which the courseware included the software imported from M/s HSL.

Assessment year	Revenue prior to purchase of Content from M/s Hi-Tech Software Ltd. and other vendors (Rs.)	Total Revenue after purchase of Content from M/s Hi-Tech Software Ltd. and other vendor (Rs.)
2001-02	189,475	-
2002-03	6,231,503	21,079,956
2003-04	-	70,245,295
2004-05	-	56,741,024
2005-06	-	44,755,453
Total	6,420,97	**19**2,821,728

41. With regard to the allegation that the software imported from HSL was earlier exported by NIIT Ltd., it was categorically submitted that NIIT Ltd. has not exported any software to HSL and indeed the software was imported to NIIT Ltd. and NIIT ANTILLES NV. Even, if it is assumed, both the softwares are different and the software exported to NIIT ANV and imported from HSL are as under:

Name of the course title exported to NIIT-NV	Name of the course title imported from Hi-Tech Software Limited, Hong Kong
MS Word 97	Word 97 Basic
Advanced Word for Office 97	Word 97 Advanced
Advanced Excel for Office 97	Excel 97 Advanced
MS PowerPoint 97	PowerPoint 97
Networking Essentials	Fundamentals of Networking
C Programming Basics	Basic C Programming
Advanced C Programming	Advanced C Programming
Object Oriented Programming with C++	C++ Object Oriented Programming

42. It was argued that the content of the software and the books available on the software and the access to the software is different from each other.

43. We find the ld. CIT(A) has examined the following points and directed to allow the depreciation:

(i) The movement/import of software via download from internet/VSAT is established by way of software download reports and intimation to custom authorities.

(ii) The payment for the software was made through normal banking channels.

(iii) The fact that software was utilized by the appellant is established from substantial increase in revenue from sale of software courses pursuant to import of software from M/s HSL.

(iv) There is no document/evidence with the Assessing Officer to doubt the transaction or suggest that payment sent to M/s HSL was received back.

(v) Agreement for purchase of the software

(vi) Purchase order placed by the assessee

(vii) Invoices issued by the seller

(viii) Software download reports

(ix) Perpetual licence agreement

(x) Intimation to custom authorities

(xi) Certificate to bank

(xii) Payment through normal banking channels.

(xiii) No proof of any infraction of law by any of the Government authorities, viz., customs, FEMA, as alleged by the AO.

44. Further, from the submissions made by the ld. Special Counsel appearing for the Revenue, it is discernable that the major factor for which the revenue wants restoration of this issue to the AO is because of the order passed u/s 263 of the Income Tax Act, 1961 in case of M/s NIIT Ltd. However, on reading of the said order dated 01.04.2010, a copy of which has been placed before us, it is evident, the revisionary authority *per se* has not disputed the fact that the assessee before us has purchased the software. His finding is, since the direct sale of software to the assessee would have attracted tax liability in the case of NIIT Ltd., the transaction has been routed through

M/s Hi Tech Software Ltd. to avail exemption u/s 10B of the Act. However, that proposition cannot distract us from the fact that the assessee has purchased the software aka whether directly from NIIT Ltd. or from Hi Tech Software Ltd.

45. Hence, keeping in view the entire facts and since the purchase of the software cannot be disputed, we decline to interfere with the order of the ld. CIT(A) directing to allow the depreciation on the software purchased.

46. In the result, the appeals of the Revenue are dismissed and that of the additional grounds of the assessee are dismissed. Since, the appeal of the revenue is dismissed, the CO of the assessee is being dismissed as infructuous.

Order Pronounced in the Open Court on 05/08/2022.

Sd/-	Sd/-
(Saktijit Dey)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 05/08/2022

Subodh Kumar, Sr. PS

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR