IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI

BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI SUDHIR PAREEK, JUDICIAL MEMBER

ITA No. 3041/Del/2018
(Assessment Year : 2013-14)

ITA No. 2118/Del/2019
(Assessment Year 2013-14)

ITA No. 247/Del/2019
(Assessment Year 2010-11)

Sh. Sunil Kumar Nagar, H.No. 561, Sector-31, Faridabad.	vs.	Income Tax Officer, Ward 2(4), Faridabad

(PAN : ACDPN3930H)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Dr. Rakesh Gupta, Advocate
Shri Deepesh Garg, Advocate
REVENUE BY : Shri Vipul Kashyap, Sr. DR.

Date of Hearing : 21.08.2024
Date of Order : 09.10.2024

O R D E R

PER S.RIFAUR RAHMAN, AM:

1. These 03 appeals are filed by the assessee against the separate orders of ld. Commissioner of Income-tax (Appeals), Faridabad (hereinafter referred to 'Ld. CIT (A)') passed in quantum as well as penalty appeals relevant to Assessment Years 2013-14 & AY 2010-11 respectively.

2. Since the issues are common and appeals are inter-connected, the same are being disposed off by this common order. We are taking ITA No.3041/Del/2018 for Assessment Year 2013-14 as lead case.

3. Brief facts of the case are, assessee filed his return of income on 31.03.2014 declaring income of Rs.6,42,380/- and the same was processed under section 143 (1) of the Income-tax Act, 1961 (for short 'the Act'). The case was selected for scrutiny after recording reasons and after getting necessary approval under section 151 (2) of the Act. Notice u/s 148 of the Act was issued on 28.03.2017. In response, the assessee filed reply dated 03.10.2017 and copy of ITR for AY 2013-14 filed on 31.03.2014. The notices u/s 143(2) & 142 (1) were issued and served on the assessee. In response, ld. AR for the assessee attended and submitted the relevant information as called for.

4. The Assessing Officer during assessment proceedings observed that in agreement dated 14.01.2010 between M/s. Bhupeindra AutoTech Industries Pvt. Ltd., Anil Kumar (brother of the assessee) & Sunil Kumar (the assessee), executed an agreement to purchase 559.02 sq.yards (which was increased to 605 sq.yards at the time of executing sale deed on 22.03.2013) at Rs.32,000/- per sq.yard. At the time of executing the agreement, assessee and his brother paid Rs.24,00,000/- (Rs.18,00,000/-

as advanced money and Rs.6,00,000/- as part payment). The Assessing Officer observed that the assessee has paid Rs.3,50,000/- through cheque and balance amount of Rs.14,50,000/- in cash on 14.01.2010 and Rs.6,00,000/- to be paid within 7 days. The Assessing Officer observed that sale deed of this transaction was executed on 22.03.2013 which reveals that sale consideration of Rs.1,09,90,000/- i.e. Rs.18,000/- per sq. yard, therefore, the under valuation of the property was Rs.14,000/- per sq.yard. The amount of Rs.84,70,000/- (i.e 605 sq. yards x Rs.14,000/- per sq.yard) was paid out of the books in which assessee's share was worked out at Rs.42,35,000/-. Vide show-cause notice dated 23.11.2017, the assessee was asked to explain the source of Rs.42,35,000/- invested in the property out of books. Assessee has filed his reply dated 11.12.2017 and submitted that agreement to sale dated 14.01.2010 was never executed nor ever seen by him and the abovesaid agreement was concocted and planted for the reasons not known to him. He also denied having paid the above said amount to M/s. Bhupeindra AutoTech Industries Pvt. Ltd.. The Assessing Officer rejected the above submissions and observed that an amount of Rs.3,50,000/- was paid through cheques at the time of entering the agreement to sale and the same is mentioned in the sale agreement. Therefore, the agreement is

valid one and payment mentioned in the agreement is actually made. Therefore, the submission of the assessee is misleading. Accordingly, he proceeded to make the addition of Rs.32,10,000/- to the returned income of the assessee.

