



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
MANISH AGARWAL, ACCOUNTANT MEMBER**

ITA No.314/CTK/2023

Assessment Year : 2015-16

Loramitra Rath, Kairapari Kotsahi, Tangi, Cuttack	Vs.	DCIT, Circle-1(1), Cuttack
PAN/GIR No.AEBPR 6065 H		
(Appellant)	..	(Respondent)

Assessee by : Shri Purnendhu Bhusan Mohanty, CA
Revenue by : Shri S.C.Mohanty, Sr DR

Date of Hearing : 5/9/2024
Date of Pronouncement : 5/9/2024

ORDER

Per Bench

This is an appeal filed by the assessee against the order of the Id
CIT(A), NFAC, Delhi dated 14.8.2023 in Appeal
No.CIT(A),Cuttack/10363/2019-20 for the assessment year 2015-16.

2. Shri Purnendhu Bhusan Mohanty, Id AR appeared for the assessee
and Shri S.C.Mohanty, Sr. DR appeared for the revenue.

3. It was submitted by Id AR that the assessee is a Director in six companies, namely; (i) M/s. Maa Durga Rice Processing Pvt Ltd., (ii) M/s. Maa Durga Flour Mills Pvt Ltd., (iii) M/s. Maa Durga Rice Products Pvt Ltd., (iv) M/s. Maa Durga Commotrade Pvt Ltd., (v) M/s. Navadurga Industries Ltd., and (vi) M/s. Maa Durga Thermal Power Company Ltd. It was the submission that M/s. Maa Durga Thermal Power Company Ltd., took loan of Rs.53,50,00,000/-, M/s. Maa Durga Coomotrade Pvt Ltd., took loan of Rs. 20,00,00,000/- and M/s. Navadurga Industries Ltd., took loan of Rs.33.07 crores. (These are the details as has been provided by the Id AR on behalf of the assessee). The said companies did not pay the loans in time. The loans were taken from SREI Equipment Finance Ltd., wherein, the assessee had stood guarantor for the loans and had consequently mortgaged certain immovable properties owned by her to SREI Equipment Finance Ltd. As these companies had not repaid the loans, SREI Equipment Finance Ltd., took over immovable properties, which were mortgaged by the assessee as the guarantor for the repayment of the loans. The issue in appeal is in regard to levy of capital gains on the takeover of the immovable properties of the assessee by SREI Equipment Finance Ltd., which were mortgaged as the security against the loans. Id AR has placed before us the copy of the sale deed by which SREI Equipment Finance Ltd., has taken over the immovable properties. The sales consideration in the said documents is Rs.1,89,13,000/-. It was the submission that the assessee did not receive

even a single pie out of the said amount and consequently, no capital gains could be levied in the hands of the assessee insofar as on account of transfer by the overriding title, the consideration was never received by the assessee. It is also specifically averred by Id AR that the sales consideration has also not moved from SREI Equipment Finance Ltd., nor has such consideration being set off against any of the loans or interest thereon. It was the submission that in respect of the said companies, NCLT proceedings have also been initiated for liquidation. It was the submission that as the assessee has not received the sales consideration, in view of the provisions of section 48, which requires that consideration has to be received or accrued and the assessee having not been received the consideration, the mode of computation of capital gains fails and consequently, there can be no levy of capital gains on the assessee. It was the further submission that there is no real income received by the assessee. Id AR has filed written submission as follows:

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B STATEMENT OF FACTS

For the sake of brevity and convenience of this Hon'ble Court the facts of the present case are summarize as follows:

1. The assessee is an individual and held directorship in various companies. The said companies had availed loan facilities from Banks & Financial Institutions. Apart from assets of the company mortgaged with the lender, the assessee in her personal capacity mortgaged assets as collateral security with the lender to avail the loan facilities by the company (ies). In the meanwhile, due to inability of the Company to service debts of the lenders, the Financial Institution executed Sale Deed in their favour for recovery of the Loan without any monetary consideration.
2. Based on the third-party information that the assessee had sold a plot of land on 31.03.2015 amounting Rs. 1,89,13,000.00/- notice was issued u/s 148 of the Act. Accordingly, assessment was done u/s 144 r.w.s. 147 of the Act treating the entire transaction under the Head "Capital Gain".
3. The assessee filed an appeal before the Hon'ble CIT (Appeal) challenging the order of Ld. Assessing Officer (AO). However, CIT (Appeal) without considering the submissions made by the assessee relied on the findings of the Ld. AO and passed the order. The matter is now before the Hon'ble ITAT, Cuttack for hearing.

C. STATEMENT OF ISSUES

1. The Ld. CIT (Appeals) considered the Sale of Immovable Property as Income from Capital Gain which is without any basis and devoid of any merits.
2. The Ld. CIT (Appeals) mis applied the ratio decidendi of CTT v. Atilli N. Rao 252 ITR 880 (SC) and T.S. Hajee Moosa & Co Vs. ACIT (ITAT Chennai) in the Appeal Number: ITA No. 2686/CHNY/2018 which is squarely not applicable to the instant case.

D. SUMMARY OF ARGUMENTS

1. The Lid. CIT (Appeals) considered the Sale of Immovable Property as Income from Capital Gain which is without any basis and devoid of any merits.

The taxation of Capital Gain under the Income Tax Act, 1961 is governed by the provisions of section 45 (charging section) and Section 48 (Mode of Computation). As per the provisions of section 45 r.w.x. section 45 Capital gain is levied when there is transfer of Capital Asset and consideration is received or accrued by virtue of such transfer. However, in the instant case even though the Capital Asset has been transferred but consideration was neither received nor accrued to the assessee. Hence, the Income is not taxable under Capital gain as consideration never received or accrued to the assessee.

That apart, Capital Asset of the assessee is mortgaged to lenders to extend loan to Group Companies. As the loan became bad, the Capital Asset was transferred to lenders by execution of the Sale Deed without any monetary exchange. Since the asset was transferred to lenders without any monetary transaction falls under the principle of "Diversion of Income by Overriding Title". As the Income is diverted at source the said income is not real hence not subjected to tax.

2. The Ld. CIT (Appeals) mis applied the ratio decidendi of CIT v. Attili N. Rao 252 ITR 880 (SC) and T.S. Hajee Moosa & Co Vs. ACIT (ITAT Chennai) in the Appeal Number: ITA No. 2686/CHNY/2018 which is squarely not applicable to the instant case.

The Ld. CIT sighted the cases which are factually different from the instant case. In both the cases assets mortgaged with the Bank or Excise Department was sold auctioned and consideration amount received in both the cases were utilised to recover the debts or dues of Excise Department. Basically, consideration amount was received and then it was applied to realise debts or dues. However, in the instant case there was no exchange of money and the entire asset/income was diverted at source without any income accruing in the hands of the assessee. Hence, factual matrix of both the cases are not applicable to the instant case as the asset/income is diverted at source and no consideration was either received or accrued to the assessee.

ARGUMENTS ADVANCED

1. The Ld. CIT (Appeals) considered the Sale of Immovable Property as Income from Capital Gain which is without any basis and devoid of any merits.

A. CONCEPT OF REAL INCOME

Income of an assessee has to be computed in the manner laid down under the Income-tax Act (Act). The Act has made elaborate provisions for classification of incomes under various heads and deductions permissible under each head. Under the Act, income is chargeable to tax on the basis of either receipt or deemed receipt in India in the previous year relevant to the year of which assessment is made or the income that accrues or arises or deemed to accrue or arise in India during such year. But, what is income has not been defined and the Income-tax Act, 1961 provides for an inclusive definition which has wide connotations. It is by now well-settled that income which is susceptible to tax is the real income as is commercially understood. In determining the real income, the question is not the physical receipt of income but of the concept of receipt in law.

When there is no provision of exemption or deduction in the law, the concept of real income has been considered in ascertaining whether an amount is taxable or not. The Privy Council in Commissioner of Income Tax vs Chetnavis (SM) AIR 1932 PC 178 had allowed a bad debt as an allowable item on the basis of commercial principles, when there is no provision in law to allow such claim. The Hon'ble Supreme Court in the case of Bodridas Daga vs. Commissioner of Income Tax. 34 ITR 10 (SC) had allowed 'loss on embezzlement', though not an expenditure, as a deduction on the principle of real income theory. This theory is propounded more particularly when there is no assistance in the form of law, so that tax was levied on real income and not on hypothetical income, either on the basis of the entries in the books of account or otherwise. There are many grey areas as to whether a particular receipt is income or a particular payment is a revenue expenditure on which a decisive answer was not forthcoming. The concept of real income is often invoked to decide the issue one way or the other. Courts have used this concept for ensuring that what is taxed is nearly real as possible within the constraints of statutory limitations. The concept of real income, i.e., what is to be subject to tax is only the real income and not income in the hypothetical sense, has been established for a long time. In

Poona Electric Supply Co. Ltd. vs. CIT [1965] 57 ITR 521 (SC) it was held that tax is exigible only on income earned in reality. Even if entries are made in the books of account, what is relevant is the entries that are made on accrual basis i.e, accrual of right to receive payment or the accrual of liability to disburse or pay, as held by the Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd vs. CIT 225 ITR 746 (SC). When income is in fact received but subsequently given up, it remains the income of the recipient and tax is payable in the year of accrual. When income has not accrued at all, i.e, neither accrual nor receipt of income, even if there an entry to that effect in the books of account, the same cannot be considered as income.

The Hon'ble Supreme Court in the case of State Bank of Travancore vs. Commissioner of Income Tax 158 ITR 102 (SC) had an occasion to invoke the concept of real income and laid down the principles on this subject which are relevant even today. It was held [in majority view] that the question of how far the concept of real income entered into the question of taxability in the facts and circumstances of this case and how far and to what extent the concept of real income should intermingle with the accrual of income will have to be judged in the light of the provisions of the Act, the principles of accountancy recognised and followed the feasibility. An acceptable formula of correlating the notion of real income in conjunction with the method of accounting for the purpose of computation of income for the purpose of taxation is difficult to evolve. Whether an accrual has taken place or not must, in appropriate cases, be judged on the principles of real income theory After accrual, non-charging of tax on the same because of certain conduct based on the ipse dixit of a particular assessee cannot be accepted. In determining the question whether it is hypothetical income or whether real income has materialised or not, various factors will have to be taken into account. It would be difficult and improper to extend the concept of real income to all cases depending upon the ipse dixit of the assessee which would then become a value judgment only. What has really accrued to the assessee has to be found out, and what has accrued must be considered from the point of view of real income, taking the probability or improbability of realisation in a realistic manner and dovetailing these factors together, but once the accrual takes place, on the conduct of the parties subsequent to the year of closing, an income which has accrued cannot be made 'no income'. In this connection the following proposition emerge:

(i) It is the income which has really accrued or arisen to the assessee that is taxable. Whether the income has really accrued or arisen to the assessee must be judged in the light of the reality of the situation.

(ii) The concept of real income would apply where there has been a surrender of income which in theory may have accrued but in the reality of the situation no income had resulted because the income did not really accrue.

(iii) Where a debt has become bad, deduction in compliance with the provisions of the Act should be claimed and allowed.

(iv) Where the Act applies, the concept of real income should not be so read as to defeat the provision of the Act.

(v) If there is any diversion of income at source under any statute or by overriding title, then there is no income to the assessee.

(vi) The conduct of the parties in treating the income in a particular manner is material evidence of the fact whether income has accrued or not.

