**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH 'C', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER**
**AND SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA Nos. 7255 & 7256/Del/2018
(Assessment Years : 2012-13 & 2013-14)

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| ACIT<br>Special Range -4,<br>New Delhi<br><br>**PAN No. AABCI 5684 A** | Vs. | Idemitsu Lube India P. Ltd.<br>603, 6th Floor, Erose Corporate Tower, Nehru Place, New Delhi-110 019 |
| **(APPELLANT)** | | **(RESPONDENT)** |

**And**

CO Nos. 36 & 35/Del/2019
(Arising out of ITA Nos.7255 & 7256/Del/2018)
(Assessment Years : 2012-13 & 2013-14)

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| Idemitsu Lube India P. Ltd.<br>603, 6th Floor, Erose Corporate Tower, Nehru Place, New Delhi-110 019<br><br>**PAN No. AABCI 5684 A** | Vs. | ACIT<br>Special Range -4,<br>New Delhi |
| **(APPELLANT)** | | **(RESPONDENT)** |

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| Assessee by | Shri Pradeep Dinodia, FCA<br>Shri Anil Kumar, C.A. |
| Revenue by | Shri Anuj Garg, Sr. D.R. |

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| Date of hearing: | 09.02.2023 |
| Date of Pronouncement: | 27.04.2023 |

**ORDER**

**PER ANIL CHATURVEDI, AM:**

Both, the appeals filed by the Revenue along with the Cross Objections by assessee, are directed against the order dated 27.08.2018 of the Commissioner of Income Tax (Appeals)-35, New Delhi relating to Assessment Years 2012-13 & 2013-14.

2. Before us, at the outset, Learned DR submitted that though the appeals filed by the Revenue are for two different assessment years but however the facts are identical in both the appeals and cross objections and therefore he has common arguments to make. Learned AR did not controvert the aforesaid submissions of Learned DR. We therefore for the sake of convenience proceed to dispose of all the appeals by a consolidated order but however proceed with narrating the facts for A.Y. 2012-13.

3. Brief facts of the case as culled out from the material on record are as under:-

4. Assessee is a wholly owned subsidiary of M/s. Idemitsu Kosan Co. Ltd., Japan and is stated to be engaged in the business of trading of petro chemical products including lubricant oil and is also stated to be providing technical assistance in the related areas. Assessee filed its return of income for A.Y. 2012-13 on 29.11.2012 declaring total income of Rs.5,87,52,089/-. Since the tax liability u/s 115JB was higher, accordingly MAT was paid on

book profit of Rs.11,17,46,315/-. The case was selected for scrutiny and thereafter, assessment was framed u/s 143(3) of the Act vide order dated 29.12.2013 and the total taxable income was determined at Rs13,30,92,970/- and book profit of Rs.11,17,46,315/-.

5. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 27.08.2018 in Appeal No.313/16-17 granted partial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal and has raised the following grounds in ITA No.7255/Del/2018 for A.Y. 2012-13:

> *"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.6,31,06,600/- made on account of foreign-exchange gain realized by the assessee on re-statement of the outstanding loan liability at the year end.*
>
> *1.a) Whether the Ld. CIT(A) has erred in holding that the gain on the re-statement on loan liability at the year was on capital account as the external commercial borrowing was raised for acquisition of fixed assets, not appreciating the fact that the underlying loan amount was no longer held by the assessee in foreign currency as it stood converted into Indian Rupees, a part of which was deposited in the form of FDRs.*
>
> *1.b) Without prejudice to the generality of the foregoing, the Ld. CIT(A) has erred in not giving the direction to reduce the cost of capital asset by the gain on fluctuation of foreign currency.*
>
> *2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 38,03,898/- on account of interest received on FDR by holding that the said interest income was liable to be netted off against the interest expense on borrowed funds, not*

*appreciating the ratio of the judgment of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers (227 ITR172) Ltd. In terms of which the interest payable in borrowings cannot be reduced from interest received on bank deposits.*

