

IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI
BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER &
SHIR PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 4493/Mum/2019
(A.Y: 2012-13)

Vivek Agnihotri 1505/1506, Amarnath Tower, Yari Road, Versova, Andheri (W) Mumbai – 400061.	Vs.	ITO – 16(1)(5), Aayakar Bhavan, M.K.Road, Mumbai – 400020.
PAN/GIR No. : ADYPA6052B		
Appellant	..	Respondent

Appellant by :	Ms.Kinjal Bhuta.AR
Respondent by :	Mr. Ankush Kapoor.DR

Date of Hearing	28.03.2023
Date of Pronouncement	01.05.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the PrCommissioner of Income Tax (Pr.CIT)-16, Mumbai passed u/s 263 of the Act.

2. At the time of hearing, the Ld.AR of the assessee submitted that there is a delay of 50 days in filing the appeal before the Hon’ble Tribunal and filed an affidavit for condonation of delay. We found the facts mentioned in the affidavit are reasonable and the Ld.

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DR has no specific objections. Accordingly, condone the delay and admit the appeal. The assessee has filed the appeal challenging the validity of the revision order U/sec263 of the Act

3. The brief facts of the case are that the assessee is engaged in the business of producing of motion pictures and feature films. The assessee has filed the return of income for the A.Y 2012-13 on 26-09-2012 disclosing a total income of Rs.18,58,640/-. The case was selected for scrutiny and notice U/sec 143(2) and 142(1) of the Act are issued. In compliance, the assessee has furnished the information including the computation of Long Term Capital Gains on sale of property and capital Gains Account. Whereas the Assessing Officer (A.O.) has considered the information and disallowed the expenditure on estimatin @10 of total expenditure of business , which works out to Rs.1,01,502/- and assessed the total income of Rs.19,60,140/- and passed the order U/sec143(3) of the Act dated 28-02-2015. Subsequently, the AO has received information from Investigation Department, Bhopal that the stamp duty valuation in respect of the property sold by the

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assessee situated E-2/73, Arera Colony, Bhopal was Rs.2,68,05,200/- instead of Rs. Rs.2,07,00,000/- disclosed as sale consideration by the assessee. The AO has reason to believe that income has escaped assessment and issued notice u/s 148 of the Act.

4. In compliance to notice u/s 148 of the Act, the assessee has filed a letter on 20.04.2016 to treat the return of income filed for A.Y 2012-13 on 13.04.2016 as due compliance. Further the AO has issued notice u/s 143(2) and 142(1) of the Act and the assessee was provided with the reasons for reopening and objections were filed by the assessee and were duly disposed off. In compliance to notice, the Ld.AR of the assessee appeared from time to time and filed the details and the case was discussed. The AO found that the assessee in the F.Y 2011-12 has sold the property at Bhopal and whereas the stamp duty valuation of property as per SRO is Rs. 2,68,05,200/- and the assessee has offered the Long capital gains by taking the sale consideration of Rs.2,07,00,000/- and the explanations were called and invoking the provisions of Section 50C of the Act. The assessee has filed a detailed letter on 22.06.2016 mentioning that

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the stamp duty valuation of the property does not reflect the fair market value of the property due to various factors peculiar to the said property. Therefore the sale consideration of Rs. 2,07,00,000/- is fair and correct value adopted by the assessee. Further the AO has referred the matter to the District Valuation Officer(DVO) Bhopal for determination of the fair market value(FMV) of the property vide letter dated 20.07.2016. Whereas the DVO Bhopal has intimated the fair market value (FMV) of the property by letter dated 28.11.2016 determined at Rs. 2,39,73,600/-. Finally the A.O. has adopted sale consideration as per DVO report and allowed deduction of (i) selling expenses(brokerage) of Rs.4,50,000/- (ii) Indexed Cost of Acquisition of the Property of Rs.78,50,000/- and (iii) Capital Gains exemption on Deposit in capital gains account Scheme of Rs.1,30,00,000/- and balance Long Term Capital Gains of Rs.26,73,600/- was determined and assessed the total income of Rs.46,33,740/- and passed the order u/s 147 r.w.s 143(3) of the Act dated 08.12.2016.

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5. Subsequently, the Pr.CIT on perusal of the records and information found that the order passed by the AO under section 143(3) r.w.s 147 of the Act is erroneous and prejudicial to the interest of the revenue and issued revision notice U/sec 263 of the Act dated 21-12-2018 as under:

In your case for the aforementioned assessee year, assessee was completed under 143(3) of the Income tax Act 1961 vide order dated 28.02.2015.