(vii) Mere improbability of recovery, where the conduct of the assessee is unequivocal, cannot be treated as evidence of the fact that income has not resulted or accrued to the assessee. After debiting the debtor's account and not reversing that entry, but taking the interest merely in suspense account, cannot be such evidence to show that no real income has accrued to the assessee or has been treated as such by the assessee.

(viii) The concept of real income is certainly applicable in judging whether there has been income or not, but in every case, it must be applied with care and within well recognised limits, and must not be called in aid to defeat the fundamental principles of law of income-tax as developed.

Above principles are laid down following the concepts of accrual of income, method of accounting followed, conduct of parties, diversion/application of income and statutory provisions. Keeping the principles laid down as above, one can analyze the concept in various situations.

Real income and Accrual of income

Income becomes taxable on the footing of accrual only when the right to receive the income becomes vested in the assessee. The Supreme Court in *E. D. Sassoon & Co Ltd* (CIT 11954) 26 ITR 27, held that if the assessee acquires a right to receive the income,

the income is said to have accrued to him, though, it may be received later on. The basic concept is that he must have acquired a right to receive the income. In other words, there must be a debt owed to him by somebody. Unless and until a debt is created in favour of the assessee by somebody, it cannot be said that the assessee has acquired a right to receive the income or the income has accrued to him. Broad principles of accrual of income have been laid down from time-to-time by various Courts including the Supreme Court, eg. CIT vs. Ahmedbhai Umarbhai & Co. 18 ITR 472 (SC), Indermoni Jaitia vs. CIT 35 ITR 298 (SC), CIT . A. Gajapathy Naidu 53 ITR 114(SC) and Morvi Industries Ltd vs. CIT 82 ITR 835 (SC), however, where income cannot be said to have resulted at all, there is neither accrual nor receipt of income, even though an entry might have been made in the books of account as held in CIT vs. Shoorji Fallabuldas & Co. 46 ITR 144 (SC). In the decision of CIT vs. Sitaldar Tirathdas 41 ITR 367, Hon'ble Supreme Court has ruled that what is to be subject for taxation is only real income over which the assessee possesses a right and not any other thing. In Somaiya Organo Chemicals Ltd vs CIT 216 ITR 291, the issue considered by Bombay High Court was whether the cess collected and kept in a separate bank account as per the statutory order and to be utilized for a particular purpose, was income in the hands of assessee? It was held that the statutory levy could not be equated as the 'real income' of the assessee. In Rajkot District Gopalak Co-op Milk Producers Union Ltd vs. CIT 204 ITR 590, the question which fell for consideration was whether income of the project assigned to a Co-operative Society on lease and license basis and profits of which were to be paid to the State Government, could be treated as 'income' of the assessee? It was held that the entire income belonged to the Government and it could not be treated as the income of the assessee and was thus not taxable. Similarly, in CIT vs. Pepur Round Transport Corpn 253 ITR 303 (Prom & Har), the Court considered the question as to whether the amount forfeited by the employer out of the provident fund where it was categorically mentioned that the said amount belonged to the Trust, was income of the assessee. Invoking the concept of 'real income', the High Court held the same not to be the income of the assessee. A somewhat similar view was taken in Gujarat Municipal Finance Board vs. Dy CIT (Assessment) 221 ITR 317 (Guj) It was decided by the Supreme Court in the case of K. P. Varghese vs. ITO 131 ITR 597(SC) that what in fact never accrued or was never received cannot be computed as capital gains under section 48. Though the aforesaid case was related to capital gains, it equally applies to the case of principle of real income. In deciding the case on real income principle one major problem arises as to the

'burden of proof. It was decided in K. P. Varghese's case (supra) that the burden lies on the revenue to show that there is an understatement of consideration. Thus, the principles laid down in the State Bank of Travancore particularly principles 1, 2, 6 & 7 are keeping in tune with the concept of accrual of income.

Thus, it can be concluded that the appellate proceeding by the Ld. CIT (Appeal) is completed in a mechanical manner and order passed by him is based on surmises, conjectures and devoid of merit as the assessee has no real income arising out of transfer of Capital Asset in favour of the lender (SREI Equipment Finance Ltd).

B. DIVERSION OF INCOME BY OVERRIDING TITLE

The assessee through her Authorised Representative pleaded before the Learned A.O. that the Sale Deed was executed by Financial Institution - SREI Equipment Finance Limited (Financial Institution) towards their recovery of loan from the company despite the said assets being mortgaged to them and not a single paisa was neither realized nor credited to the account of the assessee. It is pertinent to refer to section 45 of the Act (Charging Section) and section 48 (Mode of Computation) of the Act;

45. [(1)] Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections [54, 54B, [[54D, [54E, [54EA, 54EB,] 54F [, 54G and 54HJJJJ], be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. -----
----- Mode of computation.

48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :- -----

From conjoint reading of both the sections it is apparent that the assessee shall be liable to pay tax from Income under the Head Capital Gain only when the following conditions are fulfilled;

- i) Asset should be a Capital Asset;
- ii) There should be a transfer; and
- iii) Consideration is received or accrued as a result of the transfer of Capital Asset.

In the instant case, first two conditions were met whereas the last condition is not fulfilled. The Consideration was neither received nor accrued in the hand of the assessee as the asset was transferred by virtue of a contractual obligation overriding the income.

At this juncture, it is of paramount significance to understand the provision of law particularly under the Income Tax Act regarding "Diversion of Income by Overriding Title".

One of the fundamental principles of taxation is to tax income accruing or deemed to accrue in favour of the taxpayer. The concept of diversion of income and application of income though fundamental has great tax implication since it is a court made concept. It is well known that income when diverted before reaching the assessee is called as diversion of income, whereas when the income is applied after it reaches the assessee, either due to contractual obligation or exercise of discretion, it is called as application of income.

As explained by the Apex Court The essence of the concept of diversion of income could be found in CIT v. Sitaldas Tirathdas (1961) 41 ITR 367 (SC). The Apex Court laid out the tests for determining when an income can be said to have been diverted at source as a result of a charge or overriding title. The following is the observation of the Apex Court in Sitaldas Tirathdas's case which is quite often repeated in various judicial forums:

"The true test is whether the amounts sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by obligation income is diverted before it reaches the assessee. if is deducted: 8 but where the income is required to be applied to discharge the obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second kind of payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable

A perusal of the above said landmark case gives us a few key points:

(i) an income diverted at source by overriding charge is not chargeable to tax in the hands of the actual recipient;

(ii) a charge created for diversion of income by overriding title will insulate the recipient from tax consequences and merely because he receives the same, he could not be taxed.

An example of overriding charge is that person giving a property as a gift to another person may create a charge that the recipient is eligible to enjoy the property and its income subject to satisfying certain conditions. The conditions could be to pay a specified sum to a particular person at periodic intervals or to share the rental income from the property with a particular person for a particular period of time.

In Nariman B. Bharucha's case (1981) 130 ITR 863 Shri. Nariman Bharucha running a proprietary concern converted the same into partnership by admitting his two sons as partners and allotted 37.5 percent share to each son. The balance of 25 percent share of profit or loss was retained by him. The deed of partnership contained a recital that in the event of the demise of the erstwhile proprietor, the surviving partners have to pay 25 percent share of profits of the firm to the widow of the deceased partner (i.e. wife of erstwhile proprietor and mother of two surviving partners). It so happened that the erstwhile proprietor deceased and the firm paid 25 percent of profits to the widow of the deceased partner and claimed the same as expenditure. The claim of the assessee was negative by the revenue.

The court made a reference to the precedent in the case of CIT v. Patuck (1969) 71 ITR 713 (Born) wherein it was held that whenever a charge is created, the income which has been made the subject of the charge ceases to be the income of the assessee and the charge creates an overriding title in favour of the charge-holder to recover the income before it reaches the hands of the assessee.

The court held that it is obvious from the deed of partnership that 25 percent of income of the firm did not belong to any of the two partners and if at all that income was received by them, it was for and on behalf of the charge-holder. The nature of the charge created by the document VIZ. the partnership deed had an overriding title and such income clearly got diverted before the profits reached the partners of the assessee firm. Thus, a charge created on the profits of the partnership firm got diverted by overriding title and such portion could not be taxed in the hands of the firm. In present Scenario, the above decision and how it could be accommodated in the light of the tax provisions dealing with

taxation of partnership firms, unfold an interesting scenario. The partnership firm must authorize the payment by overriding charge. Such authorization may be of two types

(i) before allowance of working partners' salary and interest on capital; and

(ii) after allowance of working partners' salary and interest on capital.

When the quantum of diversion of income is made with reference to the profits of the firm before allowance of interest on capital and working partner salary, it would be larger and where the diversion of income by overriding title is applicable after payment of interest on capital and working partners' salary then it would be comparatively less. There is no prohibition in law with regard to such diversion of income by overriding title and therefore it could be advantageous to divert the income by overriding title before allowance of working partners' salary and interest on capital.

In such a case, the deed would tacitly admit that the working partners' salary and interest on capital are appropriation of profit. Whether it is a charge or appropriation of profit would make no difference so far as the income-tax law is consequence in recipient's assessment. The above said concept of diversion of income by overriding title exempts the actual recipient of income from tax consequences. However, the person to whom the income is diverted is chargeable to tax for the income so received by him.

An interesting case of a recipient receiving such payment from a partnership firm was discussed in Dy.CIT v. Mrs. Lakshmi MiAiyar (2011) 131 ITD 436 (Mum). In this case, the assessee, a widow of deceased partner, became eligible for 5% of the gross receipts of the firm for a period of 10 years as per the condition laid down in the deed of partnership. She received a sum of I 20.26 lakhs in the financial year 2004-05 but did not offer the same as income for the reason that it is a capital receipt and did not have any semblance of revenue nature.

The Tribunal held that the assessee had received the amount from the firm and such receipt was not in relation to any service or business done by her for the firm. It was not to compensate for any loss suffered by her because of the firm. Similarly, it is not a compensation for the services rendered by her either in present or in future. The Tribunal applied the Circular No.573, dated 21.08.1990 which exempts lump sum ex-gratia payment received by widow or legal heir of an employee who

dies while in active service. The Tribunal held that the very spirit of the Circular is to exempt any payment made to the legal heirs of the deceased employee to support them in hardship and ensure livelihood and accordingly, such receipt is not chargeable to tax. It may be noted that the facts of the case relate to the financial year after the insertion of section 56(2) (v) (introduced by Finance Act, 2004 w.e.f. 01.09.2004) meant for taxing gifts from non-relatives. Conclusion Tax laws and for that matter any law has to accommodate the requirements of the users and administrators.

The aspects of practical relevance and application are always the corner stones of legislative wisdom. Income-tax law is no exception to these principles but yet the concept of diversion of income by overriding title and its tax consequence continues to be judge made law.

What is 'Diversion of Income by Overriding Title'?

More often than not, income earned by an assessee is consumed for the purpose of meeting some recurring and non-recurring expenditure arising out of an obligation imposed on the assessee by some contract, or by a statute, or in the case of a company, by the memorandum and articles of association governing it. In such cases, the question arises whether such income so expended is to be treated as income assessable to tax in the hands of the assessee. This is where the principle of 'diversion of income by overriding title' comes into play. In past, brilliant minds have spent countless hours to devise and establish a universal test to answer the question as to whether an income actually belongs to another person. However, the only answer that has always been achieved from such exercises is that there can be no bright line rule to determine this contentious question and that each case has to be evaluated from its own surrounding facts and circumstances.