5. Aggrieved with the above order, assessee preferred an appeal before the ld. CIT (A), Faridabad. Before ld. CIT (A), assessee has raised various grounds which include ground objecting to reopening of the assessment u/s 147 of the Act and relevant jurisdiction, also merits involved in making the addition. With respect to grounds raised by the assessee on the issue on merit, ld. CIT (A) dismissed the grounds raised by the assessee by heavily relying on the decision of assessee's brother, Anil Kumar wherein the same ld. CIT (A) has adjudicated and dismissed the issues raised since the facts are absolutely identical. With regard to jurisdictional issue, he observed that what is relevant is at the time of reopening the assessment, prima facie belief has to be formed for escapement of income.

6. Aggrieved with the above order, assessee is in appeal before us raising following grounds of appeal :-

1) *That having regard to the fact and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the action of Ld. AO in framing the impugned reassessment order as the assessment order was passed without complying with the*

mandatory conditions of section 147 to 151 of the Income Tax Act, 1961 and without recording valid reasons as per law and without obtaining valid approval as per law and in any case reopening of the assessment and framing of the reassessment order was contrary to law.

2) *That in any view of the matter and in any case, action of Ld.CIT(A) in confirming the action of Ld. AO in reopening of the impugned assessment u/s 143(3)/147 is bad in law and against the facts and circumstances of the case.*

3) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. A.O. in making an addition of Rs. 32,10,000/- allegedly as unexplained investment in property u/s 69 of the Act, and that too without proper appreciation of facts on record, and by recording incorrect facts and findings, and making allegations without any basis, material or evidence and merely on the basis of surmises and conjectures and without observing the principal of natural justice.*

4) *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs. 32,10,000/- is bad in law and against the facts and circumstances of the case.*

5) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in making enhancement of income to Rs. 42,35,000/- by substituting the addition of Rs. 32,10,000/-, more so when such power could not be exercised by him in the facts and circumstances of the present case addition of Rs. 10,25,000/- (42,35,000/- - 32,10,000/-) already added in A.Y. 2010-11 as the assessment order was passed u/s 147/143(3) of the Act.*

6) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in enhancing the income of Rs. 10,25,000/- and the same addition was already added in A.Y. 2010-11, is bad in law and against the facts and circumstances of the case.*

7) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in passing the impugned order and that too without giving adequate opportunity of hearing and without observing the principle of natural justice."*

7. The assessee has also raised the following additional ground of appeal vide his letter dated 21.05.2024 :-

"That having regard to the facts and circumstances of the case, Ld. AO has erred in law and on facts of the case in making assessment under section 147 of the Income Tax Act, 1961 ("The Act") without appreciating that assessment could be made only under section 153C of the Act based upon documents/information found during the course of search of the third party.

Since the above ground of appeal is purely legal, does not require fresh facts to be investigated and goes to the root of the matter, it is prayed that the same may please be admitted in view of the following judgements:

- *CIT vs. Sinhgad Technical Education Society, (2017) 397 ITR 0344 (SC).*
- *NTPC Ltd. vs. CIT, (1998) 229 ITR 0383 (SC).*
- *VMT Spinning Co. Ltd. vs. CIT & Anr., (2016) 389 ITR 0326 (P&H).*
- *CIT vs. Sam Global Securities, (2014) 360 ITR 0682 (Del.).*
- *Siksha vs. CIT, (2011) 336 ITR 0112 (Orissa).*
- *Inventors Industrial Corporation Ltd. vs. CIT, (1992) 194*

8. At the time of hearing, ld. AR for the assessee prayed for admission of additional ground under Rule 11 of the ITAT and relied on the aforesaid decisions.

9. Ld. DR for the Revenue objected to raising of additional ground at this stage.

10. Considered the rival submissions. Since the issue involved is jurisdictional issue relying on the decision of Hon'ble Supreme Court in the case of NTPC Limited 229 ITR 383 (SC), we admit the same for adjudication.