On perusal of the records for A.Y.2012-13 the following discrepancies are found.

You have sold immovable property on 07.06.2011 for a consideration of Rs.2,07,00,000/- whereas the stamp duty valuation of the sold property was Rs.2,68,05,200/- During the assessment proceedings the assessee requested to refer the matter to valuation cell for arriving at the Fair Market Value The valuation cell arrived at the FMV of the property at Rs.2,39,73,600/-. As per the assessee the cost of the property was Rs10,00,000/- and selling expense was Rs4,50,000/- While passing the assessment order the working has been done as under:-

<i>Particulars</i>	<i>Amount in Rs.</i>
<i>Sale Consideration</i>	<i>2,39,73,600</i>
<i>Less: Selling Expenses</i>	<i>4,50,000</i>
<i>Less: Indexed Cost of acquisition</i>	<i>78,50,000</i>
	<i>1,56,73,600</i>
<i>Less: Amount deposited in Capital Gain Account</i>	<i>1,30,00,000</i>

Long Term Capital Gains	26,73,600
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Perusal of records goes to show that the assessee took the cost of acquisition at Rs10,00,000/-The assessee acquired the property by way of will. The property was acquired by his father on 27.11.1969As provided in Section 49 of the Income-tax Act he cost for which the original owner acquired it. No documentary evidences were found on record to suggest as to how the cost of acquisition has arrived at Rs10,00,000/-As regards, selling expenses of Rs.4,50,000/- the assessee submitted copy of bill of one Shri Praveen Sharma, advocate which pertains to Civil Suit No.366A/09, the bill does not specify the details of the property etc, hence no link could be found. Further, the assessee deposited Rs. 1,30,00,000/-, to the capital gains account on 26.09.2012 and in turn transferred to M/s.Zee Entertainment Ltd for acquiring new property on 26.12.2012The contention of the assessee is that since he has deposited Rs. 1,30,00,000/- in capital gains account and in turn transferred for acquiring new property, the capital gains is exempted.

Further, on perusal of return of income goes to show that the assessee did not disclosed the entire transaction in the return of income The assessee did not claim any exemption u/s 54 in the return of income. The Hon'ble Supreme Court, in the case of Goetze India Ltd Vs. CIT [284 ITR 323] (SC) precludes entertainment of such deduction which is not claimed in the return of income This has resulted in underassessment of income of Rs.2,39,73,600/-.

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In view of the above, you are requested to show cause as to why the assessment order dated 28.02.2015 should not be cancelled with a direction to the A.O. to pass fresh order.

6. In compliance to the notice, the assessee has filed the submissions referred at Page 2 Para 3 of the Pr.CIT order as under:

3. *In response to the same, Shri Anil Sekhri, CA, the Authorized representative attended and submitted the written submission vide dated 03.01.2019. The relevant portions of the written submission are reproduced below:-*

".....1. During the year under assessment, the assessee disposed of a disputed family property situated at Bhopal for a consideration of Rs 2,07,00,000/- as against the Stamp Duty Value of Rs 2,68,05,200/-. The assessment proceedings were reopened by the Assessing Officer u/s 147 to invoke the provision of Section 50C so 'as to tax the alleged difference of value between the sale consideration and the ready reckoner value amounting to Rs 61,05,200/- At the request of the assessee, the AO referred the matter to the Valuation Officer, Income-tax Department, Bhopal.

During the valuation proceedings, the assessee made submission to the valuation officer vide letter dated 21.11.2016 After considering all the relevant facts, the valuation officer revised the valuation of the property at Rs.2,39,73,600/-. The assessee was not satisfied with the valuation made by the valuation officer and therefore, filed a letter dated 05.12.2016 with the AO at the time of completion of revised assessment proceedings However,

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the Ld.AO completed the assessment proceedings adopted by the valuation made by the DVO at Rs 2,39,73,600/-

The assessee recently appointed another valuation officer viz ErAnupam Soni to arrive at Fair Market Value of the property considering the fact that the property was partly occupied by the brother-in-law of the Appellant and the matter was disputed in Court at the time of sale in the year 2011It is further, submitted that subsequently the case of the assessee was dismissed by the District Court, Bhopal vides order dated 28.01.2014.....