3. *Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs. 73,03,534/- on account of salary paid by holding that the employees did not have any direct or indirect nexus with the construction of the plant, ignoring the facts brought out the AO establishing that the employees were exclusively engaged in work related to construction of the plant and, therefore, salaries paid to such employees would from part of actual cost of the plant and not admissible as revenue expenditure.*

4. *The appellate crave leave to add, amend, modify, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal."*

6. The grounds raised by Revenue in ITA No.7256/Del/2018 for A.Y. 2013-14 reads as under :

*"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.14,67,94,400/- made on account of foreign-exchange gain realized by the assessee on re-statement of the outstanding loan liability at the year end.*

*1.a) Whether the Ld CIT(A) has erred in holding that the gain on the re-statement on loan liability at the year was on capital account as the external commercial borrowing was raised for acquisition of fixed assets, not appreciating the fact that the underlying loan amount was no longer held by the assessee in foreign currency as it stood converted into Indian Rupees, a part of which was deposited in the form of FDRs.*

*1.b) Without prejudice to the generality of the foregoing, the Ld CIT(A) has erred in not giving the direction to*

*reduce the cost of capital asset by the gain on fluctuation of foreign currency.*

2. *Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 1,61,97,594/- on account of interest received on FDR by holding that the said interest income was liable to be netted off against the interest expense on borrowed funds, not appreciating the ratio of the judgment of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers (227 ITR172) Ltd. In terms of which the interest payable in borrowings cannot be reduced from interest received on bank deposits.*

3. *Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.2,12,95,649/- on account of salary paid by holding that the employees did not have any direct or indirect nexus with the construction of the plant, ignoring the facts brought out the AO establishing that the employees were exclusively engaged in work related to construction of the plant and, therefore, salaries paid to such employees would from part of actual cost of the plant and not admissible as revenue expenditure.*

4. *The appellate crave leave to add, amend, modify, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal."*

7. Assessee in the cross objection has raised following ground of appeal in Cross Objection No.36/Del/2019 for A.Y. 2012-13 :

*"1) That the Ld. CIT(A) erred in law and on the facts and circumstance of the assessee's case in not admitting the legal ground claiming that the interest on fixed deposits of Rs. 1,36,61,685/- are capital receipts not liable to tax as the same have direct nexus to the ECB loan raised and used for acquiring fixed capital assets, on wholly erroneous, illegal and untenable ground.*

*2) That the Cross Objector/assessee may be allowed to raise any other cross objection as may be thought fit at the time of hearing of this appeal."*

8. Ground of appeal raised by the assessee in Cross Objection No.35/Del/2019 for A.Y. 2013-14 reads as under :

> *1) That the Ld. CIT(A) erred in law and on the facts and circumstance of the assessee's case in not admitting the legal ground claiming that the interest on fixed deposits of Rs. 1,71,01,668/- are capital receipts not liable to tax as the same have direct nexus to the ECB loan raised and used for acquiring fixed capital assets, on wholly erroneous, illegal and untenable ground.*
>
> *2) That the Cross Objector/assessee may be allowed to raise any other cross objection as may be thought fit at the time of hearing of this appeal."*

9. Ground No. 1 & 2 are interconnected and are considered together.

10. During the course of assessment proceedings and on perusing the computation of income, AO noticed that assessee had reduced the income by an amount of Rs.6,31,06,600/- on account of foreign exchange profit on restatement of ECB loan. The assessee was asked to justify its claim and furnish the necessary details. Assessee submitted that it was engaged in the construction of new manufacturing plant at Maharashtra and for that assessee had taken ECB loan of JPY 143,00,00,000 from its parent company. Assessee *inter alia* submitted that foreign exchange gain represents the unrealized foreign exchange gain on outstanding ECB loan which was restated in accordance with the Accounting Standard 11 (AS 11) issued by Institute of Chartered Accountant of India. It was further submitted since ECB loan has