11. At the time of hearing, ld. AR for the assessee submitted that Assessing Officer has reopened the assessment u/s 147 of the Act. However, he submitted that the correct jurisdiction falls u/s 153C of the Act and he brought to our notice reasons for reopening which is placed at pages 4 & 5 of the paper book. He also brought to our notice satisfaction note of Anil Kumar, assessee's brother case in which the reasons recorded in the abovesaid sanction note relates to the same search in which assessment of the assessee was reopened by recording the reasons for which assessed the income u/s 153C of the Act. In this regard, ld. AR submitted that from the same search conducted in the case of M/s. Urbtech group of cases, both the cases of Mrs. Anil Kumar and assessee was revised. He submitted that for the same reason, Shri Anil Kumar, brother of the assessee's case was assessed u/s 153C of the Act whereas the case of the assessee was reopened, therefore, he submitted that the reopening of the

assessment is not valid and outside the jurisdiction of section 147 of the Act. Further, he submitted that in the reasons, it is recorded that the information was received from DCIT, Central Circle 1, Gurgaon and as per the abovesaid letter and the information contained therein, the search and seizure u/s 132 of the Act was carried on 10.10.2013 at the residence/business premises of the persons associated with M/s. Urbtech Group. During the course of above search, agreement to sell dated 14.01.2010 was found and seized which is part of incriminating material which were seized. As per the perusal of this agreement, it has come to the notice that assessee and his brother, Anil Kumar entered into a deal of property with M/s. Bhupeindra AutoTech Industries Pvt. Ltd. and ld. AR for the assessee also brought to our notice page 12 of the paper book filed in the case of Anil Kumar wherein exact similar reasons are recorded. Ld. AR for the assessee brought to our notice pages 104 & 105 of the paper book wherein similar issue and objections raised before the ld. CIT (A) and brought to our notice page 5 of the appellate order and submitted that ld. CIT (A) has not discussed this issue at all. He relied on the case laws filed in the case law paper book. He heavily relied on the case of ITO vs. Batta Jangaiah order dated 29.11.2018 and Sambhavanath Infrabuild vs. ACIT in ITA No.1897/Mum/2020 order dated 06.01.2022.

He submitted that the issue of 153C assessment in the case of Anil Kumar is pending for adjudication before the ITAT Bench and since the issue involved is different under section 153C he may deal with the issue separately.

12. On the other hand, ld. DR for the Revenue objected to the submissions made by the ld. AR for the assessee and he relied on the decision of Hon'ble High Court of Madras in the case of Saloni Prakash Kumar vs. ITO (2023) 155 taxmann.com 432 (Madras). He submitted that Hon'ble High Court has remitted the impugned assessment order back to the file of Assessing Officer to pass a fresh order on merits. Accordingly, he prayed that this issue also may be remitted back to the Assessing Officer to pass a fresh assessment order. However, he submitted that there is no prejudice caused to the assessee how the assessment is concluded u/s 147 or 153C of the Act. However, he submitted that certainly there will be a prejudice to the Revenue and he prayed that the issue may be decided on merits.

13. In the rejoinder, ld. AR for the assessee submitted that at page 49 of the decision, Hon'ble Rajasthan High Court has already considered in the case of Shyam Sunder Khandelwal & Ors. the view raised by ld. DR and the decision of Saloni Prakash Kumar (supra).

14. Further, ld. AR submitted that the issue involved in appeal filed by the assessee for AY 2010-11 are exactly similar. With regard to penalty appeal for AY 2013-14, he submitted that the Assessing Officer has issued defective notice in the penalty proceedings u/s 271(1)(c) of the Act. He brought to our notice relevant notice in the paper book and submitted that penalty levied by the Assessing Officer is bad in law qua defective notice. He relied on the decisions of Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. ACIT in Tax Appeal No. 51 and 57 of 2012 dated 11.03.2021 and Pr. CIT vs Sahara India Life Insurance Co. Ltd. [2021] 432 ITR 84 (Del.)