2. After assessment order 147 r.w.s 143(3) was passed by the assessing officer on 08.12.2016, the assessee has filed an appeal before the CIT(A) on 12.01.2017(copy of the grounds of appeal enclosed as per Annexure A)It is respectfully submitted that the Ld CIT(A) has part heard the matter. During the appellant proceedings the CIT (A)-4, Mumbai asked the AO to send a remand report to ask for his comments on the valuation report(copy enclosed vide Annexure B)submitted by the assessee before the CIT(A) during the appellate proceedingsThe Ld AO i.e Addl.CIT Range 16(1), Mumbai has submitted his remand report vide letter dated 15.05.2015.....

7. Whereas the Pr.CIT was not satisfied with the explanations and submissions and is of the opinion that the order passed by the AO is erroneous and prejudicial to the interest of the revenue, and accordingly issued directions to the AO observing at Para 3.1 to 4 of the order as under:

3.1 The written submission made by the assessee's representative was forwarded to the concerned AO requiring him to offer his comments/report on the same. In this regard, the AO vide letter dated 19.11.2018 duly endorsed by the Addl.C.I.T vide letter dated 13.02.2019 made submission, the relevant part of submission is reproduced as under :-

"The AO has stated that only the valuation report of DVO Bhopal needs to be adopted and not of any private valuer. Further, assessee is in CIT(A), only on the issue of the adaption of the valuer of the property by the AO determined by DVO, Bhopal. However, the proposal u/s 263 was sent on a totally different issue of cost of acquisition of the property which was taken on estimated basis and on the issue of selling expenses, which are not before the Ld.CIT(A).....

Taking into consideration the explanation offered by the assessee in respect of cost of acquisition of the property and on the issue of selling expenses and comments of A.O Further, it is necessary to mention here that the assessee has not disclosed the entire transaction in the return of income and also not claimed any exemption u/s.54 of the Act. Reliance is placed on the judgment of Hon'ble Supreme Court in the case of Geotze (India Ltd vs CIT 284 ITR 323)(SC) In this regard, the undersigned is fully convinced and satisfied that issues need to be verified and therefore, same is restored to the file of A.O with a direction to decide the issue a fresh after giving an opportunity of being heard to the assessee. Further, it is necessary to mentioned here that Ld.CIT(A) vide order no.CIT(A)-4/IT-210/ITO- 16(1)(5)/2016-17 dated 28.02.2019 dismissed the assessee's appeal and confirmed the Bhopal DVO's Valuation Report.

4.I have gone through facts on record and considered the submission of the Authorized representative The explanation offered on issues mentioned in the show-cause notice dated 21.12.2018 are not found to be satisfactory for the reasons mentioned. Since, on these issues AO should have enquired before finalizing the assessment order. It is found that the assessment order in question is erroneous and prejudicial to the interest of the revenue Accordingly, assessment order passed by the A.O is set-aside with the direction to pass fresh assessment order after giving assessee the opportunity of being heard as per act and law in terms of the above referred issues

Finally the Pr.CIT has passed order u/s 263 of the Act dated 06.03.2019. Aggrieved by the order of the Pr.CIT, the assessee has filed an appeal before the Honble Tribunal.

8. At the time of hearing, the Ld. AR submitted that the Pr.CIT has erred in considering the order passed by the AO is erroneous and prejudicial to the interest of the revenue, irrespective of the fact that the assessee has complied with the information and the notices and the A.O. having verified and examined the facts has accepted the claims. Further the Ld.AR submitted that the Pr.CIT has issued the notice for revision of assessment order U/sec143(3) of the Act dated 28.02.2015 and the reassessment order was

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passed on 8.12.2016. Whereas the original assesment order ceases to exist after reassessment was completed on 8.02.2016 and there is no fresh revision notice for setasiding the rerassessment order. Further the revision order U/sec263 of the Act was passed beyond the period of 2 years from the end of the financial year of the order U/sec143(3) of the Act dated 28.02.2015. The contentions of the Ld. AR that the Income from capital gains was disclosed and the reasons for reopening were provided and objections were filed in the reassessement proceedings. Further the assessment was reopened U/sec147 of the Act for invoking provisions of section 50C of the Act due difference in stamp duty valuation of property and sale consideration. Whereas the Pr. CIT has issued show cause notice with respect to the claim made by the assessee on selling expenses, indexed cost of acquisition , which were not the issues in the order U/sec143(3) r.w.s147 of the Act. The Ld. AR substantiated the submissions with the paper book, chart and judicial decisions and prayed for allowing the appeal. Per Contra, the Ld. DR submitted that the AO has not considered the applicability of the facts

and has not conducted the enquiry on claims/deductions made by the assessee and the Ld.DR relied on the order of the Pr.CIT.

