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

BEFORE SHRI.NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)
AND
SHRI S RIFAUR RAHMAN (ACCOUNTANT MEMBER)

I.T.A. No.1147/Mum/2023	**:**	A.Y. 2011-12
I.T.A. No.1148/Mum/2023	**:**	A.Y. 2012-13
I.T.A. No.1149/Mum/2023	**:**	A.Y. 2015-16

DCIT, Circle-14(1)(2), Mumbai Room No.455, 4th Floor Aayakar Bhavan, M.K. Road Mumbai-400 020	vs	M/s Reliance Infrastructure Ltd, Ground Floor, Reliance Centre, 19, WalchandHirachand Marg Ballard Estate, Mumbai-400 001 **PAN : AAACR7446Q**
APPELLANT		**RESPONDENT**

Present for the Assessee : Shri Niraj Sheth (Ld. Adv),
Sh. Jitendra Sanghvi (Ld. CA)
Present for the Department : Shri Rahul Kumar (Ld. CIT DR)

Date of hearing 14/12/2023
Date of pronouncement 24/01/2024

O R D E R

Per N.K. Choudhry (JM):

These appeals have been preferred by the Assessee, against the separate orders even dated 08/02/2023 impugned herein passed by the National Faceless Appeal Centre, Delhi (in short 'NFAC') / Ld. Commissioner of Income Tax (Appeals) (in short 'Ld. Commissioner') under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for the A.Ys. 2011-12, 2012-13 & 2015-16, respectively.

2. The issues involved in all the appeals under consideration are identical, therefore, for the sake of brevity, the same were heard together and are being disposed of by this composite order. For brevity, we are deciding ITA No.1147/Mum/2023 for the A.Y. 2011-12 as a lead case and result of the same shall be applicable mutatis mutandis to all the appeals under consideration.

3. ITA No.1147/Mum/2023

In the instant case, the Assessee during the year under consideration was engaged in the business of generation and distribution of power, execution, procurement, commissioning of power plants and financial services and had declared its total income at Rs.102,14,14,228/- under normal provisions of the Act and Rs.1093,46,60,900/- for the book profit under section 115JB of the Act, by filing its return of income on 30/09/2011, which was processed under section 143(1) of the Act on 30/08/2012. Subsequently, the Assessee, by revising its return of income on dated 28/03/2013, declared its total income at Rs.86,35,14,103/- under normal provisions of the Act and 'NIL' book profit under section 115JB of the Act. Thereafter, the case of the Assessee was selected for scrutiny, which resulted into making the assessment dated 29/03/2014 under section 143(3) of the Act, whereby the income of the Assessee was determined at Rs.133,93,36,775/- and book profit to the tune of Rs.1093,46,60,960/- under section 115JB of the Act.

3.1 On appeal, the then Ld.CIT(A), vide order dated 28/04/2015 allowed partial relief to the Assessee, which was given effect while passing order 16/09/2018 by the then AO, whereby the total income of the Assessee was assessed at Rs.96,13,25,546/- against which also the Assessee preferred first appeal before the then Ld.CIT(A) who allowed the same vide order

dated 27/01/2017 and therefore, the Assessing Officer while giving effect to the order dated 27/01/2017 determined the total income at Rs.69,04,62,313/- by passing consequential order dated 27/04/2017.

4. Subsequently, the case of the Assessee was reopened under section 147 of the Act after recording the reasons for re-opening, gist of the same is reproduced below:

> *"Reliance Infrastructure Limited has booked expenditure of Rs.40 crores as contracts payments to PATH as per the Amended-2 contract, reflecting in the books of the assessee as Expenditure of EPC business and contract Business, which includes subcontract charges in the Profit and Loss Account:, which was in turn transferred to Geet Exim Pvt. Ltd by PATH after deducting Its commission. No actual work has been done by any of the entitles, either be it PATH or Geet Exim and the money was transferred out without utilization for any of the business purposes. 'Back to back' payments were made to Geet Exim Pvt. Ltd, by PATH without actual execution of contractual work. The expenditure to the extent of Rs.40 crores Is not genuine and the sub-contract expenditure has been Inflated by the incorporation of this non-genuine expenditure. Therefore, I have reasons to believe that the Income chargeable to tax to the extent of Rs.40 crores has been under-assessed.*
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> *The assessee, Reliance Infrastructure Limited, has purchased coal of Indonesian origin for the thermal power plant In Dahanu (Maharashtra) which were purchased from intermediaries at an Inflated rate than the actual value of such coals sourced from the original suppliers. The said transactions are fully paid during the year under consideration or are standing as sundry creditors and are claimed as fuel purchases In the Profit and Loss Account under the head cost of fuel. Therefore, the expenditure to the tune of Rs. 16,07,90,522/- is not genuine, and due to this inflated cost of fuels, I have reasons to believe that the income chargeable to tax to the extent of Rs. 16,07,90,522/- has been under-assessed.*
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> *As discussed above, I have reasons to believe that Income chargeable to tax has been under assessed to the tune of Rs. 56,07,90,522/- crores. The case is squarely fit to be reopened with*

reference to the provisions under section 147/ 14S of the Income Tax Act, 1961."

4.1 Accordingly, the notice dated 27/12/2017 under section 148 of the Act was issued to the Assessee, in response to which the Assessee by filing its return of income on 25/01/2018 declared its total income at Rs.57,50,52,140/- after claiming deduction under chapter VIA of the Act to the tune of Rs.89,35,98,120/-. The Assessee also claimed carry forward of long-term capital loss of Rs.2,07,07,65,293/-.

4.2 The AO, in order to verify the return of income filed by the Assessee in response to notice u/s 148 of the Act, issued the statutory notices under section 143(2) and 142(1) of the Act and also provided the reasons for reopening of the case to the Assessee, against which the Assessee vide letter dated 19/03/2018 filed its objections, which were disposed of by the Assessing Officer vide order dated 13/12/2018.

4.3 As per Assessment order, the Assessing Officer in order to verify the information from the Directorate of Revenue Intelligence (DRI), Mumbai, to the effects "*that DRI had investigated a case of over-valuation in the Import of Coal of Indonesian origin. Enquires were conducted with Reliance Infrastructure Ltd, (R Infra) under the provisions of Customs Act. The Assessee has purchased coal of Indonesian origin for the thermal power plant in Dahanu (Maharashtra) which were purchased from intermediaries at an Inflated rate than the actual value of such coals sourced from the original suppliers, The said transactions are fully paid during the year under consideration or are standing as sundry creditors and are claimed as fuel purchases in the Profit and Loss Account under the head cost of fuel. Therefore, the expenditure to the tune of Rs.16,07,90,522/- is not genuine,"* issued the notice dated 02.02.2018 u/s.142(1) of the Act and asked the Assessee to furnish complete details of

expenses debited to P&L account under the head cost of fuel along with copies of Invoices, LOAs, Ledger account bank statement reflecting the transactions.

4.4 In response to aforesaid queries, though the Assessee vide letter dated 19,03.2018 has inter-alia submitted *"That the electricity business of the company is regulated by Maharashtra Electricity Regulatory Commission (MERC). The Assessee's business is cost plus business. All the expenses incurred namely cost of fuel, power purchase, other operating cost etc. are pass through. Thus, any increase or decrease in cost of power sold would result into Increase or reduction in tariff respectively without affecting the profitability from the business,"* however as per AO ,did not furnish the details of purchase of fuel, as called for vide notice u/s,142(1)of the Act. Therefore, vide letter dated 12.10.2018, the AO requested the Assessee to furnish the details of the fuel as called for vide notice u/s, 142(1) and vide letter dated 19.12,2018 also show-caused the Assessee to explain, as to why the expenditure to the tune of Rs,16,07,90,522/- being the inflated cost of fuels should not be disallowed and added to its Income.

4.4 In response to the said show cause, the Assessee vide letter dated 24/12/2018 filed the explanation/details, relevant portion of the same is reproduced below:

> *"The company follows a proper procedure for purchase of coal Quotations are called from various parties for the coal requirements and the lowest quote is selected for purchase of coal. We provide herewith the following documents In support of transactions for purchase of coal:*
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> - *Statement giving details of imported coal purchased during the year as per books.*
> - *Copy of Invoices along with supporting documents namely contract copy, certificate In Form B from the Ministry of Trade*

of the Rebublic of Indonesia. Bill of Entry, Certificate of sampling, weight etc.

- *Copy of the proposal note and quotations taken from the various parties.*

The company has also deposited the custom duty on import of coal at the applicable rate on the value of imports amounting to Rs.16,75,22,035/-, The Electricity business of the company Is regulated by the Maharashtra Electricity Commission ("MERC"). R Infra has been granted a Distribution License for electricity in Mumbai suburban area and area falling under Mira Bhayender Municipal Corporation, Being a regulated entity, the tariffs charged by the company to its consumers are approved by the State Commission, I.e. MERC. The tariffs set by the MERC are meant to recover the cost of supplying electricity to the consumers in its License area along with the a/lowed return on equity.

In our submission dated 19,03,2018, we have explained the operation of our regulated business of electricity. The business is cost plus business. All the expenses Incurred namely cost of fuel, power purchase, other operating cost etc, are pass through. Any increase or decrease in cost of power sold would result Into Increase or reduction in tariff respectively without affecting he profitability from the business.

We further submit that the cost of coal purchase has been accepted by the MERC And never been the matter of disallowance by the MERC, In this regard, we had provided the Tariff order for F.Y.2010-11 dated 27/02/2012 and its True Up Order Dated22/03/2013. Copy of the same is enclosed. The entire fuel cost Is allowed to be recovered.

From the above documents and facts, It Is clear that the company has purchased /Imported coat from the above parties after taking quotations from various parties and selected the lower quote and therefore it cannot be said that the company has purchased / Imported coal at high / inflated price,"

4.5 The Assessing Officer perused and considered the submissions of the Assessee and by referring to the enquiry report of DRI, observed as under: -

"7.1. The Coal Procurement team (CPT) of R Infra floats inquiries for the required quality and quantity of coal and negotiates with the bidders, After settling terms a, conditions, quality specifications and price, the successful bidders (called as 1st stage traders) were told to route the transactions through certain intermediaries firms. The Intermediary firms were given letters of awards (LoAs) by R Infra for supply of coal as per specifications finalized by the CPT with the 1st stage traders. Intermediary firms further issued LoAs to the 1st stage traders selected by the CPT of R Infra In their bidding process, Both the LoAs are almost mirror of each other except the price In as much as the price In the LoAs from the Intermediary firms to the 1st stage traders was as negotiated by the CPT of R Infra, but the price in the LoAs from R Infra to the Intermediary firms was much higher, The 1st stage traders supplied Coal to R Infra after purchasing from Indonesian suppliers or 2nd stage traders, The 1st stage traders raised invoices on the Intermediary firms as per the LoAs issued by the latter to them, The Coal, however, was shipped directly from Indonesia to India.

7.2 Intermediary firms raised invoices on R-Infra at Inflated price mentioned In the latter to the former. It appears from the investigation done by Department of Revenue Intelligence that the Intermediary firms were merely Invoicing agents for facilitating Invoice Inflation. The intermediary firms appear to have received remittances towards value of Invoices raised on the assessee in India, which included the over-valued portion of the price.

7.3 Looking at the above case from the perspective of normal commercial prudence and due diligence, payment of such huge amounts running Into more than few crores over and above the actual value of the goods appears to be unusual and highly Irregular, When the actual suppliers were selling the Coal, at a much lower value, no prudent business entity would pay so much more than the actual value of the goods to Intermediary firms with no known bonafide value addition and more so by foregoing the duty benefit available to the imported goods on production of certificates In Form-AI, added to their cost, IN the Instant case, the Coal was shipped directly to India, by the actual suppliers, and only Invoices were routed through the Intermediary firms. Reliance ADAG companies, assessee

knowing fully well as to who the actual suppliers were and where the Coal was coming from (as the Coal was shipped directly to them), have chosen to pay such an Inflated value and that too on such a large scale, which appears to be contrary to all commercial prudence and due diligence, It appears that no prudent business firm/ entity can be expected to be paying such overvalued amounts for goods which Is much more than their actual value except by collusion with fraudulent intent, which appears to be apparent from the overall facts of the case as discussed above. It appears that the Reliance ADAG companies, i.e, assessee have colluded with the Intermediary firms and have been aided and abetted by various person to Import Impugned Coal by over-valuation following a well-planned and executed modus-operandi of Trade Based Mis-pricing.