15. Considered the rival submissions and material placed on record. We observed that the Assessing Officer has received information from Central Circle in the case of M/s. Urbtech Group and in the said search, certain informations/incriminating material were found relating to the transaction between the assessee, his brother Anil Kumar and M/s. Bhupeindra AutoTech Industries Pvt. Ltd. wherein document disclosed that certain cash payments were paid by the assessee along with his brother. Based on the above said incriminating material, the case of Anil Kumar, brother of the assessee was assessed u/s 153C of the Act whereas the case of the assessee was reopened u/s 147 of the Act. The same

information/material was used to reopen the case of the assessee whereas assessed the income of Anil Kumar u/s 153C of the Act. Therefore, the case of the assessee also should have been processed u/s 153C of the Act not u/s 147 of the Act. We observed from the reasons recorded for initiation of reassessment proceedings that the proceedings u/s 148 of the Act were initiated heavily relying on the documents found during search conducted in the group concerns of the Urbtech group in which the "Agreement to Sell" document dated 14.01.2010 was found and seized and the Assessing Officer has fully satisfied that these documents are belongs to assessee and his brother. After recording the satisfaction, he proceeded to initiate the proceedings u/s 148/147 instead of section 153C of the Act in the case of the assessee. The assessee has raised the separate ground before Ld.CIT(A) and Ld.CIT(A) conveniently did not address this issue and he only dealt with the procedure adopted to initiate and completion of the reassessment u/s 147. He has not even whispered on this aspect. We observe from the various decisions of Tribunals on this issue. The Hyderabad bench in the ITA NO. 1897/MUM/2020 (A.Y: 2011-12) Sambhavnath Infrabuild and Farms Pvt. Ltd., case of Batta Yadamma v. ITO in ITA.No. 1695/Hyd/2017 and in Sri Suryadevara Avinash v. DCIT in ITA.No. 496-498/Hyd/2017, in which one of the

member is a party, held as under:

> *"7. Considered the rival submissions and perused the material on record. Similar issue was dealt by the Bengaluru Bench of ITAT in the case of Shri Srinivasa Rao Hostake (supra) wherein the coordinate bench has held as under:*
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> *"06. We have heard the rival contentions and perused the record. In our view the scope of Section 153Cand 148 are clear from the bare reading of the two provisions insomuch as Section 153C it starts with 'Notwithstanding nothing containing in Section 139, 147, 148, 149, 151 and 153'. Thus if there is any contradiction between Sections 153C and 148 ,in that eventuality, Section 148 shall give way to Section 153C. There is a reason for saying so because if a notice u/s.153C is issued to the third party (assessee), then the AO may assess or reassess the income of the assessee for a period of six years whereas this is not the position in case of Section 148. Further u/s.153C of the Act, the assessment / reassessment can only be made based on the satisfaction recorded by the AO or the searched person as well as of the third party and further addition can only be made by the AO in respect of the assessment year for which the incriminating documents were found with the search person belonging to the third party. Therefore in our view the finding of the CIT(A) is in accordance with law, as the proceeding should have been initiated under section 153C of the Act, as it were based on material found during the search from the premises of searched person other than assessee and not under section 148 of the Act. Further we are of the opinion that this issue raised by the parties is no more res integra as the coordinate bench in the matter of G. Koteshwara Rao v. DCIT [(2015) 64 taxmann.com 159] in para 11 to 14 has held as under :*
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> *11. A careful study of section 153A to 153C and also the circular issued by the CBDT explaining the procedure of assessment in search cases, it shows that these are separate provisions independent of other provisions relating to reassessment, because of the non obstante clause begins with the said sections. The language used in these sections, i.e. 'notwithstanding anything contained' in section 139, section*