been utilized for acquisition of fixed assets, the net notional foreign exchange translation gain was capital in nature and therefore it was excluded from the computation of taxable income. Assessee also placed reliance on various decisions which are cited by the AO in the order. The submissions of the assessee was not found acceptable to AO. AO was of the view that the ratio of the decisions relied upon by the assessee was not applicable to the facts of the assessee's case as the assessee was not holding any foreign currency, the foreign currency loan that was received by the assessee was converted into Indian Rupees and deposited in the bank account, a part of such amount was utilized by the assessee and a part was deposited in the bank in the form of FDRs. He was, therefore, of the view that the foreign exchange gain of re-assessment of ECB loan was on revenue account. He accordingly held that assessee had wrongly excluded the amount of Rs.6,31,06,600/- from the income. He accordingly added the aforesaid amount to the income of the assessee.

11. AO noticed that during the year under consideration, assessee had received an interest of Rs.2,00,77,828/- on FDRs from bank out of which Rs.38,03,898/- was capitalized and transferred to capital work in progress and the balance amount of Rs.1,62,73,932/- was credited to the Profit and Loss account. The assessee was asked to explain the reasons for transferring of Rs.38,03,898/- to capital work in progress and not offering to tax to which assessee *inter alia* submitted that it had received unsecured loans from its holding company for setting up of new

manufacturing plant and loan amount was kept with 'The Bank of Tokyo Mitsubhishi UFJ Limited' in the form of FDRs and assessee had earned the interest from those FDRs. It was further submitted that the interest earned on ECB was transferred to capital work in progress. AO was of the view that the assessee was not entitled to set off the interest paid to its parent company with the interest received from FDRs. He accordingly treated Rs.38,03,898/- as income from other sources and made its additions.

12. Aggrieved by the order of AO, assessee carried the matter before CIT(A). CIT(A) after considering the submissions of the assessee, remand the report of the AO and assessee's submissions to the remand report decided the issue in favour of the assessee. While deciding the issue in favour of the assessee, CIT(A) has given a finding that the copy of the agreement for obtaining the ECB loan, RBI approval, the returns filed by the assessee with RBI, all establish that the ECB loans obtained by the assessee were utilized for the purpose of acquisition of capital assets in India. CIT(A) while deciding the issue has also given a finding that the provisions of Section 43A of the Income Tax Act are not applicable to the facts of the case because provisions of section 43A are attracted only when capital assets are acquired from outside India and some liability is incurred on capital account for acquiring such assets from outside India. CIT(A) also noted that in A.Ys. 2012-13 & 2013-14, AO had treated the amount as taxable whereas in A.Y. 2014-15 when it was a loss on

account of reinstatement and assessee had given the similar treatment by offering it as a disallowance in the return of income the same is accepted by AO. CIT(A), thereafter has given a finding with the reinstatement of loan liability at the year-end was on capital account, no actual reinstatement had taken place during the year under consideration and since the AO has himself accepted the treatment of the item in A.Y. 2014-15, there was no reason for the AO to give a different treatment to the issue in A.Y. 2012-13. He, accordingly, held the foreign exchange gain on reinstatement of ECB loan to be non taxable.

13. With respect to the addition on account of interest on FDRs of Rs.38,03,898/-, CIT(A) at para 4.5.3.3 has given finding that ECB loans obtained by the assessee from its parent company was obtained and utilized for acquisition of capital assets and assessee had also paid interest to its parent company which was netted against interest income. He has held that since the payment of interest and the earning of interest was inextricably linked to each other the same was required to netted off. He thereafter, placing reliance on the decision in the case of Indian Oil Panipat Power Consortium vs. ITO 315 ITR 255 (Delhi) deleted the addition made by AO.