7.4 It appears that the intermediary firms were not Independent suppliers, per-se, but merely intermediary dummy agents for artificial inflation of Invoice for enabling siphoning off of money abroad as a part of the modus-operandi.

7.5 The assessee through Coal Procurement Team (CRT) of Reliance ADAG were all along aware of the actual suppliers of the Coal ordered by them on the intermediary firms, In fact, they only dealt with the actual suppliers and finalized the prices, The Coal was shipped directly to India by the actual suppliers and only documents were routed through the intermediary firms, The Intermediary firms appear to have executed back-to-beck contracts with assessee with overlapping scope and responsibility and supply of the Coal when they were fully aware that these responsibilities were entrusted upon the actual suppliers, The Intermediary firms had no role to play even in negotiation, finalization of order with actual suppliers, and freightment of cargo as the in co-terms of trade remained identical between the actual suppliers and the Intermediary firms on one hand and the intermediary firms and assessee on the other. That the intermediary firms were dummy supplier created only for -artificially Inflating the invoice also appears to be seen from Reliance ADAG officers directly negotiating with actual suppliers In their office at Mumbai and elsewhere by Interacting with them. .

7.6. The conduit companies i.e. Intermediary Firms that have been used are as:

i. Reliance Natural Resources Ltd. (RNRL); Imports only upto Oct., 2010, 4 consignments.

ii. Larimar Holdings Ltd,, Jersey ("LHL"); A British crown dependency and tax haven. 11 consignments, stopped as Invoicing agent from May, 2011 due to S.94A of l.T. Act, 1961, ITEA with Jersey only in 2012.

iii. Epic Alloy Steel Pvt. Ltd, Raigarh, only one consignment.

Iv. Century Exports Ltd., Hong Kong, ("CEL"): Tax haven, after May, 2011 all consignments Invoiced through It (21 In number); one Sandeep Kumar Dhanuka Is its sole Director and 100% equity holder, he Is an Indian passport holder residing in Hong Kong at the registered address of GEL,

7.7 In respect of the Coal imported by assesses, documentary evidence (Invoices of actual suppliers etc.) pertaining to back-to-back transaction between the intermediary firms and the actual suppliers in relation to consignments Imported by assesses are available, based on which the actual value of the Coal Invoiced by the Intermediary firms for Individual consignments could be estimated. The extent of what appears as artificial Inflation of value by the Intermediary firms in their invoices, during F.Y.201Q-11 to F.Y.2014-15, Is at Column (6) and (7) of the Table below :

S. No.	Name of Importer	No. of vessels	Declared Value (Rs.)	Actual Value (Rs.)	Difference (Rs.)	% Inflat-ion
1	2	3	4	5	6	7
	R-Infra	37	8,60,46,25,154	7,15,44,68,198	1,45,01,56,956	20.27

It appears that the declared value of the Impugned consignments Imported by assessee totally amounting to

Rs,8,60,46,25,154/- CIF on the basis of artificially Inflated invoice price In Invoices of the intermediary firms, does not represent the actual value of the goods, which appears to be Rs.7,15,44,68,198/- CIF,-An Amount of Rs.l,45,01,56,956/- appears to have been siphoned by over-valuation by the assessee.

7.8 The Coal of Indonesian origin was exempted from Custom duty with effect from 01.10.2010 subject to submission of Country of Origin certificate in Form-AI issued by Indonesian authorities, Amongst many data fields, the 'Form-AI' certificate contains the FOB value of the goods. The assessee has, however, In majority of the Import consignments, have not availed of the concession eligible to them. It appears that they have deliberately not claimed the concession because it would have necessitated submission of the 'Form-AI' certificates, which In turn would have revealed the true FOB value of the Coal consignments to the Assessing Officers and would have exposed them to scrutiny for overvaluation.

7.9 Further, it Is pertinent to mention that the assessee, as the importers of the overvalued Coal, has preferred to pay more Customs duty inasmuch as they have not claimed the exemption under AIFTA for many Imports, This eagerness to pay taxes when less were payable was apparently for the reason that the taxes formed part of landed cost of the Coal which was being factored In for power tariff accrued to the power generators. Thus, the non-payable taxes paid by the power generators did not affect their profitability and was revenue neutral.

7.10 The overvaluation of Coal has the effect of artificially raising the power tariff fixed by the respective state electricity regulatory commission. In India the power tariff Is regulated by the regulatory authorities based on the costing date provided by power generation, By overvaluing the Coal imports, the power generator, i.e. Assessee, appear to have illegitimately managed to increase landed cost of the Coal, which is primary fuel in Coal based thermal power plants. The higher tariff dispensed by the regulators to the power generators enhances the cost of purchase of the power distributors which In turn is passed on to ultimate consumers benefiting to power generating companies.

7.11 The intermediary firm-wise extent of over-valuation for A.Y.2011-12 relevant to F.Y. 2010-11 Is tabulated as below:

Sl. No	Name of the Intermediary firm (Name of Importer)	Finan-cial Year	Declared CIF Value (Rs.)	Actual CIF Value determined (Rs.)	Extent of over-valuation (Rs.)
1.	RNRL	2010-11	63,36,23,178	59,58,78,459	3,77,44,179
2.	LHL Jersey	2010-11	122,73,93,460	111,89,31,084	10,84,62,376
3.	Epic	2010-11	23,33,34,835	21,87,51,408	1,45,83,427
TOTAL			209,43,51,473	193,35,60,951	16,07,90,522

8.1 As discussed above in summary of Interconnectedness among the buyers and their ' authenticity, It Is clear that all the buyers have been pre-arranged. If one puts together and sees In totality all that has been discussed above, which Is nothing but pure, unadulterated marshalling of hard facts, there emerges undeniable and concrete evidence to suggest that the purchase of coal of Indonesian origin through intermediaries was nothing but a colourable device, rather an outright sham scripted and executed for the purposes of reducing the taxable income of the assessee., and thus evading taxes, The Information received and facts produced above In detail need to be tested against the touchstone of human probability, After all that has transpired, preponderance of probabilities overwhelmingly suggests, rather firmly establishes, the Intention of the assessee to Indulge In deliberate wrongdoing, which was given effect by way of purchase of coal of Indonesian origin through Intermediaries at an inflated rate than the actual value of such coals.