In principle, doctrine of 'diversion of income by overriding title' signifies that an income which merely is received by or accrued to an assessee, actually belongs to somebody else. It indicates an obligation to divert the income in a particular manner before it accrues to or is received by the assessee. Though the assessee was legally entitled to receive the income, it was not his income at the very outset. Say an income is received by the assessee and held in trust on behalf of its real owner, who acquires a title over the income before it reaches the hands of the assessee. This occurs when, by reason of a superior title or overriding obligation, voluntary or otherwise, income is diverted at the source itself and it never reaches the person whose hands it is sought to be assessed. The income earned by the assessee is really not his income,

but belongs to somebody else and the assessee has no title to it. On the contrary, if the source is not assigned to, or transferred but passes through the assessee to an ultimate purpose, the case is of application of income in a particular manner. Even though he may enter into a legal obligation to apply it in a certain way, still it remains the income of the assessee. This distinction has been maintained by Hon'ble Supreme Court on numerous occasions. See for example Raja Bejoy Singh Dudhuria vs. CIT [1933J 1 ITR 135 (PC); P. C. Mullick vs. CIT [1938J 6 ITR 206 (PC); CIT vs. Sitaldas Tirathdas [1961J 41 ITR 367 (SC) and Vibhuti Glass Works vs. CIT [1989J 177 ITR 439 (SC).

In the case of CIT vs. Sunil J Kinariwala [2003 J 259 ITR 10, the Hon'ble Supreme Court has, after referring to various precedents on the subject, explained the aforesaid expression in the following manner:

"When a third person becomes entitled to receive the amount under an obligation of an assessee even before he could lay a claim to receive it as his income, there would be diversion of income by overriding title; but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by overriding title.

" Further, recently the Hon'ble Supreme Court in the case of DCIT vs. T Jayachandran [2018J 406 ITR 1 has clarified that the income which actually accrues to assessee is taxable, which is to be decided, not by reference to physical receipt of income, but by the receipt of income in reality.

It is well-settled that in order to tax an income one has to see whether it is the real income or whether the income has materialised. What is necessary to be considered is the true nature of the transaction and whether in fact the transaction has resulted in profit or loss to the assessee. The income should not be hypothetical income but real income. The foundation of the doctrine of 'diversion of income by overriding title', one can say, is the adaptation of concept of real income theory. Both the principles signify that an assessee cannot be subject to tax if the income is not "really" his.

Chapter V of the Act dealing with "Income of Other Persons, Included in Assessee's Total Income" imprecisely integrates the principle of 'diversion of income by overriding title' and 'application of income'. Section 60 of the Act provides for situations wherein income which is generated from an asset, is transferred without transferring the asset

itself. In such situations, the said income is chargeable to tax as the income of the transferor and shall be included in his total income. Therefore, the said section has a limited application to it, that is it applies only to a case where income accrues to the transferee but the income earning asset or source of income remains with the transferor.

Similarly, section 61 of the Act states that a revocable transfer of an asset by a person will not lead to transfer of taxability of any income which is generated from such an asset and thus, the same shall continue to be taxed in the hands of the person who transfers the asset.

When income is said to be diverted by overriding title?

The principle is simple enough but now and again, the question arises as to what is the criteria to determine, when does the income attributable to an assessee get diverted by overriding title?]4 It may be difficult, in a particular case, to distinguish between what is an 'application' of income and what amounts to 'diversion'.

The landmark case of the Supreme Court in CIT vs. Sitaldas Tirathdas (supra) is probably the best answer to this vexed question. A 3 Judge Bench of the Apex Court has wonderfully explained in what circumstances there is a diversion of income by overriding title and where the income can be said to have been applied after it is received by a taxpayer.

The assessee in that case, claimed a deduction from his total income, the amount paid under a consent decree as maintenance to his wife and children. The assessing officer however disallowed said deduction, which was confirmed by the Commissioner and also the Tribunal. On reference, the Hon'ble Bombay High Court held that the income to the extent of the decree must be taken to have been diverted to the wife and children, and never became income in the hands of the assessee and hence, was an allowable deduction. The revenue challenged this before the Hon'ble Supreme Court. Justice M. Hidayatullah (as His Lordship then was), reversed the decision of the High Court and while doing so, held as under:

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part

of the income of the assessee. Whereby the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it does so not as part of his income. but for and on behalf of the person to whom it is payable in our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income. The matter in the present case would have been different, if such an overriding charge had existed either upon the property or upon its income, which is not the case In our opinion, the case falls outside the rule in Bejoy Singh Dudhuria's case (supra) and rather falls within the rule stated by the Judicial Committee in P.C. Mullick's case (supra)."

Therefore, what the above stresses is the nature of the obligation by reason of which the income becomes payable to a person other than the one entitled to it. The expressions 'reaches the assessee' and 'has been received' have not been used in the sense of the income being received by one person or another. Where the obligation flows out of an antecedent and independent title in the former (such as, for example, the rights of dependants to maintenance or of coparceners on partition, or rights under a statutory provision or an obligation imposed by a third party and the like), it effectively slices away a part of the corpus of the right of the latter to receive the entire income and so it would be a case of diversion. On the other hand, where the obligation is self-imposed or gratuitous, it can be only a case of an application of income. See *Moti Lal Chhadami Lal Jain vs. CIT* [1991] 190 ITR 1 (SC) wherein the above has been laid down.

Further, the appearing or non-appearing of a particular income in the books of account of an assessee is not a relevant criterion to determine the question of diversion of income As held by the Hon'ble Supreme Court, the expressions 'reaches the assessee and has been received' have been used not in the sense of the income being received by one person or whether it has entered into the books of account. Therefore, just because certain income is not recorded in the books of account of

an assessee but in some other person's books, one can still hold that such income was of the first person.

It will not be out of place to clarify here that what is relevant is a charge on the source of income. The fact that a charge has been created on some assets by itself cannot take a case out of the category of application of income' Though a charge of asset may aid in determining the vital question of 'diversion' vs. 'application' However, it is certainly not a conclusive yardstick. Say a charge created by an assessee on some assets voluntarily and by his own choice, for the purpose of maintaining his wife and children, will not make the appropriation of income a case of diversion Conversely, a case can fall within the ambit of diversion' even though there is no specific charge on assets is created. Diversion of income signifies an absolute obligation on the assessee to part with a piece of his income.

In many judgments delivered subsequent to the decision of Justice Hidayatulla (supra), various courts have, from time to time, analyzed the law in this regard and have suggested various tests to find out whether, in a given set of facts, was the case an event of 'diversion or 'application' of income. However, all these diverse tests revolve around and/or the supplement the "true test" formulated in Sitaldas Tirathdas (supra).

One such instance is of the Hon'ble Allahabad High Court in the case of U P. Bhumi Sudhar Nigam vs. CIT (2006) 280 ITR 197. Here the High Court devised a set of four tests to determine the taxability in the hands of an assessee under this principle. After analysing various other judgments including Sitadas Tirathdas (spa), it suggested the following:

24. From the aforesaid cases the following principle emerges

(i) If a third person becomes entitled to receive an amount under an obligation of an assessee even before he could claim to receive it as his income, there would be a diversion of income by overriding title but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by overriding title

(ii) If income does not result at all, there cannot be a tax, even though in book keeping, an entry is made about the hypothetical income which does not materialize.

(iii) The existence or absence of entries in his books of account cannot be decisive or conclusive in the matter

(iv) The concept of 'real income' must be applied in appropriate cases but with circumspection and must not be called in aid to defeat the fundamental principle of law of income-tax as developed"

Apart from the aforesaid submission, views expressed in AddL CIT vs Glad Investments (P.) Ltd (2006) 102 ITD 227 (Delhi) is in pari materia with the instant case. The relevant portions of the judgement are given below;

We are now left with the argument of the revenue that constructively the assessee should be treated to have received the amounts of sale proceeds. It is argued that credit institutions sold the shares in question on behalf of the assessee and the sale proceeds were applied in discharge of debts owed to the credit institutions by Pertech and Swati on behalf of the assessee. We do not see any basis for these arguments of the revenue. It is not the case of the revenue that the assessee sold the shares belonging to him first and deposited sale proceeds with the credit institutions as security. What the assessee parted with and entirely for the benefit of Pertech & Swati, were the share certificates themselves. The assessee had at that stage completed his part of the transferor and it was open to anybody to insert his name as transferee and claim the ownership of the shares in question. If at all the assessee applied anything for the benefit of Pertech & Swati, it was the share certificates themselves and not sale proceeds of the share certificates. Credit institutions subsequently sold these shares in the open market not on behalf of the assessee but on behalf of Pertech & Swan. By appropriation of the sale proceeds by the credit institutions, it is the liability of Pertech & Swati that was discharged and no consideration was either received or accrued to the assessee before us. On these facts it is difficult to say how capital gains liability is attracted in the hands of the assessee before us. As early as in Raja Bejoy Singh Dhudhuria v. CIT [1933] ITR 135 (PC) in the case of Raja Bejoy Singh Dhudhuria (supra), the Hon'ble Privy Council have held as under:

When the Act by Section 3. subjects to charge "all income" of an individual, it is what reaches the individual as income which it is intended to charge. In the present case the decree of the court by charging the appellant's whole resources with a specific payment to his step mother has to that extent diverted his income from him and has directed it to his step mother, to that extent what he receives for her is not his income. It is not a case of the application by the appellant of part

of his income in a particular way, a is rather the allocation of a sum out of his revenue before it becomes income in his hands.

In view of the discussion in the foregoing paragraphs, we hold that profits or gains arising from the sale of 11,72,900 shares of NIIT Lid. in question cannot be charged to tax in the hands of the assessee before us because no value of the consideration was either received or accrued as a result of the transfer of those shares. Moreover, even if notionally any consideration on sale of transfer accrued to the assessee, there was diversion of the entire consideration at source before it became income in the hands of the assessee.

Further, reliance is placed on the judgements of ACIT Vs Emaar MGF Construction Pvt. Ltd (ITAT Delhi) ITA No. 928/Del/2016 and Shroff Eye Centre vs. ACIT (ITAT Delhi). For the sake of brevity, the relevant portions of the judgements are reproduced below;

ACIT Vs Emaar MGF Construction Pvt. Ltd (ITAT Delhi) ITA No. 928/Del/2016 We find that the assessee is under the obligation to part away with the source of income to the holding company and it was not its volition alone, to give away the revenue that could have been otherwise accrued to them. An agreement entered into by the holding company with the assessee for providing financial security cover and to part away 25% sales proceeds was clearly a case of division of source of income between the holding company and the assessee. The flats to be constructed, by the assessee company were the source of income and the holding company had created a lien over 25% for a quid pro quo thereof and therefore took away 25% shares from the sale proceeds. It is not a case that the entire sale proceeds of flats and therefore, the income there from would have accrued to the assessee and 25% thereof had been applied or given away by the assessee to the holding company. The assessee acts as a collector of revenue for the holding company of the receipt to the extent of 25% of the sale proceeds. The 25% belongs to the holding company by virtue of the contributions made and the agreement entered.

Where a superior title is created before any income accrues or arises, it would be the diversion of income by overriding title but where there is no obligation attached and income is applied as per assessee's own choice after it accrues, it will not be a case of diversion by superior title as no superior title existed. In diversion, there is no earmarking by the assessee of a particular income but a charge is created upon his property being source of income. A charge created voluntarily for own purpose cannot be claimed as diversion. If there is an obligation before an income accrues and the assessee is under compulsion to discharge his obligation, it would be a

case of diversion by superior title but, where there is no compulsion and no pre-existing obligation, but it is assessee's choice to create an obligation on himself either before income received, accrues or arisen or thereafter, it would only be a case of application of income. A compulsion at source imposed by a third party is necessary to create a superior title. Just because diverted income is collected by the assessee himself for and on behalf of the beneficiary, it cannot be inferred that it was only an application and not diversion. In the instant case, the assessee has been obligated by virtue of the agreement to divert the income at source and also for the contributions made by the holding company. Thus, we hold that the revenue sharing agreement entered with the holding company by the assessee is diversion of income by overriding title. The revenue's contention that the entire transaction is sham and aimed at only to divert the income to EMLL cannot be said to be correct based on the facts and the judicial pronouncements.