14. Aggrieved by the order of CIT(A), Revenue is before the Tribunal.

15. Before us, Learned DR took us through the findings of AO and strongly supported the order of AO. Learned AR on the other hand reiterated the submissions made before AO and CIT(A) and supported the order of CIT(A). Learned AR also relied on the decision of Delhi High Court in the case of PCIT vs. Triumph Realty Pvt. Ltd. reported in (2023) 450 ITR 271 (Delhi). He also placed on record copy of the decision. He, therefore, submitted in view of the settled law, no interference to the order of CIT(A) is called for.

16. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the addition of Rs.6,31,06,600/- made on account of re-statement foreign exchange gain which was made by AO but deleted by CIT(A) and the deletion of Rs.38,03,898/- on account of interest received on FDR. Before the lower authorities, assessee has *inter alia* submitted that assessee had taken unsecured foreign currency loan from its parent company and loan amount outstanding at the year-end was reinstated in view of the mandate of AS-11 issued by ICAI and on re-statement of the loan amount at the yearend notional gain of Rs.6,31,06,600/- was made which according to AO should have been treated by the assessee as taxable income. We find that CIT(A) after considering the submissions of the assessee, the remand report of the AO and assessee's submissions to the remand report by detailed and speaking order has held the re-statement of liability at the year-end to be on capital account as the ECB loans which assessee

had received was for the purpose of the setting off a new manufacturing plant at Maharashtra. We find that CIT(A) while deciding the issue in favour of the assessee has also noted the fact that in A.Y. 2014-15 when the re-statement of foreign currency loan at the year-end had resulted into loss and the same was disallowed by the assessee in the return of income, it was accepted by the AO as a notional loss but however in A.Ys. 2012-13 & 2013-14, AO is treating the same loss arising out of the re-statement of the same loan as taxable income and thus there is an inconsistency in the approach of AO in the treatment in 2 different years. We further find that the CIT(A) has further given a finding that provision of Section 43A & 43AA are not applicable to the facts of the case of the assessee, as the ECB loan obtained by the assessee was for the purpose of setting up of a plant and the ECB loans acquired by the assessee have been utilized for the purpose of acquisition of capital assets in India. As far as the issue with respect to interest earned from fixed deposits on unutilized ECB loans is concerned, we find that CIT(A) after relying on the various decisions cited in his order has given a finding that the payment of interest and the earning of interest was inextricably linked to each other and the same was required to netted off and therefore, assessee had rightly capitalized the interest amount of Rs.38,03,898/-. We further find that Hon'ble Delhi High Court in the case of PCIT vs. Triumph Realty Pvt. Ltd. (supra) has held that the interest earned from fixed deposits on unutilized foreign exchange borrowing loan during the year is a capital receipt. Before us, Revenue has not pointed to any fallacy

in the findings of CIT(A) nor has placed any contrary binding decisions in its support. In such a situation, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

17. **Ground No.3** is with respect to deleting the addition of Rs.73,03,534/- on account of salary paid to the employees.

18. During the course of assessment proceedings, AO after perusing the details furnished by the assessee concluded that four employees were assigned the job at plant which was under construction and name of those employees and salary paid are tabulated under para 19 of the order. AO noted that aggregate amount which was paid to those employees as salary was Rs.73,03,534/-. AO was of the view that since those employees were assigned the job at plant which was under construction, the salary paid to those employees should have been capitalized and not claimed as revenue expenditure. The submissions of the assessee that none of the employees were directly involved with the construction of the plant nor were the employees having direct nexus with any services in respect of construction of new plant was not found acceptable to AO. AO was of the view that since the assessee was in process of construction of a new plant with an investment of more than Rs.200 crores, it cannot be accepted that no employee of the assessee was coordinating and supervising the construction activities undertaken by the contractor. AO therefore, for the reasons stated in the order held

the aggregate salary of Rs.73,03,834/- to be towards supervising and coordinating the construction activity of the new manufacturing plant which was capital in nature and accordingly disallowed the same.