8,2 This entire order thus far has focused solely on facts and evidences, for they form the bedrock of lifting the veil from the sham transaction. However, income tax proceedings ultimately need to stand the test of judicial scrutiny, and facts, when backed by precedent and judicial pronouncements, gain substance, weight and meaning, time and cases of financial and economic fraud, Assessees have raised questions about

the evidence rooted in circumstances, and the test of human probability.

4.6 The AO also analyzed and considered the judgments passed by the Hon'ble Apex Court and High Courts and the Tribunal and ultimately made the disallowance/addition of R.16,07,90,522/- on account of inflated coal expenses by holding that Assessee has purchased coal from Indonesia originally, which was purchased by intermediary at an inflated rate than the actual value of coal rate. Conclusion drawn by the AO is reproduced herein below:

"8.3.8 Finally, only very recently, the Bangalore bench of the Hon'bie ITAT, in the case of ***M.K. Rajeshwari vs. The 1TO, Ward-3, Raichur,*** *dismissed the appeal of the assessee against the order of the Ld. CIT (A) upholding the additions made by the Assessing Officer :*

"We do not find merit in these contentions of the assesses in the lights of the facts that there is prevalent practice in the country through which unaccounted money Is converted Into long term capital gain by circuitous means. While dealing with the issue of LTCG, one has to examine the financials of the company whose shares were inflated,. In *the instant case, financials were examined by us and we find that the financial worth of the company is meager and not at all worth to be invested therein,"*

8.4 In view of the above discussion and judicial pronouncements, the contentions of the assessee are rejected and it is concluded that the assessee has purchased coal of Indonesian origin, which were purchased from intermediaries at an inflated rate than the actual value of such coals sourced from the original suppliers'. Therefore, the inflated coal expenses of Rs 16,07,90,522/- are disallowed and added back to the total Income,

> *8.5 As the assessee has inflated the cost-of coal expenses of Rs.1,6,07,90,522/- and claimed the same in the Profit and Loss Account, therefore,* ***penalty proceedings are initiated separately under section 271(l)(c) of the Income Tax Act, 1961 for inaccurate particulars of income."***

5. The Assessee being aggrieved, challenged the said addition before the Ld. Commissioner, who vide impugned order by analyzing the peculiar facts and circumstances of the case and following the order dated 31/05/2018 passed by the Hon'ble CESTAT, Mumbai in the case of Knowledge Infrastructure Systems Ltd and two others (Appeal No.A/86617–86619/2018), deleted the addition, by concluding as under: -

> *"I have considered the facts of the case, assessment order, appellant submission and details of document uploaded by the appellant. The appellant submitted vide letter dated 25.08.2022, that the Custom Authority informed them vide letter F.NO S/26-68/ADJ/Reliance Infrastructure 72017-18/2132,dated 25th March, 2019 that in similar matter Hon'ble CESTAT Mumbai vide Order dated 31st May 2018 in respect of Appeal Nos. A/86617-86619/2018 filed by M/s Knowledge Infrastructure Systems Limited and two others, set aside the Order-in-original NO.05/KVSS(05) ADG(ADJ)/DRI/MUMABI/2016-17 dated 23.12.2016. The Customs Authority has filed appeal before Bombay High Court against this order of Hon'ble CESTAT, Mumbai. Hon'ble Bombay High Court vide order dated 18th June 2019 disposed the appeal as not maintainable.*
>
> *The said order discusses several crucial and important legal and quasi legal issues which has bearing on this case. Some of the relevant paras discussed in the said order are mentioned below:*
>
> 1. *The Paras 36 to 40 of the Hon'ble CESTAT order elaborates as to how the valuation done by the Customs Authorities is arbitrary and without any reasoning. Therefore, the fundamental allegation of over valuation of coal made by DRI which has been dealt in detail in these Paras has been rendered without any basis.*

2. *The Paras 32 to 35 and 43 elaborates as to how the goods in question can not be confiscated and fine imposed under provision of 111(m) of the Customs Act 1962 and therefore how Section 112 of the Customs Act, 1962 cannot be invoked to impose penalty. Hon'ble CESTAT concluded that imposition of penalty is without any basis.*

Therefore, on the basis of above said Orders, it can be concluded that the imported coal is not overvalued and there is no inflation in coal expenses. In view of order of Hon'ble CESTAT, further Hon'ble Bombay High Court vide order datec 18th June 2019 disposed the appeal as not maintainable and from the above mentioned facts of the case, it is inferred that coal expenses are not inflated. This ground of appeal is allowed."

6. The Revenue being aggrieved is in appeal before us. The Ld. DR more or less claimed as under: -

PLEA

1. *Appellate bodies orders are delivered in the case of different Assessee.*

2. *There is nothing to suggest that facts are similar to Assessee. Intimation u/s 28(9A) of the Customs Act , 1962 referred to by the Assessee is in the context of recovery of duty / interest not paid or short-paid or erroneously refunded to person chargeable to duty/ interest. It is with regard to applicability of Clause (a) of section 28(9A) of the Act. It does not suggest anything related to the issue on hand.*

> *(9) The proper officer shall determine the amount of duty or interest under subsection (8),- (a) within six months from the date of notice, 3* in respect of cases falling under clause (a) of sub- section (I); (b) within one year from the date of notice, 3 * in respect of cases falling under sub-section (4).*
> *[Provided that where the proper officer fails to so determine within the specified period, any officer senior in rank to the proper officer may, having regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year:*

Provided further that where the proper officer fails to determine within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued;]
(9A) Notwithstanding anything contained in sub-section (9), where the proper officer is unable to determine the amount of duty or interest under sub-section (8) for the reason that-

(a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court or the Supreme Court;
Or
(b) an interim order of stay has been issued by the Appellate Tribunal or the High Court or the Supreme Court; or
(c) the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or
(d) the Settlement Commission has admitted an application made by the person concerned,
the proper officer shall inform the person concerned the reason for non-determination of the amount of duty or interest under sub-section (8) and in such case, the time specified in sub-section (9) shall apply not from the date of notice, but from the date when such reason ceases to exist.