In view of the above finding of the coordinate bench in case of assessee itself based on the same agreement, we do not find any merit in the appeal of the assessee in deleting the addition made by the learned CIT(A) holding that the agreement between the holding company as well as the assessee was not sham agreements. Accordingly, we dismiss the appeal of the learned assessing officer.

Now we come to the appeal of the assessee. The coordinate bench has also dealt with the issue whether the payment of the disbursement income to the holding company was diversion of income by overriding title or merely on application of income. The coordinate bench has held in paragraph number 51 of the order of the coordinate bench. It has been held that the payment made to the holding company is obligated in diversion of income by overriding title. The coordinate bench also after considering the contribution made by the holding company and keeping in view the amounts that have been already offered for taxation in the hands of the respective entities the above expenditure is allowable in the hands of the company. The relevant paragraphs as cited above that the revenue sharing agreement entered with the holding company by the assessee is a diversion of income by overriding title, we allow ground number one of the appeal following the reasoning given by the coordinate bench.

Shroff Eye Centre vs. ACIT (ITAT Delhi)

The Id. AR relied upon the number of decisions in this connection. In CIT Vs Sitaladas Tirathdas, (1961) 41 ITR 367, Hon'ble Apex court while referring to decisions in Raja Bejoy Singh Dudhuria's case [1933] 1 ITR 135 (PC) and in P.C Mullick's case [1938] 6 ITR 206 (PC) laid down a test to

determine as to whether or not income is diverted before it reaches the assessee and observed as under: -

"In our opinion, the true test is whether the amount sought to be deducted in truth never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible, but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so not as part of his income, but for and on behalf of the person to whom it is payable.

Following the aforesaid decision, Hon'ble Bombay High Court in the case of CIT Vs. Crawford Bayley & Co., 106 ITR 884 (Bom), concluded as under: -

"9. "The first two contentions of Mr. Joshi can be discussed together, because they are different phases of the same question. In respect of this matter the material question to be considered is, is there diversion of income by an overriding title or whether there is an application of income after it accrued to the assessee-firm. The true test in determining this question is laid down in Sitaldas Tirathdas's case (supra). The true test for the application of the rule of diversion of income by an overriding charge, is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation can be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible, but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied.

Accordingly, Hon'ble High Court held that there was an absolute obligation imposed on the continuing partners to hand over the commission to the

retired partners and the income was diverted by overriding title. In a similar situation, in V. N. V Devarajulu Chetty and Co. v. CIT [1950] 18 ITR 357, Hon'ble Madras High Court held that that where a new firm which merely collected the money on behalf of the old firm and bank the same to the new firm (sic), the new firm could not be assessed.

In CIT v. Sunil J. Kinariwala [2003] 259 ITR 10, Hon'ble Apex court, after referring to the decisions of the Privy Council in the cases of Raja Bejoy Singh Dudhuria v. CIT [1933] 1 ITR 135 and P.C Mullick v. CIT (1938) 6 ITR 206 and of the apex court in the cases of CIT v. Sitaldas Tirathdas [1961] 41 ITR 367; KA Ramachar v CIT [1961] 42 ITR 25, Moti Lal Chhadami Lal Jain v. CIT (1991) 190 ITR 1; CIT v Bagyalakshmi and Co. (1965) 55 ITR 660 (SC) and Murlidhar Himatsingka v. CIT [1966] 62 ITR 323 has held that if a third person becomes entitled to receive an amount under an obligation of an assessee even before he could lay claim to receive it as his income, there would be a diversion of income by overriding title but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by overriding title

In RSM & Co. Vs. Addl. CIT (2010) 125 ITD 243 (Mum), it was the contractual obligation on the assessee-firm to pay the retirement benefits for the period of five years and he retired partner had nothing to do with the profit earned or losses suffered by the assessee-firm, but the quantum of the retirement benefit had been fixed. In pursuance of partnership deed, a co-ordinate Bench concluded that there was a charge on the profits of the assessee-firm and, hence, there was a diversion of income to the extent of the retirement benefits paid by the assessee-firm to the retired partner.

In UP. Bhumi Sudhar Nigam Vs. Commissioner of Income-tax, 280ITR 197 (All), Hon'ble High Court observed that the principles relating to diversion of income by overriding title are (i) if a third person becomes entitled to receive an amount under an obligation of an assessee even before he could claim to receive it as his income, there would be a diversion of income by overriding title but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by overriding title,

In the light of view taken in the aforesaid decisions, there being an absolute contractual obligation imposed on the continuing firm/partners in terms of clause 13 of the partnership deed executed on 1.4.2003, the assessee firm is required to pay the amount @2% of the gross receipts

subject to maximum of 3 lacs pa to Mrs. Mehru Menoo Shroof and this amount being the first charge on receipts of the continuing firm/partners, apparently, there would be a diversion of income by overriding title. Indisputably, a similar claim has already been accepted by the AO in the AY 2004-05 & 2006-07. In view of the foregoing, we have no alternative hut to allow ground no.2 in the appeal.

Concluding the above, it is, therefore, submitted that on the facts and in the circumstances of the case, documents/evidences submitted in respect of the transactions it is evident that there is "Diversion of Income by Overriding Title" hence the assessee is not exigible to tax under the Income Tax Act.

2. The Ld. CIT (Appeals) mis applied the ratio decidendi of CITY. Attili N. Rag 252 ITR 880 (SC) and T.S. Hajee Moosa & Co Vs. ACIT (ITAT Chennai) in the Appeal Number: ITA No. 2686/CHNY/2018 which is squarely not applicable to the instant case.

The Ld. CIT (Appeal) heavily relied on the judgements of CIT v. Attili N. Rao 252 ITR 880 (SC) and T.S. Hajee Moosa & Co Vs. ACIT (ITAT Chennai). However, relevant extracts of the judgements stated in the order are stated below;

A. In the case of CIT v. Attili N. Rao 252 ITR 880 (SC), wherein, the Hon'ble Supreme Court has observed and held as under:

4.The assessment year with which we are concerned is the assessment year 1982-83. The assessee carried on abkari business. In the course of the financial year 1970-71 he mortgaged to the Excise Department of the State of Andhra Pradesh immovable property belonging to him at Waltair. He did so to provide security for the amounts of "kist" which were due by him to the State. The State, in the assessment year with which we are concerned, sold the immovable property by public auction, without the intervention of the court, to realise its dues A sum of Rs 3,62,980 was realised at the auction. Therefore, the State deducted the amount of Rs. 1.29,020 due to it towards kist and interest and paid over the balance to the assessee.

5. The Revenue contended that the assessee was liable to capital gains tax on capital gain in the sum of Rs. 3.70.970, having regard to the cost at which the said immovable property had been acquired by the assessee: According to the assessee, the sum of Rs. 1.29.020 due by him to the State on account of "kist" was required to be deducted from the amount of Rs 5,57,980 realised at the auction before computing the capital gain According to him, the capital gain was only Rs. 85,130 Neither the Income-

tax Officer nor the appellate authority agreed with the assessee and the assessee went up in further appeal to the Income-tax Appellate Tribunal

6. The Tribunal upheld the assessee's claim. According to it, the full sale price realised by the sale of the immovable property had two components: the first represented the price which could be ascribed to the interest of the assessee in the immovable property and the rest represented the arrears of debt and interest due to the State. In its opinion, as there was a clear charge or mortgage over the immovable property, the amount realised under the charge or mortgage was an amount which never reached the hands of the assessee but which reached the Government by overriding title

7. From out of the judgment and order of the Tribunal, the questions aforesaid were placed before the High Court for its consideration. The High Court observed that the undisputed fact was that the immovable property was mortgaged to the State. Thereby, an interest in the property was created in favour of the State. When the immovable property was sold by public auction, its value had to be reduced to the extent of the interest that was created in favour of the State by reason of the mortgage

8. We are of the view that the Tribunal and the High Court were in error. What was sold by the State at the auction was the immovable property that belonged to the assessee. The price that was realised therefore belonged to the assessee. From out of that price, the State deducted its dues towards "kist" and interest due from the assessee and paid over the balance to him. The capital gain that the assessee made was on the immovable property that belonged to him. Therefore, it is on the full price realised (less admitted deductions) that the capital gain and the tax thereon has to be computed.

9. In these premises, the first question is answered in the negative and in favour of the Revenue. The other questions do not arise for consideration.

B. Similarly, in the case of T.S. Hajee Moosa & Co Vs. ACIT (ITAT Chennai), the operative part of the judgement is stated below,

5. The next is in connection with the additional ground. It is submitted that the assessee firm had given guarantee / security for the borrowals made by other entities. The assessee did not receive any benefit or accrue any benefits from the transfer and therefore, the levy of Capital Gains Tax is not correct.

"The assessee contends that since it has not received any benefit from the transfer of its property given as security to bank & others for borrowals made by other entities, no capital gain is leviable. The Appellant relies on the case law ITA (2006) 102 ITD 227 (Delhi) - Additional Commissioner of Income-Tax, Special Range- 26. New Delhi Vs. Glad Investments (P) Ltd, a copy of which is enclosed. The appellant submitted that the property was sold for Rs.30 crores, the sale proceeds of which were disbursed to Bank and creditors of other entities and the disbursement details are also submitted herewith. In view of the above, the legal question now raised is to cancel the levy of Capital Gain Tax

6 We heard the rival submissions and being a legal issue admit the additional ground. The assessee has pledged its property to Canara Bank as a security to the loan availed by its group concerns. No lay man can execute a deed of mortgage of his property against the loan availed by a third party/parties, until and unless the individual has substantial interest over them. Thus, it is clear that the assessee availed loan from the Bank under the banner of group concerns by mortgaging its own property and group concerns failed to repay the loan, the bank sold the property and the entire consideration was recovered by the bank. Thus, it cannot be held that the assessee has not received any consideration directly or indirectly which were liable to tax

In both the Cases Atilli N. Rao and T.S. Hajee Moosa & Co (supra) the assets mortgaged were sold and consideration amount was realised. Thereafter consideration amount was utilised to recover debts/dues. Hence, income reaches the assessee and the said income is applied to discharge an obligation which is merely a case of application of income to satisfy an obligation of payment and is therefore, not deductible. But in the instant case, assessee's income is diverted at source without any consideration received or accrued, it is not really the income of the assessee but is somebody else's income. It is, thus, clear that whereby the obligation income is diverted before it reaches the assessee, it is deductible. Hence, factual matrix of the cases cited by the Ld. CIT (Appeal) is not applicable to the instant case as there is no consideration amount accrued or received by the assessee.

RELIEF

Wherefore in the light of facts presented, issues raised, arguments advanced and authorities cited, the Counsels on behalf of the Appellants

humbly pray before this Hon'ble Tribunal that it may be pleased to adjudge and declare that

1. The appeal is allowed
2. The decision of the Ld. CIT (Appeal) to be set aside.

Or pass any other order that the court may deem fit in the light of equity, justice and good conscience and for this Act of kindness of Your Lordships the Appellants shall ax duty bound ever pray.”