19. Aggrieved by the order of AO, assessee carried the matter before CIT(A). CIT(A) after considering the submissions of the assessee, remand report of the AO and the submissions of the assessee to the remand report deleted the addition. Aggrieved by the order of CIT(A), Revenue is now before Tribunal.

20. Before us, Learned DR took us through the findings of AO and supported the order of AO and further submitted that CIT(A) has erred in deciding the issue in favour of the assessee. He thus supporting the order of AO submitted that the order of CIT(A) be set aside.

21. Learned AR on the other hand reiterated the submissions made before lower authorities and further submitted that for the construction of new plant at Patalganga, the contract was given to Shimizu Corporation India Pvt. Ltd. on turn-key basis and none of the employees of the company was directly involved in the construction of the plant. With respect to the four employees which AO has noted to be for the purpose of construction, he submitted that those four employees were experienced in the field of trading and manufacturing of petrochemical products and were rendering the services in the existing business of the company

and there was no direct or indirect nexus between any services provided by them in respect of construction of new plant. He therefore submitted that after considering the factual matrix, CIT(A) has rightly deleted the addition and no interference to the order of CIT(A)'s order is called for. He thus supported the order of CIT(A).

22. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the deletion of addition on account of salary that was held by AO to be capital in nature. We find that before CIT(A), assessee had *inter alia* submitted that the work for construction of new plant was entrusted to Shimizu Corporation India Pvt. Ltd. on turn-key basis and none of the employees were directly involved in the construction of plant. The Learned AR had further submitted that the employee's salary which has been disallowed by the AO were engaged in the regular basis activities of trading and manufacturing of petrochemical products and had no direct nexus in the construction of new plant. Before us, Revenue has not placed any material on record to point out any fallacy in the findings of CIT(A) nor placed any material on record to point out that the submissions made by Learned AR before the Tribunal or before the CIT(A) were incorrect. In such a situation, we find no reason to interfere with the order of CIT(A) on this issue and **thus the ground of Revenue is dismissed.**

**23. In the result, appeal of the Revenue in ITA No.7255/Del/2018 is dismissed.**

**24.** **As far as ITA No.7256/Del/2018 for A.Y. 2013-14** is concerned, before us, both the parties have submitted and facts of the case in the year under consideration is identical to that of A.Y. 2012-13. We have hereinabove while deciding the appeal for A.Y. 2012-13 for the reasons stated therein have dismissed the grounds of Revenue and thus the appeal of the Revenue was dismissed. We, therefore, for similar reasons also dismiss the grounds of the Revenue for **A.Y. 2013-14**.

25. **Thus the appeal of the Revenue is dismissed.**

***Now we take Cross Objection No.36/Del/2019 for A.Y.2012-13:***

26. During the course of appellate proceedings before CIT(A), assessee had taken an additional ground *inter alia* stating that assessee had erroneously offered a sum of Rs.1,36,61,685/- as income although the same ought to have been capitalized as the loan was obtained and utilized for capital purpose and installing plant.

27. CIT(A) vide para 4.5.3.2 noted that the issue was raised for the first time before him and does not arose from assessment order and the assessee should have revised its income as per law.

He noted that since the assessee had not filed revised return of income to claim the income which it seeks to be capital in nature, the plea of the assessee cannot be allowed and accordingly dismissed the ground of assessee. Aggrieved by the order of CIT(A), assessee is now before us.

28. Before us, Learned AR submitted that during the year under consideration, assessee had earned total interest income of Rs.2,00,77,828/- from FDRs that was made out of ECB loans, which was for acquiring capital assets. It was submitted that the interest was required to be treated as capital in nature and reduced from the cost of fixed assets as it was having direct nexus for the purpose of acquiring assets in India. He submitted that before CIT(A), assessee had raised an additional ground but the same was dismissed by CIT(A) by holding that it does not arise from the order of AO. Before us, Learned AR submitted that issue involved in the ground was a legal claim and the legal claim can be raised before the appellate authorities and in support of the aforesaid contention, he placed reliance on the decision in the case of National Thermal Power Company Ltd. vs. CIT reported in 229 ITR 383 (SC) and Jute Corporation vs. CIT reported in 187 ITR 688 (SC). He fairly admitted that since CIT(A) has not adjudicated the issue on merits, the matter may be remitted back to CIT(A) with appropriate directions.