3. DRI report pertains to AYs 2011-12 to 2015-16, hence facts of AY 2016-17 are different from the AYs in appeal.

4. ITAT's observation on revenue-neutrality of the transaction and profitability element is not correct because it has not absolved the Assessee from the wrong claim of non-genuine expenses in P&L account and which also has other consequences such as imposition of penalty u/s 271(l)(c) of the Act."

7. On the contrary, the Assessee more or less claimed as under: -

"The Assessee submits that the Assessing Officer has disallowed so-called inflated coal expenses merely based on the preliminary report received from the Directorate of Revenue Intelligence (DRI), Mumbai without providing the same to the Assessee and also without providing any opportunity of cross examination of the information to the Assessee.

The Assessee has a coal-based generation plant at Dahanu and requires coal as a primary fuel for generation of power. Due to shortage in domestic supply of coal, the Assessee resorted to import of coal required for generation of power. The Assessee follows a proper procedure for purchase of coal. Quotations are called from various parties for the coal requirements and the lowest quote is selected for purchase of coal.

The Assessee has purchased / imported coal transparently and based on price linked to international coal-indices and therefore it cannot be said that the Assessee has purchased / imported coal at high / inflated price. The Assessee's business is a regulated business and the Assessee under no circumstances can inflate the cost or reduce its revenue.

The electricity business of the Assessee is regulated by the Maharashtra Electricity Regulatory Commission ("MERC"). Being a regulated entity, the tariffs charged by the Assessee to its consumers are approved by the State Commission i.e. MERC. The tariffs set by the MERC are meant to recover the cost of supplying electricity to the consumers in its License area along with the allowed Return on Equity. The business is cost plus business. All the expenses incurred namely cost of fuel, power purchase, other operating cost etc. are pass through. Any increase or decrease in cost of power sold would result into increase or reduction in tariff respectively without affecting the profitability from the business. The cost of coal purchase has been accepted by the MERC and was never a matter of dispute by the MERC.

The Assessee submits that the Assessing Officer has made the disallowances without appreciating the fact that cost of coal is an integral part for determining the tariff price and the cost of coal already recovered as part of tariff from the consumers and credited to Profit and Loss Account through tariff of electricity sold is offered for tax. Therefore the disallowance of coal cost has resulted in taxing the recovery of coal cost without allowing corresponding deduction in respect of the coal cost.

The Assessee further submits that the Adjudicating Authority of Directorate of Revenue Intelligence (DRI) had passed an order upholding the show cause notice of DRI for alleged over valuation of Indonesian coal imports in case of Knowledge Infrastructure Systems Pvt. Ltd. which was further challenged before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). Mumbai by Knowledge Infrastructure Systems Pvt. Ltd. CESTAT vide its order dated 31.05.2018 in Order No: A/86617-86619 / 2018 has set aside the order passed by the Adjudicating Authority of DRI (Page 40 to 90 of the Paper book for A.Y. 2011-12).

The order of CESTAT dated 31.05.2018 was further challenged by the Additional Director General (DRI) Mumbai before the Bombay High Court. The Hon'ble Bombay High Court also vide their order dated 18.06.2019 in customs appeal no. 7 of 2019 has dismissed the appeal as not maintainable. Therefore the order of CESTAT has attained finality (Page 91 to 100 of Paperbook for A.Y. 2011-12)

Further the Assessee has also received Intimation under section 28(9A) of the Customs Act, 1962 dated 25.03.2019 wherein the Addnl. Director General, DRI (Adjudication), Mumbai has intimated the Assessee that since the issue involved in SCN No. DRI/MZUF/INT-154/2014 dated 31.08.2016 issued in Assessee's case is similar to the one dealt in the matter of M/s. Knowledge Infrastructure

Systems Limited, the same is covered under clause (a) of section 28(9A) of the Customs Act, 1962.

The Department had also filed appeal before the Hon'ble Supreme Court against the Bombay High Court Order dated 18.06.2019 which was subsequently withdrawn by the Department as stated in the Supreme Court Order in Civil Appeal No.1666/2020 dated 24.01.2023 (Copy enclosed and marked Annexure "A").

DRI Show cause notice in Assessee's case

As stated earlier, the assessment proceedings were reopened based on the information by way of DRI show cause notice in the Assessee's case. The Assessee has made detailed submissions in respect of the said show cause notice. Pr. Commissioner of Customs (Adjudication) has passed a detailed order on 29.11.2023 quashing the show cause notice.
The Assessee submits that the entire basis of the reopening of the assessments is now no longer there as the show cause notice of DRI is cancelled by the Pr. Commissioner of Customs. Further the Assessing Officer has not provided any evidence about the inflation of coal price in course of the re-assessment proceedings.

The matter of similar addition had come up in the Assessee's case for A.Y.2016-17. DRI show cause notice did not cover the period in A.Y.2016-17. The Tribunal has decided the matter in favour of the Assessee and deleted the addition. The gist of the said Tribunal order is as under-

Income Tax Appellate Tribunal Order in A.Y.2016-17 in Assessee's case
The Assessee further submits that the Hon'ble ITAT in the Assessee's own case in Appeal no. ITA 2796/Mum/2022 & 2590/Mum/2022 for AY 2016-17 has decided the issue of disallowance of so-called inflated coal expenses in favour of the Assessee.

The ITAT observed that all the observations and findings given by the Assessing Officer as incorporated in the Assessment order are based on DRI report which had not been approved by the higher appellate forums and was still at the show cause notice stage and no final order had been passed and therefore all the observations made by the AO had no relevance.

The ITAT has also accepted the Assessee's contention that once the cost of coal is part of tariff price determination by the regulatory authority and once the electricity is sold on the same tariff which has been credited to the profit and loss account and offered to tax, then there is no question of separately taxing the alleged inflated cost of coal.
The ITAT has also stated that since the CESTAT has already set aside the order passed by the adjudicating authority of DRI and the Bombay High Court has also confirmed the CESTAT Order in case of Knowledge Infrastructure Systems

Ltd., the DRI Report on which the Assessing Officer has heavily relied upon for making the disallowance has no legs to stand on.

The Assessee therefore submits that the disallowance of so-called inflated coal expenses is wrongly made and ought to be deleted. . .