4. In reply, Id Sr DR submitted that the assessee has transferred the immovable properties as per the sale deed. In the sale deed, consideration is said to have been received by the assessee before the presence of Sub-Registrar. The sale deed having been executed by SREI Equipment Finance Ltd., and the sale deed mentioning the consideration and as per the sale deed consideration has passed, the capital gains is liable to be taxed. It was the further submission that the Id CIT(A) has considered the fact that the immovable properties of the assessee nor the sale consideration has been used for settling any of the loans and, therefore, there is no question of transfer on account of overriding title. He vehemently relied upon the order of the Id CIT(A).

5. We have considered the rival submissions. A perusal of the paper book as filed by the assessee at page-1, which is extracted as follows shows the details of the land sold/ transferred to SREI Equipment Finance Ltd., and the companies to which the loan relates.

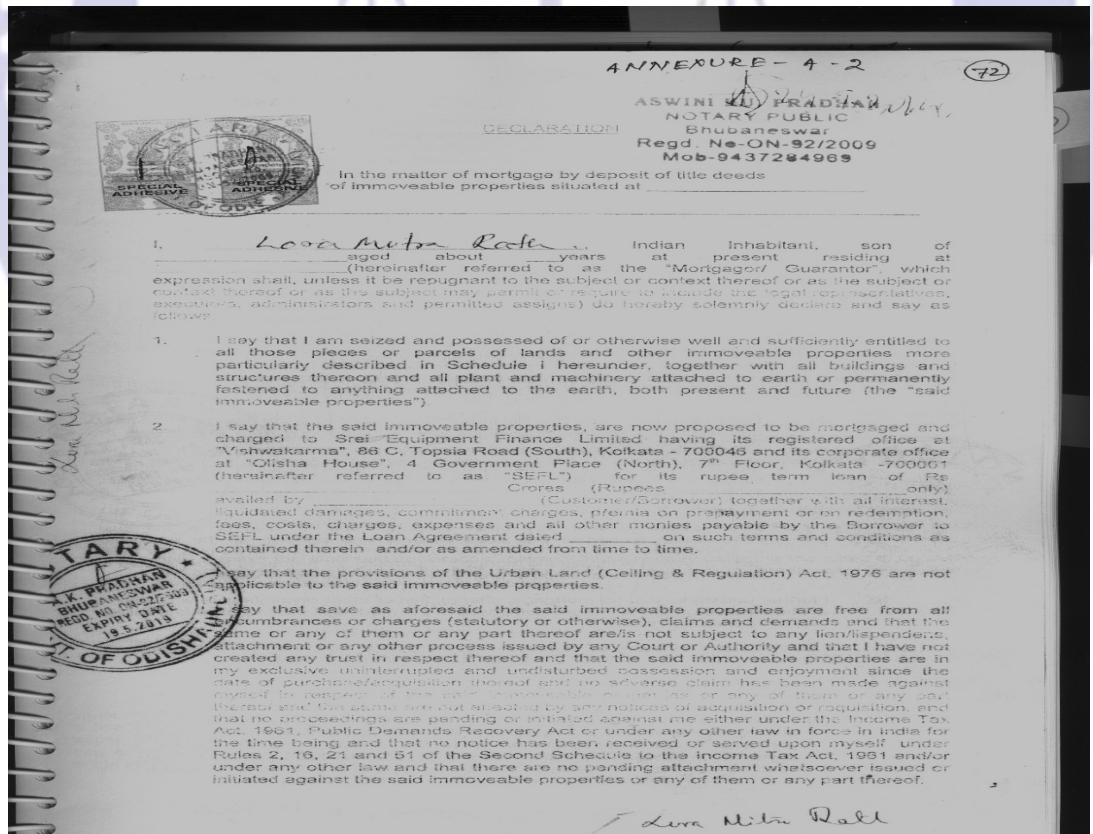
SNo	Colateral File No	Contract No	Customer	Land Owner Name	Sale Deed No	District	SRO	P.S	Tehsil	Kiam	Mouza	Khata	Chika	Plot No	Area (In Acres)
27	947	50018	Narendrag Industrial Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	123/3		85	0.2
28	947	50018	Narendrag Industrial Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	43	89	134	0.53
29	947	50018	Narendrag Industrial Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	119	127	184	0.44
30	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	10		142	1.04
31	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	10		164	2.7
32	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	10		173	0.24
33	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	65		72	0.55
34	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	65		140	0.95
35	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	116		146	0.2
36	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	16		143	0.34
37	691	49821	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	83	105	151	2.54
38	691	49821	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	108	105	152	0.27
39	691	49821	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Bani	6		153	1.08
40	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Beuan	250/44		475	2.07
41	995	70161	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Beuan	250/45		476	0.68
42	411	49817	Maa Durga Commodore Pvt Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Balchuan	974/187		240	0.13
43	411	49817	Maa Durga Commodore Pvt Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Balchuan	285		239	0.04
44	411	49817	Maa Durga Commodore Pvt Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Balchuan	974/188		238	1.29
45	411	49817	Maa Durga Commodore Pvt Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Balchuan	974/188		174	0.62
46	411	49817	Maa Durga Commodore Pvt Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Balchuan	974/121		246	0.82
47	411	49817	Maa Durga Commodore Pvt Ltd	Lorantira Rah	856	Cuttack	Jagpur	Tangl	Tangl-Choudwar	Gharabari	Balchuan	974/121		265	0.35
68	691	49821	Maa Durga Thermal Power Company Ltd.	Lorantira Rah	977	Cuttack	Jagpur	Tangl	Tangl-Choudwar		Narendragur	188		190	4.88
															19.34

6. A perusal of the loan agreement between SREI Equipment Finance limited and various companies shows that the same was entered into on 22nd September 2014. Article VIII of the said Article is the guarantee clause. Clause (b) of the said Article is of importance insofar as in the event of the

failure on the part of the customer in payment/repayment of any of the monies..... guarantor shall, upon demand forthwith pay to the company without demur all the amounts payable by the customers in respect of the agreement. The relevant portion is as follows:

“(b) In the event of any default on the part of the customer in payment/repayment of any of the monies referred to above, or in the event of default, the guarantee shall, upon demand forthwith pay to the company without demur all the amounts payable by the customer in respect of the agreement”

7. The declaration which is part of the agreement by the guarantor also categorically provides in clause 12(d) to give unconditional and irrevocable consent to the same of any of the immovable assets by SREI Equipment Finance Ltd.. The declaration is as follows



73

NOTARY PUBLIC
Bhubaneswar
Regd. No.-ON-92/2009
Mob-9437284969

5. I have duly paid all rents, royalties and all public demands, including but not limited to income tax and all other taxes and revenue payable to, the Government of India or to the Government of any State or to any local authority and that at present there are no arrears of such dues, rents, royalties, taxes and revenues due and outstanding and that no attachments or warrants have been served upon myself in respect of income tax, Government revenues and other applicable taxes.

6. I also agree and undertake to give such other declarations, undertakings and other writings as may be required by SEFL or their Solicitors and satisfactorily comply with all other requirements and requisitions submitted by or on behalf of SEFL.

7. I say that I have obtained the requisite consent from the Income Tax Authorities pursuant to the provisions contained in Section 281(1)(ii) of the Income Tax Act, 1961 for the alienation of the said immoveable properties in favour of SEFL.

8. I, assure, agree and declare that the security to be created in favour of SEFL shall enure in respect of the immoveable properties owned by me, both present and future, and that the documents of title, evidences, deeds and writings in relation to the said immoveable properties which are to be deposited / handed over to SEFL are the only documents of title relating to the said immoveable properties.

9. I, hereby, agree and undertake that I shall within a period of seven (07) days from the date hereof or such extended date as may be permitted by SEFL to:-

a) perfectly assure the title to the properties comprised in the mortgaged security and to comply with all requisitions that may be made from time to time by SEFL in that behalf;

b) give such declarations, undertakings and other writings as may be required by SEFL and satisfactorily comply with all other requirements and requisitions submitted by SEFL.

c) pay all rents, rates, taxes, cesses, fees, revenues, assessments, duties and other outgoings and pay other amounts due in respect of the said immoveable properties and shall observe and perform all the rules and regulations pertaining to the same and will not do or omit to do or suffer to be done anything whereby the mortgaged property as proposed to be created in favour of SEFL be affected or prejudiced in any manner whatsoever;

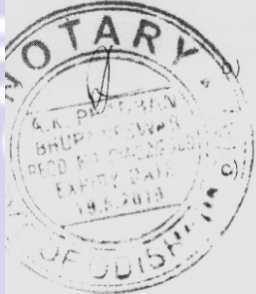
10. I further undertake that no mortgage, charge, lien or other encumbrance whatsoever will be created on the properties comprised in the mortgage security save and except with the permission of SEFL.

11. I am not aware of any act, deed, matter or thing or circumstance which prevents me from charging in favour of SEFL, the said immoveable properties.

12. We further, hereby agree that:

(a) Without my concurrence, SEFL shall be at liberty to vary, alter or modify the terms and conditions of the Loan Agreement executed by the Customer/Borrower and in particular to defer, postpone or revise the repayment of the Facility and/or payment of interest and other monies payable to SEFL on such terms and conditions as may be considered necessary by SEFL including any revision in the

Done At Bhubaneswar



NOTARY PUBLIC
Bhubaneswar
Regd. No-ON-92/2009
Mob-9437284969

74

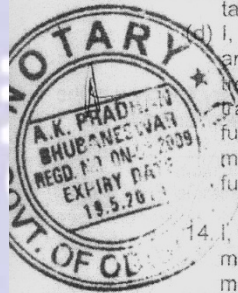
rate of interest. SEFL shall also be at liberty to absolutely dispense with or release all or any of the security/securities furnished or required to be furnished to SEFL to secure the Facility. I, also agree that the liberty under the security documents shall in no manner be affected by any such variations, alterations, modifications, waiver, dispensation with or release of security and that no further consent on my behalf is/would be required for giving effect to any such variation, alteration, modification, waiver, dispensation with, or release of security,

(b) SEFL shall have full liberty, without notice to me and without in any way affecting the mortgage security, to exercise at any time and in any manner any power or powers reserved with SEFL under the Loan Agreement, to enforce or forbear to enforce payment of the Facility or any part thereof or interest or other moneys due to SEFL or any of the remedies or securities available to SEFL, to enter into any composition or compound with or to grant time or any other indulgence. I shall not be released by the exercise by SEFL of their liberty in regard to the matters referred to above or by any act or omission on the part of SEFL or by any other matter or thing whatsoever which under the law have the effect of so releasing the myself AND I, hereby waive in favour of SEFL so far as may be necessary to give effect to any of the provisions of the security documents, all the rights which I might otherwise be entitled to enforce.

(c) The mortgage security shall be enforceable against myself notwithstanding that any security or securities comprised in any instrument(s) executed or to be executed by me in favour of SEFL shall, at the time when the proceedings are taken against us on the security documents, be outstanding or unrealised or lost.

(d) I, hereby, unconditionally and irrevocably agree and give consent to the sale, of any of my immovable assets by SEFL as SEFL may deem fit and this may be treated as a standing and continuing consent for each and every individual act of transfer, mortgage, release or lease of any of such immovable assets. I, hereby further declare and agree that no separate consent for each such transfer, mortgage, release or lease any of such immoveable assets would be necessary in future.

14. I, waive any right of subrogation, contribution or indemnity as also all other rights I, may have as a result of the enforcement of the security interest under the mortgage security



AND I, make the aforesaid declaration solemnly and sincerely believing the same to be true and knowing fully well that on the faith thereof SEFL agreed to complete the said transaction of security over the said immoveable properties.