9. We heard the rival submissions and perused the material available on record. The Ld.AR contentions are that the order passed by the A.O. does not satisfy the twin conditions that (i) erroneous and (ii) prejudicial to the interest of the revenue. The Ld. AR submitted that the Pr.CIT only considered the fact that the AO has not conducted enquiry but there are no specific reasons and findings are recorded. The Ld.AR referred to revision notice of the Pr.CIT were the order sought to revised was under section 143(3) of the Act dated 28-02-2015 and whereas in the revision order dated 6.03.2019, the Pr.CIT consider/referred to revise the order 143(3) r.w.s 147 of the Act dated 8.12.2016 and there is no fresh revision notice for set asiding the reassessment order therefore the original notice issued itself is bad in law. Further the contentions of the Ld. AR that Long term capital gains on the sale of property was disclosed and the Ld. AR has demonstrated letter dated 3-02-2015 filed with reference to notice U/sec142(1) of the Act at

page 40 Annexure C of paper book. The assessee has submitted the details before the AO in respect of long term capital gains on sale of property in the assessee proceedings. Whereas the assessment was reopened U/sec 147 of the Act due to difference in stamp duty valuation of property and sale consideration u/sec Sec.50C of the Act. The Ld. AR has demonstrated original assessment under 143(3) of the Act dated 28.02.2016 and there is no addition in respect of Long capital gains and was accepted by the Assessing Officer.

10. Further the Ld.AR emphasized that in the reassessment proceedings U/sec 143(3) r.w.s 147 of the Act, the AO found that the assessee in the F.Y 2011-12 has sold the property at Bhopal and whereas the stamp duty valuation as per SRO is Rs.2,68,05,200/- and the assessee has offered the Long capital gains by taking the sale consideration of Rs.2,07,00,000/- and the explanations were called for and invoking the provisions of Section 50C of the Act. The assessee has filed a detailed letter on 22.06.2016 mentioning that the stamp duty valuation of the property does not reflect the fair market value of the

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property due to various factors peculiar to the said property. Therefore the sale consideration was Rs. 2,07,00,000/- is fair and correct value adopted by the assessee. Further the AO has referred the matter to the District Valuation Officer (DVO) Bhopal for determination of the fair market value of the property vide letter dated 20.07.2016. Whereas the DVO Bhopal has intimated the fair market value (FMV) of the property by letter dated 28.11.2016 determined at Rs. 2,39,73,600/-. Finally the A.O. has adopted sale consideration as per DVO report and allowed deduction of (i) selling expenses (brokerage) of Rs. 4,50,000/- (ii) Indexed Cost of Acquisition of the Property of Rs. 78,50,000/- and (iii) Capital Gains exemption on Deposit in capital gains account Scheme of Rs. 1,30,00,000/- and balance Long Term Capital Gains of Rs. 26,73,600/- was determined. The Ld. AR also emphasized that the Pr.CIT sought to revise U/sec 263 of the Act the original assessment order passed u/s 143(3) of the Act dated 28.02.2015 and the Pr.CIT has passed the revision order beyond the period of two years from the end of the financial year in which order U/sec 143(3) of the Act was

passed. But the Pr.CIT passed order to revise the A.O. order u/s 143(3) r.w.s 147 of the Act dated 08.12.2016 and the Pr.CIT order cease to exist as there is no fresh show cause notice was issued. Whereas the notice was issued by the Pr.CIT mentioning that the AO has not verified selling expenses and the cost of acquisition of the asset for which the indexation was claimed by the assessee. The contentions of the Ld. AR that these facts of disputes with respect to selling expenses, cost acquisition were before the AO in the course of hearing and the A.O. has applied the mind and the order was passed u/s 143(3) r.w.s 147 of the Act.

11. We rely on the decision of the Honble High Court of Bombay in the case of M/S Grasim Industries Ltd Vs CIT (321 ITR 92) considered the law laid down by the Honble Supreme Court on the scope of the revisionary proceedings initiated under sec 263 of the Act and the observations are read as under:

“Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the Act and, if he considers that any order passed therein, by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of

the Revenue, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be “erroneous in so far as it is prejudicial to the interests of the Revenue”. This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83, the Supreme Court held that the provision “cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer” and “it is only when an order is erroneous that the section will be attracted”. The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression “prejudicial to the interests of the Revenue”, the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :

“The phrase ‘prejudicial to the interests of the Revenue’ has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view

with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.”