Conclusion:
The Assessee submits that the reopening of the assessment is bad in law as DRI show cause notice which was the material relied upon for reopening the assessment is quashed and is therefore not in existence.
Further, there is no evidence of the so called inflation of coal price. The Assessing Officer has not provided any tangible material or evidence of the socalled inflation. Thus the addition is made without any evidence and supporting documents.

The Assessee therefore prays that the department's appeal may be dismissed."

8. Heard the parties and perused the materials available on record. In this case, the regular assessment was made under section 143(3) of the Act and the total income of the Assessee was determined at Rs. 69,04,62,313/- vide consequential order dated 27/04/2017 passed by the AO. Subsequently, the case of the Assessee was reopened under section 147 of the Act by recording reasons, main part of which is reproduced herein below for the sake of brevity and ready reference: -

"Reliance Infrastructure Limited has booked expenditure of Rs.40 crores as contracts payments to PATH as per the Amended-2 contract, reflecting in the books of the assessee as Expenditure of EPC business and contract Business, which includes subcontract charges in the Profit and Loss Account:, which was in turn transferred to Geet Exim Pvt. Ltd by PATH after deducting Its commission. No actual work has been done by any of the entitles, either be it PATH or Geet Exim and the money was transferred out without utilization for any of the business purposes. 'Back to back' payments were made to Geet Exim Pvt, Ltd, by PATH without actual execution of contractual work. The expenditure to the extent of Rs.40 crores Is not genuine and the sub-contract expenditure has been Inflated by the incorporation of this non-genuine expenditure. Therefore, I have reasons to believe that the Income chargeable to tax to the extent of Rs.40 crores has been under-assessed.

The assessee, Reliance Infrastructure Limited, has purchased coal of Indonesian origin for the thermal power plant In Dahanu (Maharashtra) which were purchased from intermediaries at an Inflated rate than the actual value of such coals sourced from the original suppliers. The said transactions are fully paid during the year under consideration or are standing as sundry creditors and are claimed as fuel purchases In the Profit and Loss Account under the head cost of fuel. Therefore, the expenditure to the tune of Rs. 16,07,90,522/- is not genuine, and due to this inflated cost of fuels, I have reasons to believe that the income chargeable to tax to the extent of Rs. 16,07,90,522/- has been under-assessed.

As discussed above, I have reasons to believe that Income chargeable to tax has been under assessed to the tune of Rs. 56,07,90,522/- crores. The case is squarely fit to be reopened with reference to the provisions under section 147/148 of the Income Tax Act, 1961."

8.1 Consequent to the reopening of the case under section 147, notice dated27/12/2017 under section 148 of the Act was issued to the Assessee, in response to which the Assessee, by filing its return of income on 25/01/2018, declared its total income at Rs.57,50,52,140/- after claiming deduction under Chapter VIA of the Act to the tune of Rs.89,35,98,120/-. The Assessee also claimed carry forward of long- term capital loss of Rs. 207,07,65,293/-. Subsequently, statutory notices have also been issued in response to which the Assessee from time to time made submissions as called for and furnished the details as well. The Assessing Officer observed that the Directorate of Revenue Intelligence (DRI), Mumbai had investigated a case of over valuation in the import of coal of Indonesian origin wherein enquiries were conducted with Reliance Infrastructure Ld (RInfra) under the provisions of Customs Act. The Assessee has purchased coals of Indonesian origin for the thermal plant in Dahanu (Mumbai) which were purchased from intermediaries at an inflated rate than the actual value of such coals sourced from the original suppliers. The said transactions are fully paid during the year under consideration or are standing as sundry creditors and are claimed

as 'fuel purchases' in the profit & loss account under the head 'cost of fuel'. Therefore, the expenditure to the tune of Rs.16,07,90,522/- is not genuine. Consequently, the Assessee was asked to furnish complete details of expenses debited to its profit & loss account under the head 'cost of fuel' along with copies of invoices, LoS, ledger account, bank statement reflecting the transactions.

8.2 In response to said notice dated 02/02/2018 under section 142(1) of the Act, the Assessee vide letter dated 19/03/2018 more or less claimed as under:

> *"That electricity business of the company is regulated by Maharashtra Electricity Regulation Commission (MERC). The Assessee's business is of cost-plus business. All the expenses incurred, namely, cost of fuel, power purchases, other operating cost, etc. are pass-through costs. Thus, any increase or decrease in cost of power sold would result into increase / reduction in tariff, respectively without having the profitability from the business. The tariffs charged by the Assessee from its customers / consumers are approved by the said Commission, i.e. MERC. Tariffs set out by the MERC are meant to discover the cost of supplying electricity to the consumers in its licensed area along with the allowed return on equity. Cost of annual purchases has been accepted by the MERC and never been the matter of disallowance by MERC and entire fuel cost is allowed to be recovered and it is a fact that Assessee has purchased/imported coal from the above parties after taking quotations from various parties and selected the lower quote and, therefore, it cannot be said that the Assessee has purchased / imported coal at high / inflated price."*

8.3 The Assessing Officer by considering the reply of the Assessee and the enquiry report conducted by the DRI, observed that from report it appears that the intermediaries' firms were merely invoicing agents for facilitating invoice inflation. Further, the intermediary firms appear to have been received remittances towards valid invoices raised by the Assessee in India, which includes the overvalued portion of the price. Looking at the above case from the perspective of normal commercial prudence and due diligence, payment of such huge amount running in more than few crores over and

above the actual value of the goods appears to be unusual and highly irregular. When the actual suppliers were selling the coal at a much lower value, no prudent business entity would buy so much quantity by paying more than the actual value of the goods to intermediary firms with no known bonafide value addition and more so, by foregoing the deemed benefit available to the imported goods on production of certificate in Form "A1" added to their cost. In the instant case, the coal was shipped directly to India by the coal suppliers and only invoices were routed through the intermediary firms. The Reliance ADAG company i.e. the Assessee knowing fully as well as to whom the actual suppliers were and where the coal was coming from (as the coal was shipped directly to them) have chosen to pay such an inflated value and that too on such a large scale which appears to be contrary to all commercial prudence and due diligence. It appears that Reliance ADAG company, i.e. the Assessee has colluded with the intermediary firms and paid various persons to import impugned coal by over valuation following a well-planned and executed modus operandi of trade passed mis-pricing. Further, other intermediary firms were not independent suppliers per se, but merely intermediary dummy agents for artificial inflation of invoice for enabling siphoning off of money abroad as a part of the modus-operandi. The Assessing Officer also observed that the conduit companies i.e. intermediary firms that have been used as mentioned below:-