ASWINI K. PRADHAN
NOTARY PUBLIC
Bhubaneswar
Regd. No-ON-92/2009
Schedule Mob-9437284909
(Description of the said immoveable properties)

Dist	Plot No.	Khata No.	Manza	Tahsil	Thana	Area
(1) Cuttack	151,52,53	83,108,6	Bomi	Tangi	Tangi	389
(2) "	488	188	Narendrapur	Tangi	Tangi	2.26
						<u>615</u>

Lora Mitra Rath

[INSERT DETAILS OF IMMOVEABLE PROPERTIES]



together with all buildings and structures thereon and all plant and machinery attached to the earth or permanently fastened to anything attached to the earth, both present and future.

8. A perusal of the shareholding pattern of the three companies, which had taken loans shows that M/s Maa Durga Thermal Power Company Ltd., the assessee Smt. Lora Mitra Rath holding 17,53,333 shares out of 2,97,79,332 shares. Substantial portion of the shares are also held by 7 other companies in which the assessee has shareholding. The shareholding pattern of M/s. Maa Durga Thermal Power Company Ltd., is as follows:

ANNEXURE - A - 6

106

MaaDurga Thermal Power Company Ltd
Cadd Center Building, 2nd Floor, Press Chhak, Madhupatna,
Cuttack - 753010, Odisha

Details of ERSTWHILW SHARE HOLDING

SL NO	NAME OF THE SHARE HOLDERS	No.of Shares Allotted
1	Atulya Dash	3,70,000
2	Cethar Energy Ltd	59,33,330
3	DNA Financial Consultants Pvt.Ltd.	15,33,332
4	Hotel Padma	1,50,000
5	Lora Mitra Rath	17,53,333
6	Maa Durga Commotrade Pvt.Ltd	16,66,667
7	Maa Durga Flour Mills (P) Ltd.	62,96,667
8	Maa Durga Rice Processing & Exports (P) Ltd.	11,00,000
9	Maa Durga Rice Product (P) Ltd.	22,50,000
10	Maa Shakti Hospital (P) Ltd	3,40,000
11	Ma Durga Food & Spices Pvt.Ltd	11,333
12	Navadurga Hospitality Pvt.Ltd.	9,00,000
13	Navadurga Industries Ltd.	6,36,004
14	Padmini Rath.	1,30,000
15	Pradeepta Chandra Rath	50,000
16	Pramod Chandra Rath.	1,50,000
17	Prasanta Chandra Rath	15,48,666
18	Sri Durga Condev (P) Ltd.	12,40,000
19	Subas Chandra Rath	1,00,000
20	SuryaKanta Acharya	5,80,000
21	Surya Kanta Panda	5,40,000
22	Vishnu Commercial & Viniyog	25,00,000
Grand Total		2,97,79,332

9. In the case of M/s. Maa Durga Commotrade Pvt Ltd., the assessee holds 15,000 shares out of 41,400 shares. The shareholding pattern is as follows:

ANNEXURE-B-5

155

MAA DURGA COMMOTRADE (P) LTD
Flat No. 302, Neelakantha Apartment, College Square, Cuttack - 750003, Odisha

Details of SHAREHOLDING

Sl No.	Name of the Shareholders	No. of Shares Allotted
1	Mrs. Lora Mitra Rath	15,000
2	Mr. Suryakanta Panda	4,000
3	Mr. Suryakanta Acharya	4,000
4	Mr. Balaram Kar	3,000
5	M/s Anubhav Infrastructure Limited	9,000
6	M/s Mayapur Merchandise Private Limited	6,400
	Grand Total	41,400

10. In M/s. Nava Durga Industries Ltd., the assessee holds 3,65,454 shares out of 45,12,719 shares and the shareholding pattern is as follows:

ANNEXURE - C-5

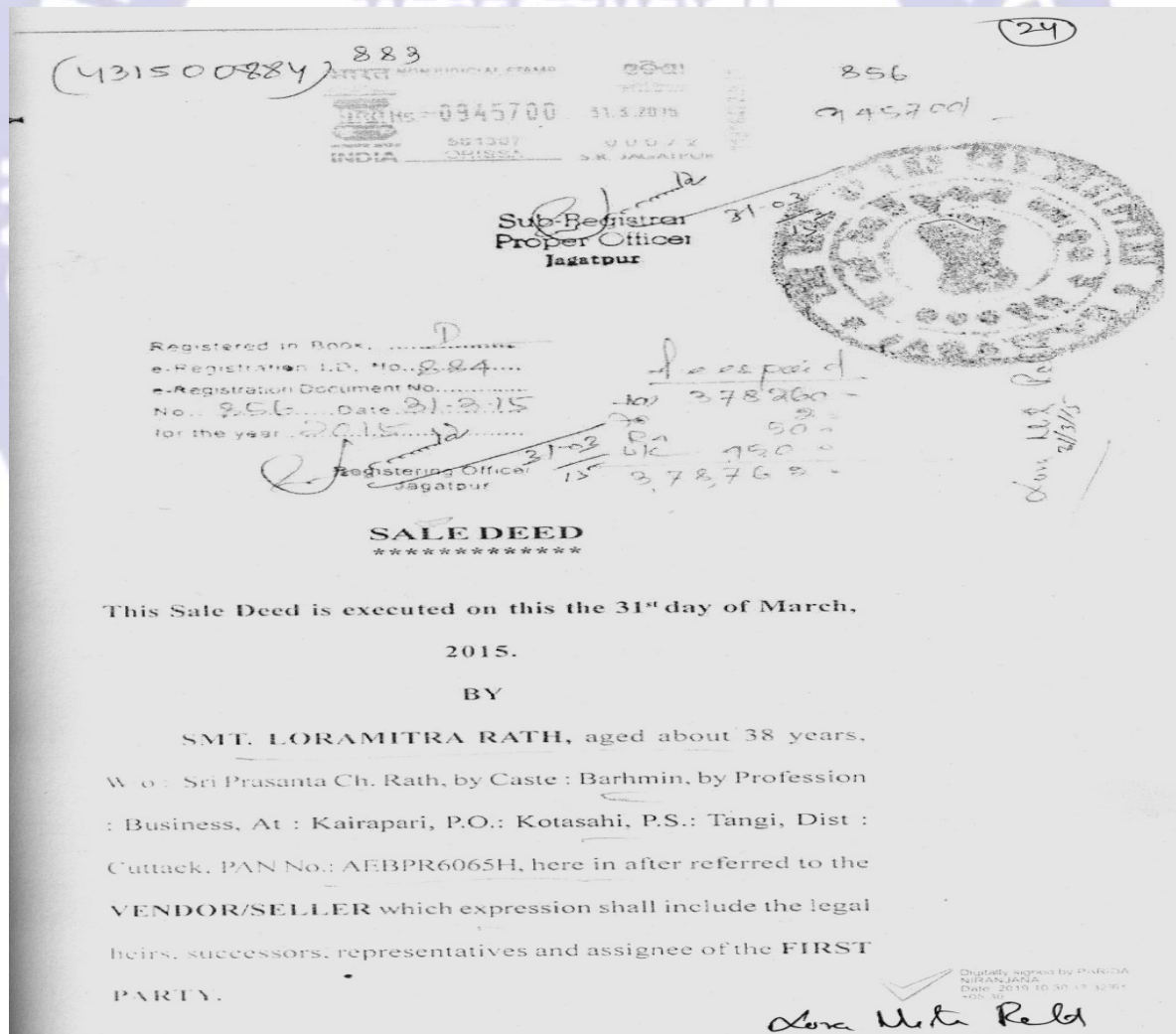
NAVADURGA INDUSTRIES LTD
A-84, MALVIYA NAGAR, New Delhi - 110017, India

Details of SHAREHOLDING

Sl No.	Name of the Shareholders	No. of Shares Allotted
1	Lora Mitra Rath	365454
2	Suryakanta Acharya	30909
3	Manorama Acharya	24545
4	Lopamudra Mishra	24545
5	Prasant Chandra Rath	51818
6	Bhubaneswari Mishra	24545
7	Manoj Kumar Panda	24545
8	Shelly Soni	21818
9	DNA Financial Consultants Pvt. Ltd	22727
10	Navadurga Hospitality (P)Ltd.	1502727
11	MAA Durga Commotrade Pvt ltd	72727
12	Trisuladhari Vanijya pvt ltd	1017727
13	Eastern Infra-Equipments pvt ltd	1147000
14	Dynanic Conclave Pvt Ltd	54,545
15	Suvaraj Realters Pvt Ltd	36,363
16	Ajaya Kumar Das	2,272
17	Bijay Kumar Panda	1,818
18	Birabar Sahoo	2,272
19	Bishnu Prasad Puri	2,272
20	Hrudananda Jena	1,818
21	Improve Distributors Pvt. Ltd	30,000
22	Jagannath Bhuiyan	2,272
23	Jitu Ranjan Paila	2,272
24	Jyoti Ranjan Mohapatra	1,818
25	Kalandi Mallick	2,272
26	Kuber Muduli	1,818
27	Laxmidhar Kuanr	2,557
28	Madhusmita Satapathy	1,363
29	Mohan Behera	2,272
30	Prafulla Kumar Kar	2,272
31	Pramod Kumar Pani	2,272
32	Pravakar Swain	2,272
33	Pravat Kumar Swain	1,818
34	Rabi Narayan Panda	2,272
35	Rabindra Kumar Sahu	2,272
36	Radhakrushna Mohanty	1,818
37	Rahas Kumar Pati	2,272
38	Ramesh Kumar Sahoo	2,272
39	Ranjan Barik	2,272
40	Ranjit Kumar Panda	2,727
41	Sahadev Mohanty	2,272
42	Sarat Chandra Mishra	1,818
43	Subas Sahoo	2,272
44	Tapan Kumar Sahoo	2,727
	Grand Total	45,12,719

In this company also, some of the group companies holding shares in which assessee has shares.

11. The assessee is the Director in all the companies. After taking these loans in around September, 2014, the sale deed has been executed leading failure on the part of the company to repay the loans on 31.3.2015 i.e. practically after giving loan within the same financial year, the properties which were held as guarantee was taken over by the lender. For better understanding, copy of the sale deed in its entirety is as follows:



Print Endorsement

Page 1 of 1

କ୍ରମିକ ନଂ- 140 ତାରିଖ 31.03.2015
 ପ୍ରାକ୍ତି ଆମ ମୂଲ୍ୟ ଟ. 9,45,700/- Rupees Nine Lakh
 - fourty five thousand Seven hundred
 ଭାରତ ସରକାର ପ୍ରାକ୍ତି କରାଯାଇ ବାକ୍ୟ
 ଉପସ୍ଥାପନ କରିବ

[Handwritten Signature]
31/03/2015

Lora Mitra Rath



Endorsement of the certificate of admissibility

Admissibility under rule 25: duly stamped under the Indian stamp (Orissa Amendment act 1 of 2008) Act 1899, Schedule 1-A No. 23 Fees Paid : A(1)-378260 ,1-3-2 ,L4-50, User Charges-450 ,Total 378762

Date: 31/03/2015

[Handwritten Signature]
Signature of Registering officer 31/03/15

Endorsement under section 52

Presented for registration in the office of the Sub-Registrar JAGATPUR between the hours of 10:30 AM and 2:30 PM on the 31/03/2015 by LORAMITRA RATH, son/wife of PRASANTA CH RATH, of AT- KAIRAPARI, PO- KOTASAH1, PS- TANGI, DIST- CUTTACK, by caste General, profession Business and finger prints affixed.