The principle which has been laid down in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282.”

12. Further In the case of Nagesh Knitwears P Ltd (2012)(345 ITR 135), the Hon’ble Delhi High Court has elucidated and explained the scope of the provisions of sec. 263 of the Act and the same has been extracted by the Delhi High court in the case of CIT Vs. Goetze (India) Ltd (361 ITR 505) as under:-

“Thus, in cases of wrong opinion or finding on merits, the Commissioner of Income tax has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order is not sustainable in law and the said finding must be recorded. The Commissioner of Income tax cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In

cases where there is inadequate enquiry but not lack of enquiry, again the Commissioner of Income tax must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Commissioner of Income tax and he is able to establish and show the error or mistake made by the Assessing officer, making the order unstainable in law. In some cases possibly though rarely, the Commissioner of Income tax can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263 of the Act. In such matters, to remand the matter/ssie to the Assessing Officer would imply and mean the Commissioner of Income tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question....” Similar view has been expressed by Hon’ble Madras High Court in the case of CIT Vs. Amalgamations Ltd (238 ITR 963).

Considering the ratio of decisions of the Honble High courts, it is clear the Pr.CIT before holding the order of the A.O. is erroneous should conduct necessary inquiries. The Ld.AR submitted that the Pr.CIT has not considered the facts that the A.O has called for

the information as evident from letters referred in the paper book and there cannot be any non application of mind by the A.O.

13. We find the Honble Supreme Court in the case of Alagendra Finance Ltd. Vs. ITO (162 taxamnn. 465) SC held as under:

Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment years 1994-95 to 1996-97 - Assessee's assessment for assessment years in question was completed by Assessing Officer accepting its claim relating to certain expenses and income shown by assessee under head 'Lease equalization fund' on 27-2-1997, 12-5-1997 and 30-3-1998, respectively - Subsequently, reassessment proceedings were initiated in respect of only items relating to expenses claimed by assessee and reassessment order was passed on 28-3-2002 - Commissioner taking view that part of assessment order relating to lease equalization fund was prejudicial to interest of revenue, passed order under section 263 on 29-3-2004 - Assessee's case was that order passed under section 263 was barred by limitation with reference to orders passed under section 143(3) by Assessing Officer - However, revenue's case was that in view of doctrine of merger, computation of period of limitation as provided in section 263(2) was to commence from date of passing of order of reassessment and not from date of initial assessment - Whether since only that part of order of assessment was found to be prejudicial to interest of revenue which related to lease equalization fund and proceedings for reassessment had

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nothing to do with said head of income, doctrine of merger would not apply in instant case - Held, yes - Whether since Commissioner in exercising its revisional jurisdiction reopened order of assessment in relation to lease equalization fund, which was not subject of reassessment proceedings, period of limitation provided for in section 263(2) would begin to run from date of order of original assessment and not from order of reassessment - Held, yes

14. We Considering the overall facts, circumstances, ratio of the judicial decisions and the details submitted in the course of hearing are of the view that the if any query is raised in the assessment proceedings and it was responded by the assessee, mere fact that it is not dealt within by the A.O. in the order cannot implied that there is no application of mind and the A.O. has applied one of the possible view. On the legality of issue of notice u/sec263 of the Act, the Pr.CIT has issued the notice dated 28.02.2018 for revision of assessement order U/sec143(3) of the Act dated 28.02.2015 and reassessment order was passed on 8.12.2016. Whereas the original assessement order ceases to exist after reassessment was completed on 8.02.2016 and there is no fresh revision notice. Further the revision order U/sec263 of the Act was passed beyond

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the period of two years from the end of the financial year in which the order U/sec143(3) of the Act dated 28.02.2015 was passed. Accordingly, the revision order passed is barred by limitation and is quashed and we allow the grounds of appeal in favour of the assessee.

15. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 01.05.2023.

Sd/-
(BASKARAN BR)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 01.05.2023

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT (Judicial)
4. The PCIT
5. DR, ITAT, Mumbai
6. Guard File

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//()

1.

ITA No. 4493/Mum/2019
Vivek Agnihotri, Mumbai.

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(Asst. Registrar)
ITAT, Mumbai