> *"I, Reliance Natgral Resources Ltd. (RNRL); Imports only upto Oct., 2010, 4 consignments.*
>
> *II. Larimar Holdings Ltd,, Jersey ("LHL"): A British crown dependency and tax haven. 11 consignments, stopped as Invoicing agent from May, 2011 due to S.94A of I.T. Act, 1961, ITEA with Jersey only In 2012.*
>
> *III. Epic Alloy Steel Pvt. Ltd, Raigarh, only one consignment,*

IV. Century Exports Ltd., Hong Kong, ('GEL"): Tax haven, after May, 2011 all consignments Invoiced through It (21 In number); one Sandeep Kumar Dhanuka Is its sols Director and 100% equity holder, he Is an Indian passport holder residing in Hong Kong at the registered address of CEL."

8.4 The Assessing Officer also observed that coal of Indonesian origin was exempted from customs duty with effect from 01-10-2010 subject to submission of country-of-origin certificate in Form-AI issued by Indonesian authorities. The Assessing Officer tabulated the firm-wise over valuation for the assessment year under consideration which is reproduced below: -

S. No.	Name of the Intermediary firm (Name of Importer)	Financial year	Declared CIT Value (Rs.)	Actual CIF Value determined (Rs.)	Extent of over-valuation (Rs.)
1.	RNRL	2010-11	63,36,23,178	59,58,78,459	3,77,44,179
2.	LHL Jersey	2010-11	122,73,93,460	111,89,31,084	10,84,62,376
3.	Epic	2010-11	23,33,34,835	21,87,51,408	1,45,83,427
TOTAL			209,43,51,473	193,35,60,951	16,07,90,522

8.5 The Assessing Officer at last by citing various judgments and concluding "*that the Assessee has purchased coals of Indonesian origin from intermediaries, at an inflated rate than the actual value of such coals sourced from the original suppliers",* ultimately disallowed an amount of Rs.16,07,90,522/- on account of inflated actual expenses and added back to the total income of the Assessee.

8.6 We observe that more or less, the Assessing Officer acted on the investigation conducted by the DRI. It is a fact that DRI, on the basis of investigation issued a show cause notice dated 31/08/2016 with regard to the alleged inflation of coal expenses as involved in the instant case. The said show cause notice dated 31/08/2016 was challenged by the Assessee

before the Principal Commissioner of Customs (Adjudication) who by analyzing the facts and circumstances in its entirety, vide its order dated 29/11/2023 ultimately dropped all the proceedings initiated in respect of show cause notice No.F.DRI/Mizu/F.Int/154/2014 dated 31/08/2016. It is a matter of fact that in the aforesaid show cause notice, the issues involved relates to the same matter as involved in the instant case. The Ld. Principal Commissioner of Customs (Adjudication) has clearly held that the show cause has not given out any separate reasons and evidences that the extent of over-valuation alleged in the show cause notice in respect of RNRL & other intermediaries are more or less same suggestive of the fact that the relationship per se has not affected the transaction value. The declared value does not appear to satisfy the requirements of the transaction value under section 14 of the Customs Act, 1962 read with rule 3(1) an 2(2(vi) of the CVR, 2007 and needs to be arrived at in accordance with the provisions of sub section (1) of section 14 of Customs Act, 1962 read with sub rule (1) of Rule 3 of the CVR.

8.7 We further observe that the Ld. Commissioner while deleting the addition under consideration also mainly relied upon the order passed in Knowledge Infrastructure Systems Pvt. Ltd (supra) by CESTAT, Mumbai

8.8 It is a fact that issues involved in this case and in the case of Knowledge Infrastructure Systems Pvt. Ltd are exactly similar, wherein the order in original dated 23/12/2016 has also been set aside by the Hon'ble CESTAT vide its order No.A/86617-86619/2018 dated 31/05 /2018.

8.9 Affirming the said facts, even the Customs Department through Additional Director General (DRI)(Adjudication), Mumbai, vide intimation

dated 25/03/2019 under section 28(9A) of the Customs Act, 1962, has also clearly intimated that the issue involved in show cause notice No.F.DRI/Mizu/F.Int/154/2014 dated 31/08/2016 issued to M/s Reliance Infrastructure Ltd and 4 other entities is similar to the one dealt in the matter of Knowledge Infrastructure Systems Pvt. Ltd, the same is covered under clause (a) of section 28(9A) of the Customs Act, 1962. In the first para of said intimation it is clearly written and acknowledged that Hon'ble CESTAT, Mumbai vide order dated 31/05/2018 (supra) in appeal filed by Knowledge Infrastructure Systems Pvt. Ltd and two others, set aside the original OIO dated 23/12/2016. The department has filed an appeal on 01/12/2018 in the Hon'ble High Court of Bombay against the said order of Hon'ble CESTAT. For ready reference and completeness, the intimation dated *25th*March, 2019 issued by DRI is reproduced below:

DIRECTORATE OF REVENUE INTELLIGENCE
OFFICE OF THE ADDITIONAL DIRECTOR GENERAL (ADJUDICATION)
2m FLOOR, OLD BUILDING,NEW CUSTOM HOUSE, BALLARD ESTATE
MUMBAI-400001. Tel. No. 022-22757030/22757034

F. No. S/26-68/ADJ. DRI/Reliance infrastructure /2017-18/2132
Mumbai, *25th*March, 2019

INTIMATION UNDER SECTION 28OA) OF THE CUSTOMS ACT, 1962

It is intimated that Hon'ble CESTAT, Mumbai vide Order dated 31.05.2018 in respect of Appeal Nos. A/86617-86619/2018 filed by M/s Knowledge Infrastructure Systems Limited and two others, set aside the OIO No. 05/KVSS(05)ADG(ADJ)/DRI/MUMBAI/2016-17 dated 23.12.2016. It is intimated that department has filed an appeal on 01.12.2018 in the Hon'ble High Court of Bombay against the said order of Hon'ble CESTAT, Mumbai.