Lora Mitra Rath



Signature of Presenter / Date: 31/03/2015

[Handwritten Signature]
Signature of Registering officer 31/03/15

Endorsement under section 58

Execution is admitted by :

Name	Photo	Thumb Impression	Signature	Date of Admission of Execution
LORAMITRA RATH		 310428979	<i>[Handwritten Signature]</i> Registering Officer Jagatpur Lora Mitra Rath	31-Mar-2015

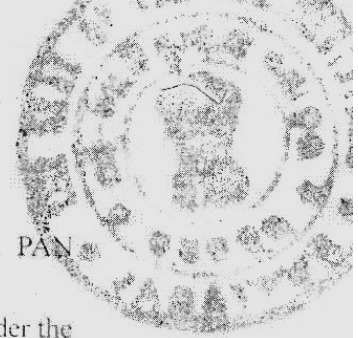
//2//

IN FAVOUR OF

"SREI EQUIPMENT FINANCE LIMITED", PAN

No. AAKCS3431L, bearing a company incorporated under the Companies Act, 1956 having its registered office at 86C, Topsia Road (South), Kolkata - 700046 and its corporate office at "Olisha House", 4 Government Place (North), 7th Floor, Kolkata - 700001 and having its local office at Plot No.1, BDA Housing Colony, Jyadev Vihar, Bhubaneswar, Odisha - 751013, represented through its authorized signatory **MR. PRASANT NATH**, aged about 51 years, S/o. : Late B. Nath, by Caste : Brahmin, by Profession : Business, (hereinafter referred to as the "SREI", which expression shall, unless it be repugnant to the subject or context thereof, include its successors and assigns) here in after referred to the **VENDEE / PURCHASER** which expression shall include the legal heirs, successors, representatives and assignee of the **SECOND PARTY**.

NATURE OF DOCUMENT : Sale Deed.



*Done Mr. P. Nath
3/13/15*

Digitally signed by PARIDA NIRANJANA
Date: 2019.10.30 17:32:53
+05:30

Done Mr. P. Nath

Print Endorsement

Page 2 of 2

IRSANI NATHI
REPRESENTED
THROUGH ITS
AUTHORIZED
SIGNATORY FOR
SRI. EQUIPMENT
FINANCE LIMITED



240033001

31-Mar-2015

Identified by **HRUDANANDA JENA** Son/Wife of **GAJENDRA JENA** of **SAME PLACE** by profession **Business**

Name	Photo	Thumb Impression	Signature	Date of Admission of Execution
HRUDANANDA JENA				31-Mar-2015

39733209

Date: 31/03/2015

31-03/15
Signature of Registering officer

Endorsement of certificate of registration under section 60

Registered and true copy filed in Office of the Sub-Registrar, JAGATPUR

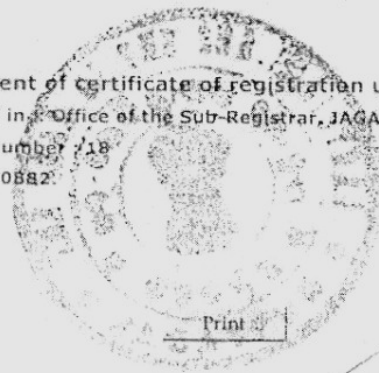
Book Number : 1 || Volume Number : 18

Document Number : 10431500882

For the year : 2015

Seal :

Date: 31/03/2015



Print

31-03/15
Signature of Registering officer

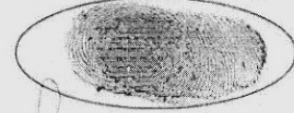
Registering Officer
Jagatpur

28

//3//

Vendor

Vendee

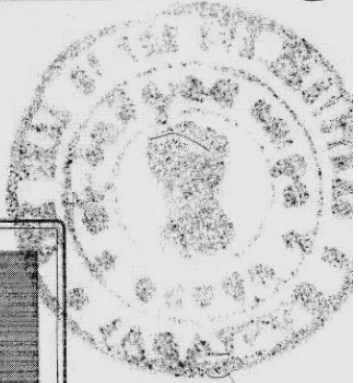


L.I

L.I

Lora Mitha Reth

[Handwritten signature]



Lora Mitha Reth
27/3/23

CONSIDERATION AMOUNT : Rs1,89,13,000/- (Rupees

One Core Eighty Nine Lakhs Thirteen Thousand Only).

NATURE OF RIGHTS : Mouza : Bani, PS : Tangi, P.S.

No.47. Stitiban A11.08Dec. of land with annual rent

Rs.296.00paisa

Mouza : Beruan, PS : Tangi, P.S. No.46, Stitiban

A2.75Dec. of land with annual rent Rs.500.00paisa

Mouza : Bainchuan, PS : Tangi, P.S. No.44, Stitiban

A3.25Dec. of land with annual rent Rs.684.50paisa

Digitally signed by PARHSA
NIRANJANA
Date: 2019.10.30 17:32:55
+05'30'

Lora Mitha Reth

//4//

RECITALS:

WHEREAS the property comprised in the Khata described in the schedule of property appended below of record in the settlement ROR stands the name in respect there of the vendor is in khas possession of the same and paying rent to the concerned Tahasil. The vendor is a stitiban right holder in respect of the said land under the Govt. of Orissa.

AND WHERE AS, due to urgent need of money for repayment of loan amount the present Vendor and having negotiated with the purchaser and agreed to sell the schedule land to her at the current market price. The Vendor have received the above mentioned total Consideration amount Rs1,89,13,000/- (Rupees One Core Eighty Nine Lakhs Thirteen Thousand Only) in full and final satisfaction from the Vendee / Purchaser out of their own money at the time of execution of this sale deed in presence of the attesting witnesses signed to this sale deed and to which the vendors have acknowledged the total receipt of Consideration full and final Satisfaction at the time of registration of this sale deed before the Sub-registrar.



Don't let it be
3/13/16

Digitally signed by: PARIDA
NIRANJANA
Date: 2015.10.30 17:10:56
+05:30

Don't let it be

11511

AND WHEREAS the vendors do hereby conveys
transfers, assures and sell the Schedule below property in favour
of the vendee / purchaser. The aforesaid vendee / purchaser
shall be the absolute owner in possession thereof and the right,
title interest of vendor shall be vested upon the vendee from
today and the vendors do hereby delivered the peaceful / vacant
possession of the land in favour of the vendee / purchaser from
today.

NOW THIS DEED OF WITNESSES AS FOLLOWS :-

i. That in pursuance of the aforesaid sale, the vendor do
hereby grants sale, conveys and assures unto the purchaser, the
aforesaid land and the successors of the present purchasers
administrators and assignees that all the rights, title, interest and
possession of the schedule below property, the land have passed
to the purchaser who shall use and enjoy the same as absolute
owner thereof.



Kara M.L. Reddy
3/13/15

Kara M.L. Reddy
Digitally signed by PARIDA
NIRANJANA
Date: 2015.10.30 17:32:52
+05'30'

11611

2. That from to day the vendor / seller have delivered possession of the Schedule below property physically to the purchaser / vendee and the purchaser shall get the land mutated in his name in all official and Tahasil and Revenue records in view of the sale deed.

3. That the vendee / purchaser and his legal heirs, successors representative shall use and enjoy the property by constructing roads/buildings as per this own sweet without any objection from vendors or his legal heirs.

4. That the rights, title, interest and possession of the vendor shall cease from to-day and the same shall be vested upon the vendee / purchaser, the aforesaid firm and he shall pay the rent, other tax and dues payable to the concerned departments from out of his own funds.

Don. M.K. R. B. J.
3/11/15

Don. M.K. R. B. J.

7

5. That the vendor and his legal heirs shall have absolutely no manner of right, title, interest or possession over the Schedule below land from today. In case of any claim or demand made by any legal heirs of the vendors or any body for which the purchased vendee may sustain any loss, the vendor / seller shall be liable to restore peaceful possession to the vendee / purchaser.

6. That the vendor do hereby further declare that the property hereby sold is free from all encumbrances. The vendors have not encumbered the same in any way or in any manner to any body else. The property hereby sold is nor the subject matter of any dispute. There is no Civil or Criminal dispute is pending over the same. The Scheduled land or any portion thereof have not been acquired by Govt. by way of lease nor it has been given as lienequitable mortgage to any Bank or Financial


Digitally signed by PARIDA
NIRANJANA
Date: 2019.10.30 17:33:02
+05:30

11811
Institutions. The property here by sold is free from all disputes
and encumbrances.

7 That the vendor and the vendee do not belong to SC/ST
community. The property hereby sold has never been acquired
by the vendors from Govt. by way of lease within last 10 year.

The property hereby sold is not under the management of
Endowment Commissioner or is not got Bhudan Sampaty. That
the vendor have not under Ceiling Surplus land. The land is a
vacant land. That the below Scheduled land or any portion
thereof neither require Ceiling permission as per the Gazette
notification of the Orissa Govt. nor fall within the per view of U/
s 10(5) and V/s 10(6) of Urban land Ceiling Act.

8. That the photographs of the parties are affixed in both
Original and copy of this document which shall be treated as
part and parcel of this deed. That a declaration is hereby annexed
with this deed.

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SCHEDULE OF PROPERTY

1. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S.

No.47, Tahasil : Tangi-Choudwar, **Mouza : Bani**, Sitiban Khata

No.123/3 (One Hundred Twenty Three / Three), Sale Full

Plot No.85 (Eighty Five), Kissam : Sarada Jala Two, A0.20dec.

(Twenty Dec.) is annual rent Rs.1.20paisa.

2. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S

No.47, Tahasil : Tangi-Choudwar, **Mouza : Bani**, Sitiban Khata

No.43 (Fourty Three). Sale Full Chhaka No.89 (Eighty Nine),

Sale Chhaka Plot No.134 (One Hundred Thirty Four),

A0.53dec. (Fifty Three Dec.) is annual rent Rs.4.30paisa.

3. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S

No.47, Tahasil : Tangi-Choudwar, **Mouza : Bani**, Sitiban Khata

No.119 (One Hundred Nineteen), Sale Full Chhaka No.127

(One Hundred Twenty Seven), Sale Chhaka Plot No.184 (One

Hundred Eighty Four), A0.44dec. (Forty Four Dec.) is

annual rent Rs.4.80paisa.

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4. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S.
No.47, Tahasil : Tangi-Choudwar, Mouza : Bani, Sitiban Khata
No.10 (Ten), Sale Plot No.142 (One Hundred Forty Two),
Kissam : Gharabari, A1.04dec. (One Acaire Four Dec.)

Sale Plot No.164 (One Hundred Sixty Four), Kissam :
Gharabari, A2.70dec. (Two Acaire Seventy Dec.)

Sale Plot No.173 (One Hundred Seventy Three), Kissam :
Gharabari, A0.24dec. (Twenty Four Dec.)

Three plots total area A3.98Dec. (Three Acaire Ninety
Eight) is annual rent Rs.110.00paisa.

5. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S.
No.47, Tahasil : Tangi-Choudwar, Mouza : Bani, Sitiban Khata
No.65 (Sixty Five), Sale Plot No.72 (Seventy Two), Kissam
: Gharabari, A0.55dec. (Fifty Five Dec.)

Sale Plot No.140 (One Hundred Forty), Kissam : Gharabari,
A0.95dec. (Ninety Five Dec.)

Two plots total area A1.50Dec. (One Acaire Fifty Dec.)
is annual rent Rs.42.00paisa.