29. Learned DR on the other hand supported the order of CIT(A) and submitted that since the issue does not arise out of the

assessment order, CIT(A) has rightly dismissed the ground of the appeal. He strongly opposed the plea of Learned AR to remit the issue back to CIT(A).

30. We have heard the rival submissions and perused the material available on record. It is the contention of the assessee that it had erroneously offered Rs.1,36,61,685/- as income although the same ought to have been capitalized as the loan was obtained and utilized for and thus it was a capital receipt. It is further the submission the CIT(A) did not accept the plea of the assessee for the reason that the plea was raised before him for the first time and without filing a revised return. We find that Hon'ble Gujarat High Court in the case of CIT vs. Mitesh Impex reported in [2014] 46 taxman.com 30 (Gujarat) after considering the decisions of Hon'ble Apex Court in the case of NTPC Ltd. (supra) and Goetze (India) Ltd. vs. CIT (2006) 284 ITR 323 and various other decisions has held that the decision of Supreme Court in the case of Goetze (India) Ltd. is confined to the powers of the assessing officer and accepting the claim without revised return. It has further observed that when it comes to the power of Appellate Commissioner or Tribunal, they have jurisdiction to entertain a new ground or a legal contention, for the first time though not made before the AO. It is further observed that if a claim that in law is not made either inadvertently or on account of erroneous belief of legal position, such claim cannot be shut out for all times to come merely because it is raised for the first time before the appellate authority without resorting to revising the return of income before the Assessing Officer. It is thereafter,

held that any ground legal contention or even a claim would be permissible for the first time before the appellate authority or the Tribunal when the facts of such ground are already on record. In the present case, the contention of the Learned AR that the facts necessary to examine the ground, the assessee's contention is already on record has not been demonstrated by Revenue to be not correct. In such a situation, following the aforesaid decision of Hon'ble High Court in the case of Mitesh Impex (supra) we hold that CIT(A) has not justified in not adjudicating the ground raised by the assessee before him for the first time. We therefore restore the issue back to the file of CIT(A) and direct him to decide the issue in accordance with law and after giving reasonable opportunity of hearing. CIT(A) shall be free to call for such information and explanations as he deems fit to adjudicate the claim of the assessee. Assessee shall also be free to file such documents, explanations, submissions as it deems fit in respect of the claim. Needless to state that CIT(A) shall grant adequate opportunity of hearing to both the parties. **Thus the ground of assessee is allowed for statistical purposes.**

31. Since we have restored the issue back to the file of CIT(A), we are not adjudicating the other grounds raised by the assessee.

**32. In the result, Cross objection of assessee is allowed for statistical purposes.**

**33. <u>As far as CO No.35/Del/2019 for A.Y. 2013-14</u>** is concerned, before us, both the parties have submitted that the facts in the present case are identical to that of assessee's CO for 2012-13. we have hereinabove while deciding the CO for A.Y. 2012-13 for the reasons stated therein have allowed the ground of assessee and restored the issue back to CIT(A) and thus the CO of the assessee was allowed. We for similar reasons and similar directions also allow the ground of the assessee for **A.Y. 2013-14**. **Thus the CO of the assessee is allowed.**

**34. In the combined result, both the appeals of the Revenue are dismissed and both the CO of the Assessee are allowed.**

**Order pronounced in the open court on 27.04.2023**

| **Sd/-** | **Sd/-** |
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| **(ANUBHAV SHARMA)** | **(ANIL CHATURVEDI)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Date:- 27.04.2023

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**Copy forwarded to:**

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

ASSISTANT REGISTRAR
ITAT NEW DELHI