2. Since the issue involved in SCN No. DRI/MZU/F/INT-154/2014 dated 31" August 2016 issued to M/s Reliance Infrastructure Limited and four (4) other co-notices is similar to the one dealt in the matter of M/s Knowledge Infrastructure Systems Limited, the same is covered under Clause (a) of Section 28(9A) of the Customs Act, 1962.

3. This intimation is being submitted in terms of requirement as prescribed under Section 28(9A) of the Customs act, 1962.

SD/-
(SUBHASH AGRAWAL)
Additional Director General
DRI (Adjudication), Mumbai

l. M/s Reliance Infrastructure Ltd.,
Dhirubhai Ambani Knowledge City,
Koparkhairane,
Thane Belapur Road,
Navi Mumbai - 400 710.

2. M/s Rosa Power Supply Co. Ltd.,
Dhirubhai Ambani Knowledge City,
Koparkhairane, -Thane Belapur Road,
Navi Mumbai - 400 710.

8.10 We further observe that the co-ordinate bench of the Tribunal in Assessee's own case for the A.Y. 2016-17, vide order dated 29/03/2023 also dealt with identical issue as involved in the instant case and ultimately by taking cognizance of the decision in Knowledge Infrastructure Systems Pvt Ltd (supra), deleted the similar addition as involved in the instant case by holding as under:-

"47. We have heard rival submissions and perused the relevant finding given in the impugned orders. For the purpose of generation of electricity plant at Dahanu which requires coal as a primary fuel for generation of power, assessee purchased coal from M/s. Century Exports Ltd. Hongkong based company for supply of imported coal to Dahanu thermal power station at agreed standard terms and conditions. The assessee had purchased imported coal from CPL Hongkong based on price linked to international coal-indices. The entire basis of the addition was made by the ld. AO is the information received from DRI, Mumbai for A.Y.2011-12 to 2015-16, wherein it had investigated the case of over valuation in the import of coal of Indonesian origin. The case of the ld. AO is that intermediary firms were merely invoicing agents for facilitating invoice inflation which has effect of artificially raising the power tariff fixed by the respective state electricity regulatory commission. The ld. CIT(A) has merely stated that the ld. AO has not brought out profitability and the over

valuation of coal as an effect of artificially raising the power tariff fixed by the respective state electricity regulatory commission and accordingly, he restricted the disallowance in Adhoc 50% made by the ld. AO.

48. First of all, so far as DRI report is concerned, the same pertains to A.Y.2011-12 to 2015-16 and moreover, no final conclusion or any order has been passed in the case of the assessee therein and it is still at show-cause notice stage.

49. Here in this case, the cost of coal is otherwise an integral part of determining the tariff price and the cost of coal are tariff price and the cost of coal already recovered as part of tariff from the consumers has been credited to the profit and loss account and tariff of electricity sold has already been offered for tax. Though ld. Counsel has pointed out that based on similar show-cause notice issued by the DRI for alleged over valuation of Indonesian coal imports in case of Knowledge Infrastructure Systems Pvt. Ltd., CESTAT has already set aside the order passed by the adjudicating authority of DRI and finally that CESTAT order has also been confirmed by the Hon'ble Bombay High Court, in the sense that the Hon'ble Court has held that appeal was not maintainable. If the ld. AO is heavily relying upon report of the DRI on similar information, then the same has no legs to stand because CESTAT Mumbai in the case of Knowledge Infrastructure Systems Pvt. Ltd has already set aside the order of the adjudicating authority, thus, the said information cannot be the basis for any kind of disallowance.

50. In any case, all the observations and the finding given by the ld. AO as incorporated supra these are all based on DRI report which as of now has not been approved by the higher appellate forums and as informed by the assessee, the same are still at the stage of show-cause notice and no final order has been passed. Thus, all the observations of AO has no relevance at all. As observed above, the case of the Revenue is that assessee might have inflated cost of the coal, however, once the cost of the coal is part of tariff price determination by the regulatory authority and once the electricity is sold on the same tariff which has been credited to the profit and loss account and offered to tax, then there is no question of separately taxing the alleged inflated cost of coal. Therefore, we agree with the contention of the ld. Counsel that in such circumstances, no disallowance at all is warranted. Accordingly, the entire addition is deleted and consequently, the Revenue's appeal is dismissed and Assessee's appeal is allowed."

8.11 It is also a fact that Hon'ble High Court of Bombay, vide order dated 18/06/2019 by dismissing the appeal of the Customs Department, has already affirmed the decision of CESTAT order dated 31/05/2018. The said order dated 18/06/2019 passed by the Hon'ble High Court, was though also challenged before the Hon'ble Apex Court, however, the Customs Department has subsequently withdrawn the said appeal and, therefore, the Hon'ble Apex Court vide order dated 24/01/2023 allowed the withdrawal of Civil Appeal No.1666/2020 as dismissed as withdrawn and, therefore, the setting aside of order in original dated 23/12/2016 passed by the CESTAT vide order dated 31/05/2018 has also attained finality.

8.12 Even otherwise as observed by us above, the show cause notice dated 31/08/2016 of DRI based on the investigation carried out by it, which is the foundation for reopening of the case u/s 147 of the Act and making the addition by the AO, has already been set aside by the Principal Commissioner of Customs (Adjudication) vide his order dated 29/11/2023, by holding ***"that the show cause has not come out with any separate reasons and evidences that the extent of over-valuation alleged in the show cause notice in respect of RNRL & other intermediaries are more or less same, suggestive of the fact that the relationship per se has not affected the transaction value"***.

8.13 Hence considering the peculiar facts and circumstances in totality, in our considered view, the determination made by the AO in any case is un-sustainable being sans foundation/substantive material and thus the impugned order is affirmed and the appeal i.e. ITA No.1147/Mum/2023 filed by the Revenue Department is dismissed.

9. In view of our judgment in ITA No.1147/Mum/2023 for the A.Y. 2011-12, all the appeals under consideration stands dismissed.

Order pronounced in the open Court on 24 /01 /2024.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN) **ACCOUNTANT MEMBER**	**(NARENDER KUMAR CHOUDHRY)** **JUDICIAL MEMBER**

Pavanan

प्रतिलिपिअग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

Asstt.Registrar
ITAT, Mumbai