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6. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S.
No.47, Tahasil : Tangi-Choudwar, Mouza : Bani, Sitiban Khata
No.116 (One Hundred Sixteen), Sale Plot No.146 (One
Hundred Forty Six), Kissam: Gharabari, A0.20dec. (Twenty
Dec.) is annual rent Rs.6.00paisa.

7. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S.
No.47, Tahasil : Tangi-Choudwar, Mouza : Bani, Sitiban Khata
No.16 (Sixteen), Sale Plot No.143 (One Hundred Forty
Three), Kissam : Gharabari, A0.34dec. (Thirty Four Dec.)
is annual rent Rs.10.00paisa.

8. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S.
No.47, Tahasil : Tangi-Choudwar, Mouza : Bani, Sitiban Khata
No.83 (Eighty Three), Sale Full Chaka No.105 (One Hundred
Five) Sale Chhaka Plot No.151 (One Hundred Fifty One),
A2.54dec. (Two Acaire Fifty Four Dec.) is annual rent
Rs.20.55paisa.

9. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S.
No.47, Tahasil : Tangi-Choudwar, Mouza : Bani, Sitiban Khata
No.108 (One Hundred Eight), Sale Plot No.152 (One
Hundred Fifty Two), A0.27dec. (Twenty Seven Dec.) is
annual rent Rs.2.15paisa.

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10. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S
No.47, Tahasil : Tangi-Choudwar, **Mouza : Bani**, Sitiban Khata
No.6 (Six), Sale Full Chhaka No.106 (One Hundred Six)
Sale Full Chhaka Plot No.153 (One Hundred Fifty Three),
A1.08dec. (One Acre Eight Dec.) is annual rent Rs.8.60paisa.

Mouza : Bani, ten khatas total area A11.08Dec. (Eleven
Acre Eight Dec.) is annual rent Rs.209.60paisa. Kissam :
Gharabari area A6.29dec. Consideration Amount Rs.75,48,000/-
Kissam Chhaka area A4.79dec. Consideration Amount
Rs.47,90,000/-,

11. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S
No.46. Tahasil : Tangi-Choudwar, Tahasil No.110, Mouza :
Beruan, Sitiban Khata No.250/44 (Two Hundred Fifty /
Forty Four), Sale Plot No.475 (Four Hundred Seventy Five),
Kissam : Gharabari, A2.07dec. (Two Acre Seven Dec.) is
annual rent Rs.376.00paisa.

12. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S
No.46, Tahasil : Tangi-Choudwar, Tahasil No.110, Mouza :
Beruan, Sitiban Khata No.250/45 (Two Hundred Fifty /
Forty Five). Sale Plot No.476 (Four Hundred Seventy Six),
Kissam : Gharabari, A0.68dec. (Sixty Eight Dec.) is annual
rent Rs.124.00paisa.

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Mouza: Baruan, two khatas total area A2.75Dec. (Two Acre Seventy Five Dec.) is annual rent Rs.500.00paisa.
Consideration Amount Rs.13,75,000/-

13. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S No.44, Tahasil : Tangi-Choudwar, Mouza : Bainchuan, Sitiban Khata No.974/187 (Nine Hundred Seventy Four / One Hundred Eighty Seven), Sale Plot No.240 (Two Hundred Forty), Kissam : Gharabari, A0.13dec. (Thirteen Dec.) is annual rent Rs.28.00paisa.

14. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S No.44, Tahasil : Tangi-Choudwar, Mouza : Bainchuan, Sitiban Khata No.285 (Two Hundred Eighty Five), Sale Plot No.239 (Two Hundred Thirty Nine), Kissam : Gharabari, A0.04dec. (Four Dec.) is annual rent Rs.8.50paisa.

15. District : Cuttack, S.R.O : Jagatpur, P. S : Tangi, P.S No.44, Tahasil : Tangi-Choudwar, Mouza : Bainchuan, Sitiban Khata No.974/188 (Nine Hundred Seventy Four / One Hundred Eighty Eight), Sale Plot No.238 (Two Hundred Thirty Eight), Kissam : Gharabari, A1.29dec. (One Acre Twenty Nine Dec.)

Done M.A. Patil
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Done M.A. Patil

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Sale Plot No.174 (One Hundred Seventy Four), Kissam
Gharabari, A0.62dec. (Sixty Two Dec.)

Two plots total area A1.91Dec. (One Acre Ninety One
Dec.) is annual rent Rs.402.00paisa.

16 - District : Cuttaek, S.R.O : Jagatpur, P. S : Tangi, P.S
No.44, Tahasil: Tangi-Choudwar, Mouza : Bainchuan, Sitiban
Khata No.974/121 (Nine Hundred Seventy Four / One
Hundred Twenty One), Sale Plot No.246 (Two Hundred
Forty Six), Kissam : Gharabari, A0.82dec. (Eighty Two Dec.)

Sale Plot No.265 (Two Hundred Sixty Five), Kissam :
Gharabari, A0.35dec. (Thirty Five Dec.)

Two plots total area A1.17Dec. (One Acre Seventeen
Dec.) is annual rent Rs.246.00paisa.

Mouza : Bainchuan, four khatas total area A3.25Dec.
(Three Acre Twenty Five Dec.) is annual rent Rs.684.50paisa.
Consideration Amount Rs.52,00,000/-.

Total Three Mousa. Sixteen Khatas total area A17.8Dec.
(Seventeen Acre Eight Dec.) is annual rent Rs.1394.10paisa.

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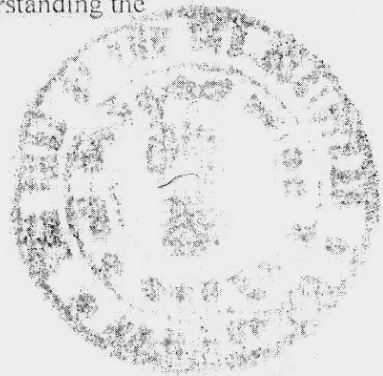
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IN WITNESS WHEREOF the vendors execute the deed of sale without any concern under influence in free will being in sound state of health and mind and the contents of the deed was read by the vendor and after fully understanding the contents of the deed put his signature.

WITNESS

1. *Handwritten signature*
S/o. *Handwritten name*, *Handwritten address*
3/3/15



2. *Handwritten signature* *Signature of Vendor/Seller.*
S/o. *Handwritten name*, *Handwritten address*
3/3/15

CERTIFICATE

Certified that the executants are my clients and I have dictated the terms of this sale deed as for their instructions, which is prepared by my typist in my office.

Handwritten signature
Typist

Handwritten signature
Advocate 3/3/15
O.H.C
B.C.E.No. 0/2298/01

Handwritten signature
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Form-A

DECLARATION

(Land / Property where there is no Structure / House)



We the Executant/s and Claimant/s do hereby declare that there is no structure / house on the schedule property transacted in this document. If existence of any structure / house is detected at a later stage the document would be treated as invalid.

Lena M. R. P. T.
Signature of Executant *2/2/15*

[Handwritten Signature]
Signature of Claimant

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Lena M. R. P. T.

12. A perusal of the sale deed shows that there is no mention in the sale deed that the transfer of the immovable properties was on account of the enforcement of the guarantee clause. The recital to the sale deed refers to the urgent need of money for repayment of loan amount. The recital to the sale deed also clearly mentions that consideration has been received in full and final satisfaction from the vendee/purchaser. Admittedly, there is no clarity in the sale deed as to how the consideration has passed, whether it is in cash. Clause (2) of the sale deed specifically refers that vendors/sellers have delivered the possession of the scheduled property physically to the purchasers. Clause (6) of the sale deed specifically mentions that the scheduled land or any portion thereof have not been acquired by the government by way of lease nor it has been given as equitable mortgage to any bank or financial institution. A perusal of the above recording in the sale deed when compared with the recording as the guarantor to the loans and the guarantee clause and the mortgage clause clearly shows that though admittedly originally the said immovable properties were mortgaged, something has happened between them by which the mortgage has been released and the properties have been sold to the financial institutions as an asset free from any incumbrance. A perusal of the provisions of section 2 (47) of the Act defines the transfer to be inclusive definition. The facts in the present case clearly shows that the sale deed what has been executed is plain and simple sale deed and

immovable properties of the assessee, herein, has been transferred for variable consideration. Once the condition of section 2(47) of the Act is applied, then the provisions of section 45 and 48 of the Act would come into play. The cost of the properties is very much available, the consideration of the properties sold is very much available, capital gains is very much computable and this is what has been done by the Assessing Officer and upheld by the Id CIT(A), which we are in full agreement.

13. Coming to the arguments raised by Id AR that what is obvious of the sale deed is not the actual picture and the sale deed has been executed under compulsion for taking over of the immovable properties by the financial institutions due to defaults in payment of the loans of the various companies in respect of which the assessee has given guarantee. The same raises a lot of question. The loan was granted in September, 2014 and in six months, the guarantor's properties are taken away. In short, nearly Rs.70 crores of loans taken by the various three companies from the financial institution has become bad and that too pay to such an extent that the guarantor's immovable properties has been acquired by the financial institution in this short period of time. It is an admitted fact that before giving loans, the financial institution would look for financial stability of the various companies but how such loans was granted knowing fully well or evident that the companies would sick. Even assuming that what is claimed by the assessee is true what normally happens is when the immovable

properties of the guarantor is taken over by the financial institution against the loans of the company for which guarantor has stood guarantee. The guarantor steps into the shoes of the financial institution as a creditor in the books of account of the company, who has taken said loans. A valuable right accrues and is acquired by the said guarantor. The claim of the assessee that she has received no consideration or benefits would not stand to reason insofar as the assessee is a Director and that too having substantial shareholding pattern in all the said companies. She would have received salary and other benefits from the said companies. Thus, when she steps into the shoes of the financial institution to the extent of the loan, which has been repaid by the acquisition of the immovable properties in which she had put as guarantee, the consideration become evident insofar as she become the creditors to that extent. This view of our also find support from the decision of the Hon'ble Supreme Court in the case of CIT vs Attili N Rao (2001) 252 ITR 880 (SC). The decision relied upon by Id AR in the case of ACIT vs Glad Investments Pvt Ltd., (2006) 102 ITD 227 (Del) would not apply insofar as in the said case, first; the guarantor was third party whereas in assessee's case, it is the Director and has substantial shareholding patterns and secondly the said decision does not discuss anything as to the status of the guarantor in respect of the loan amount, he has repaid. On account of third party, whereas the assessee's case admittedly, the assessee would become the creditor to such extent of loan

repayment on account of acquisition of the immovable property. In view of above aforesaid reasons, the findings of the Assessing Officer as upheld by the Id CIT(A) stands confirmed.

14. In the result, appeal of the assessee stands dismissed.

Order dictated and pronounced in the open court on 5/9/2024.

(Manish Agarwal)
ACCOUNTANT MEMBER

(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 5/9/2024

B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Loramitra Rath, Kairapari Kotsahi, Tangi, Cuttack
2. The Respondent: DCIT, Circle-1(1), Cuttack
3. The CIT(A)- NFAC, Delhi
4. Pr.CIT, Cuttack
5. DR, ITAT,
6. Guard file.
//True Copy//

By order

Sr.Pvt.Secretary
ITAT, Cuttack

		Date	Initial	
1.	Draft dictated on	5.9.24		Sr.PS
2.	Draft placed before author	5.9.24		Sr.PS
3.	Draft proposed & placed before the second member			JM
4.	Draft discussed/approved by Second Member.			AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the OS			
9.	Date on which file goes to the SPS			
10.	Date of dispatch of Order.			