147, section ITA NO. 1897/MUM/2020 (A.Y: 2011-12) Sambhavnath Infrabuild and Farms Pvt. Ltd., 148, section 149, section 151 and section 153 made it clear that provisions of these sections are not made applicable to the assessments covered by the provisions of section 153A. Prior to the introduction of these three sections, there was a separate chapter XIV -B of the Act, by section 158BC to 158BE which governs the search assessments which is popularly known as Block assessment. The earlier provisions provides for single assessment to be made in respect of undisclosed income of Block period consisting of 10 assessment years immediately preceding the assessment year in which search took place and the broken period of up to the date of search was also included in the block period. After the introduction of new sections, i.e. section 153A to 153C, the single block assessment concept was done way with the new scheme of assessment of search cases where the Assessing Officer is to assess or reassess the total income of each of the assessment years falling within the period of six assessment years immediately preceding the assessment year in which the search is conducted. Therefore, under the new scheme, the Assessing Officer is required to exercise the normal assessment powers in respect of the previous year in which the search took place. From these facts, one thing is clearly emerged that both i.e. earlier concept of Block assessment and the new scheme of assessment is separate provisions created for assessment of search cases where the search is conducted u/s 132 or requisition was made u/s 132A of the Act."

16. Under the provisions of section 147, the Assessing Officer is having power to re-open the assessment, if he is of the opinion that the income chargeable to tax has escaped assessment. Before doing so, the Assessing Officer should satisfy himself that, there is material which suggests that there is an escapement of income. The AO can exercise these powers

with a reasonable belief coupled with some material which suggest the escapement of income. Once the conditions precedent for assumption of jurisdiction to commence the reassessment proceedings, he has to cross the hurdles attached with reassessment by way reasons for reopening of assessment, time limit for issue of notice and provision for obtaining sanction of higher authority in certain circumstances. Under the provisions of section 153A to 153C these hurdles are cleared by using the non abstante clause in the said section. In other words, under ITA NO. 1897/MUM/2020 (A.Y: 2011-12) Sambhavnath Infrabuild and Farms Pvt. Ltd., the new provisions of section 153A, the AO is not required to satisfy these conditions before issue of notice. The only requirement is that there should be a search action u/s 132 or books of account, other documents or any other asset are requisitioned under section 132A. Therefore, we are of the opinion that though, the Assessing Officer from both sections empowered to tax the income escaped from tax, both are works in a different situations, i.e. section 147 comes in to operation where there is an escapement of income chargeable to tax and section 153A comes in to operation where there is search u/s 132.

17. Under the provisions of section 153A/153C, the Assessing Officer is bound to issue notice to the assessee to furnish the returns of income for

each assessment years falling within the six assessment years immediately preceding the assessment year in which search or requisition is made. Another significant feature of this section is that the Assessing Officer is empowered to assess or reassess the total income of the aforesaid period which includes disclosed and undisclosed income. Therefore, the provisions has given wide powers to the Assessing Officer to assess or reassess the total income of six assessment years falling within the period of those six assessment years immediately preceding the assessment year in which search is conducted. Under the provisions of section 153A, the statute is provides wide powers to the Assessing Officer in respect of assessments already completed u/s 143(1) or 143(3). If such orders is already in existence prior to the initiation of search, the Assessing Officer is empowered to reopen those proceedings and reassess the total income taking note of the undisclosed income, if any, found during the course of search. For this purpose, the restrictions imposed on the Assessing Officer by way of sections 148 to 153 to reopen the assessment u/s 147 has been removed by the non abstante clause used in section 153A.

18. In the present case on hand, admittedly, the Assessing Officer has reopened the assessment based on a search conducted in a third party

case. The AO formed the opinion based on the statement recorded from the assessee, consequent to post search proceedings taken up by the DDIT(Inv), which shows undisclosed income which is the very basis of reopening the assessment. The search is conducted on 10.10.2013 which comes under the assessment year 2014-15. The assessee case falls within the provisions of section 153C, as the incriminating document seized in the case of search of third party. The Assessing Officer, on satisfying the above condition is under obligation to issue notice to the person requiring him to furnish the return for the six assessment years immediately preceding the assessment year in which satisfaction was recorded. Thereafter, the Assessing Officer has to assess or reassess the total income of those six assessment years. The word "shall" used in section 153A made it clear that the Assessing Officer has no option, but to issue notice and proceed thereafter to assess or reassess the total income. In the instant case, the Assessing Officer issued notice u/s 148 to reopen the assessment. Therefore, in view of the non- obstante clause begin with section 153A, the Assessing Officer has no jurisdiction to issue notice u/s 148 to reopen the assessment which falls within the exclusive jurisdiction of section 153A. Though, both provisions of the Act empowers the Assessing Officer to assess or reassess the income escaped

from assessment, both sections are dealing with different situations. Section 147 comes into operation when, the Assessing Officer believes that there is an escapement of income chargeable to tax, either from the return already filed or through some external material evidence came to his knowledge, which shows the escapement of income. Whereas, section 153A comes into operation when there is search u/s 132 or books of accounts, or any other asset or other documents requisitioned u/s 132A. If Assessing Officer justified in proceeding with section 147 to reopen the assessment, then there would be no relevance to section 153A, which was inserted in to the Act to deal exclusively with search cases. The legislators in their wisdom clearly spelt out the provisions of law applicable to search cases by using the word shall to begin with section 153A, made it mandatory that the Assessing Officer bound to issue notice u/s 153A or 153C, thereafter proceed to assess or reassess the total income, where search is conducted u/s 132 or requisition is made u/s 132A. Therefore, in our opinion, the AO is not justified in reopening the assessment u/s 147 and his order is illegal and arbitrary.

19. In view of the above discussion, we are of the view that the AO wrongly initiated the proceedings u/s 148 and completed the assessment u/s

143(3) rws 147 of the Act, instead of initiating the proceedings u/s 153C of the Act. Therefore, we set aside the order of CIT(A) and quash the assessment made by the AO u/s 143(3) rws 147 of the Act. Since the very assessment is quashed, the additions made in such assessment automatically get deleted.

20. Therefore, we set aside the assessment passed section 143(3) r.w.s 147 of the Act. Accordingly, the grounds raised by the assessee are allowed.

21. Since we are not dealing with other grounds on merit, we kept these grounds open and not adjudicated at this stage.

22. In the result, ITA No.3041/Del/20118 filed by the assessee is partly allowed

23. With regard to appeal for AY 2010-11, since the facts are exactly similar to AY 2013-14 our above findings in AY 2013-14 are applicable *mutatis mutandis* in AY 2010-11. Accordingly, the appeal being ITA No. 247/Del/2019 for AY 2010-11 filed by the assessee is partly allowed.

24. With regard to penalty appeal being ITA No.2118/Del/2019 for AY 2013-14, ld. AR for the assessee brought to our consideration notice issued u/s 274 of the Act to initiate penalty proceedings without indicating the limbs of penalty for which the proceedings were initiated, were not indicated in the notice itself.

25. Upon careful consideration, we note that assessee has duly raised issue against the assumption of jurisdiction for the levy of section 271(1)(c) that in the penalty notice, relevant limb was not struck off to specify whether the penalty was initiated for concealment of income or furnishing of inaccurate particulars of income. When the same was not so specified in the penalty notice itself, it has been held in the case laws cited before us that non-mention of the same in the notice or penalty order cannot cure fatal short-coming. This view was recently reiterated by Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. ACIT in Tax Appeal No. 51 and 57 of 2012 dated 11.03.2021. Similar proposition was laid down in Pr. CIT vs Sahara India Life Insurance Co. Ltd. [2021] 432 ITR 84 (Del.) Thus, since the penalty notice is omnibus and the charge has not been specified, the penalty is not sustainable. Accordingly, following the precedent and on the undisputed proposition that relevant limb of the penalty notice was not identified as to whether penalty was initiated for concealment or furnishing of inaccurate particulars of income, we direct that the penalty in this case is liable to be deleted. Hence, we set aside the orders of the authorities below and decide the issue in favour of the assessee. Accordingly, the appeal filed by the assessee being ITA No.2118/Del/2019 is allowed.

26. In the result, the appeals filed by the assessee being ITA Nos.3041/Del/2019 & 247/Del/2019 are partly allowed and the appeal filed by the assessee being ITA No.2118/Del/2019 is allowed

Order pronounced in the open court on this 9th day of October 2024.

Sd/-	sd/-
(SUDHIR PAREEK)	**(S.RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 09.10.2024
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Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI