

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE SHRI A.T.VARKEY, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.4808/Del/2012 (Assessment Year: 2008-09)

ITA No.4809/Del/2012 (Assessment Year: 2009-10)

ITA No.4810/Del/2012 (Assessment Year: 2010-11)

Chintels India Ltd., A-11, Kailash Colony, New Delhi PAN:AAACC0897N	Vs.	DCIT, Central Circle-8, New Delhi
(Appellant)		(Respondent)

Assessee by :Sh.S.M. Mathur, CA

Revenue by:Sh. Sunil Chander Sharma, CIT DR

Date of Hearing	11/01/2016
Date of pronouncement	10/03/2016

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are three appeals preferred by the assessee for Assessment Year 2008-09, 2009-10 and 2010-11 against the order dated 18.07.2012 of learned Commissioner of Income-tax (Appeals)-XXXII, New Delhi for respective assessment years where in he has confirmed the disallowance of depreciation on software made by the Assessing officer [hereinafter referred to as 'AO'] as per order u/s 143(3) of the Income tax Act (hereinafter referred to as "the Act").

2. The grounds of appeal raised by the assessee for the Assessment Year 2008-09 are as under:-

"1. That the Hon'ble Commissioner of Income Tax (Appeals) has erred in law as much as facts of the case in sustaining the disallowance made by the learned Assessing Officer of depreciation of Rs. 84.84,910/- on the purchase of Software of Rs. 4,24,25,050/- from M/s Macro Infotech Ltd. by the appellant company.

2. That the Hon'ble Commissioner of Income Tax (Appeals) while sustaining the disallowance of deprecation has erred in law as much as

facts of the case in violating the principle of natural justice by not providing any opportunity of confronting the information and documents received by the learned Assessing Officer from the learned Director of Income Tax (Inv.) New Delhi and also not providing the opportunity to the appellant for cross examination of Sh. Tarun Goyal who has alleged to have issued bogus bill and accommodation entries to the appellant.

3. *That the information received by the learned Assessing Officer from the learned Director Commissioner of Income Tax (Inv.) was used as tool against the appellant for disallowing the depreciation.*
 4. *That the learned Assessing Officer merely relied upon the information received from the learned Director of Income Tax (Inv.) on the face of it without independently verifying the facts of the case. Likewise the Hon'ble Commissioner of Income Tax (Appeals) also followed the same and had erroneously sustained the disallowance of depreciation.*
 5. *That the Hon'ble Commissioner of Income Tax (Appeals) while sustaining the disallowance of claim of depreciation has not brought on record any tangible material on record to hold that the assessee company has acted in the conspiracy of Sh. Tarun Goyal and his associate company. The Hon'ble Commissioner of Income Tax (Appeals) had also not brought any tangible material on records to establish who has enjoyed the financial benefits out of the alleged bogus deal or transaction. Neither the learned Assessing Officer nor the Hon'ble Commissioner of Income Tax (Appeals) has also brought any material on record that the appellant company is connected in bogus transaction of creation of false documents. In the absence of such material disallowance of depreciation is totally unwarranted and unsustainable in law.*
 6. *That on the facts and circumstances of the case the Hon'ble Commissioner of Income Tax (Appeals) had erred in law is not appreciating that the appellant already proved the ownership of the said Softwares purchased by it and also proved its user in the business carried by the appellant.”*
3. The grounds of appeal raised by the assessee for the Assessment Year 2009-10 are as under:-
- “1. *That the Hon'ble Commissioner of Income Tax (Appeals) has erred in law as much as facts of the case by upholding the disallowance of depreciation of Rs.1,35,75,856/- on Softwares by following the findings of the immediate proceeding year relevant to Assessment Year 2008-09.”*
4. The grounds of appeal raised by the assessee for the Assessment Year 2010-11 are as under:-
1. *That the Hon'ble Commissioner of Income Tax (Appeals) has erred in law as much as facts of the case by upholding the disallowance of depreciation of Rs. 81,14,514/- on Softwares by following the findings of*

the immediate proceeding years relevant to Assessment Year 2008-09 and 2009-10.”

5. The assessee has also raised additional grounds of appeal for Assessment Year 2008-09 vide application dated 15th September 2015. The reason given for filing the additional grounds of appeal is that it has inadvertently escaped the attention while preparing the original grounds. The additional grounds of appeal is also a legal ground and does not required ascertainment on any factual of the case and therefore the ld AR submitted that the same may be admitted. The additional grounds raised for Assessment Year 2008-09, 2009-10 and 2010-11 are identical as under:-

- “1. *That the Hon'ble Commissioner of Income Tax (Appeals) has erred in law as much as facts of the case in sustaining the disallowance made by the learned Assessing Officer of depreciation of Rs. 84,84,910/- on the Softwares of Rs. 4,24,25,050/-purchased by the appellant from M/s Macro Infotech Ltd.*
 2. *That the Hon'ble Commissioner of Income Tax (Appeals) while sustaining the aforesaid disallowance of deprecation has erred in law as much as facts of the case in violating the principle of natural justice by not providing any opportunity of being heard to the appellant for confronting the informations and documents received by the learned Assessing Officer from the learned Director of Income Tax (Inv.) New Delhi and also not providing the opportunity to the appellant for cross examination of Sh. Tarun Goyal who alleged to have issued bogus bills and accommodation entries to the appellant.*
 3. *That the Hon'ble Commissioner of Income Tax (Appeals) while sustaining the disallowance of claim of depreciation has not brought on record any tangible material to substantiate that the appellant company had acted in the conspiracy of Sh. Tarun Goyal and his associate company in arranging the so called bogus bills and in lieu of cheque payable giving back cash to the appellant company.*
 4. *That on the facts and circumstances of the case the Hon'ble Commissioner of Income Tax (Appeals) had erred in law is not appreciating that the appellant already proved the ownership of the said Softwares purchased by it and also proved its user in the business carried by the appellant.”*
6. The ld DR did not object to the additional grounds of appeal for all the three years and therefore the same are admitted as these grounds are legal in nature and parties can raise them at any point of the proceedings by following the

procedures laid down. Hence we admit these grounds in the interest of the justice.

7. Firstly we advert to the appeal of the assessee for Assessment Year 2008-09. Brief facts of the case are that the assessee is a company engaged in business of horticulture, agriculture and real estate carried out from A-11, Kailash Colony, New Delhi.
8. On 26.03.2010 search u/s 132 of the Act was carried out at the business and residential premises of the assessee who belongs to Ashok Solomen and Chintels Group of cases. Notice u/s 153A of the Act was issued on 10.03.2011 and in response to that return of income was filed on 28.04.2011 u/s 153A of the Act declared income of Rs. 2,31,47,987/- . On post search enquiry it was found that one Shri Tarun Goyal was subjected to search u/s 132 of the Act on 1st September 2008 and wherein it was found that he has created more than 90 companies which are engaged in the business of bogus bills and providing accommodation entries such as share capital, share application money, loans and advances and charges commission accordingly. During the enquiry it was noted that he has more than 120 bank accounts and he has deposited more than Rs.250 crores as cash in those bank accounts. It was also found that Directors of those companies were bogus and addresses of these companies were also bogus. U/s 132(4) of the Act, statement of Shri Tarun Goyal was recorded where he has accepted that he is engaged in providing accommodation entries and bogus bills to various persons. During the course of investigation it was found that one company M/s Macro Infotech Ltd was also formed by Shri Tarun Goyal, who is engaged in issuing bogus bills and it does not have any expertise in software business. During the enquiry after the search and seizure operation it was found that the assessee has purchased software of Rs. 42424550/- from M/s. Macro Infotech Ltd. It was alleged by AO that it in fact the assessee has taken the bogus bills to inflate their expenditure. When the enquiry was conducted by the Intelligence Wing no information was or

explanation was provided by the assessee in this matter. Further vide letter dated 19.08.2011 the assessee was further asked about the Macro Infotech Ltd and its transaction with the assessee from Assessment Year 2003-04 to 2009-10 and the assessee was also asked to prove the genuineness of the transaction made with M/s. Macro Infotech Ltd. In response to this the assessee submitted on 28.11.2011 that M/s. Macro Infotech Ltd is engaged in the business of supply of various kinds of the computer software, graphics and other elite products and during FY 2007-08 the assessee has purchased software of Rs. 424245050/- from these companies and payment for which is made through account payee cheques. It was further submitted that these software were installed in the company and recorded in the books of account. The assessee submitted that the software is sophisticated and is most effectively used as marketing and sales tools. It was later handed over to Sobha Developers Limited for joint use of developing and marketing upon entering joint development agreement dated 25th September, 2008 for 32 acres of group housing project. Later on this project was cancelled vide agreement dated 08.10.2011 and assessee was informed by Sobha that the software has been damaged and destroyed and therefore it cannot be returned. It was submitted that the bills have been debited in the books of account and depreciation has been claimed. As the AO was not satisfied with this explanation of the assessee the depreciation on the software amounting to Rs.8484910/- being 20% depreciation on the cost of software of Rs.42424550/- was disallowed. The assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals), who confirmed the disallowance as the assessee has failed to establish the ownership and use of the alleged software. Therefore the assessee is in appeal before us.

9. The additional grounds raised by the assessee was against the fact that for Assessment Year 2008-09 provision of section 153A cannot be applied as there is no incriminating material found during the search. For this it was submitted that the date of search is 26.03.2010 to 27.03.2010. Return of income

of Assessment Year 2008-09 was filed on 21st October 2008 and return of income was processed u/s 143(1) on 27.03.2010. Therefore it was argued that processing u/s 143(1) is an assessment which is already completed and not 'pending' at the time of search and therefore for assessment for A.Y. 2008-09 can be made only if there is an incriminating material found during the course of search. Therefore according to AR this assessment is not pending and in absence of any incriminating material the assessment is bad in law. For this he also relied on the decision of Honorable Delhi high court in cases of CIT V Kabul Chawala [ITA No 707/2014] [dated 28/08/2015].

10. Against the argument of Id AR the Id DR submitted that assessment u/s 143(1) processing of return and it is not an assessment at all. He submitted that therefore second proviso to section 153A of the Act does not apply and assessment does not abate. The second argument is regarding information received from the premises of Mr. Tarun Goyal during the Search conducted in 2008 and based on the post search enquiries has shown that there are incriminating documents and hence the assessment is correctly made.
11. Provisions of section 153A are as under :-

ASSESSMENT IN CASE OF SEARCH OR REQUISITION

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall-

- (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 ;*
- (b) assess or reassess the total income of six assessment years immediately proceeding the assessment year relevant to the previous year in which such search is conducted or requisition is made :*

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years :

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

12. According to provisions of section 153A of the Act AO is required to assess or reassess the total income of six assessment years separately. According to the provision of section 153A only the assessment or reassessment 'pending' on the date of initiation of the search shall abate. Therefore the assessment can be made with respect to assessment years which are pending on the date of initiation of the search. Then the total income of the assessee for such assessment years will have to be computed by the AO as a fresh exercises.
13. In this case the assessee has submitted a copy of Panchnama dated 27.03.2010 which shows that the search commenced on 26.03.2010 based on the authorization dated 25.03.2010. Therefore the date of initiation of the search is 25.03.2010 and the date of intimation u/s 143(1) of the Act was 27.03.2010. Hence, we are of the view that as on the date of initiation of the search the assessment for Assessment Year 2008-09 was pending. Hence the assessment for Assessment Year 2008-09 and subsequent years are not abated and total income of the assessee shall be computed by the AO as a afresh exercise. In view of this the argument of the assessee that the assessment for Assessment Year 2008-09 is concluded and the assessment was abated and in absence of any incriminating material same is required to be quashed, is rejected. Therefore in that case the assessment of the assessee for Assessment Year 2008-09 is required to be made as unabated assessment.
14. Hence the additional grounds raised by the assessee are dismissed.

15. Other grounds of the appeal are on the merits of the case that the assessee is eligible for depreciation on the software purchased of R 42425050/-. The main argument of the assessee is that the assessee has purchased this software amounting to Rs.42424550/- from only one company i.e. Macro Infotech Ltd. The details of the payment made by the assessee to these companies is through six cheques of different dates between 24th August 2007 to 29th August 2007 amounting to Rs.42424550/-. According to the copy of account, payments have been made by the cheque and date of installation of the software was said to be 2nd October 2008 for all the software as stated in the narration of the account for each of the entry of payment. All the invoices of Macro Infotech Ltd were in the month of July and August 2007. The bank statement of the assessee also showed that cheques have been issued in favour of M/s. Macro Infotech Ltd. and for this the assessee submitted the bank statement of its bank account with Bank of Rajasthan Ltd. Subsequently, certificate dated 20th June 2012 from ICICI Bank Ltd (in which the Bank of Rajasthan has merged with ICICI bank Ltd) was given showing the date of payment, amount, cheque no and the date of clearance showing that the amount of payment has been made to Macro Infotech. Copies of the bills of the software purchased from Macro Infotech ltd were also submitted. Based on the above evidence assessee submitted that the software have been purchased by the assessee and the claim of the depreciation is lodged. Regarding the destruction of the software the assessee has placed before us the cancellation agreement dated 8th October 2011 entered between the assessee and seven parties which shows that joint development agreement entered into between them have been cancelled. According to Clause No.6 of that agreement it was mentioned that the second party i.e. Sobha Developers Ltd has agreed to hand over the first party i.e. seven different parties , including the sophisticated software presentation and other material. It was mentioned that the software which has been given by first party to the second party have been damaged and destroyed and therefore could not return that to the first party and first party has waived all claims and damages arising out of that loss. Therefore it was stated that now the software is not available. It was further

stated that additions have been made on the basis of Statement of Mr. Tarun Goyal who has not been confronted to the assessee, copy of the statement is not given and therefore it cannot be used against the assessee. It was further submitted that the bills of the software purchased are available and submitted before the lower authorities, which shows PAN No, Central Sales Tax No etc of the suppliers of the software. It was further stated that the assessee has discharged its onus that it is a business income, the software asset is owned by him, if that no question have been asked by the AO and therefore disallowance of depreciation cannot be made in the hands of the assessee.

16. Against this the Id DR submitted that the learned Commissioner of Income-tax (Appeals) has given detailed reasons at Page 10 to 12 of the order wherein the learned Commissioner of Income-tax (Appeals) has dealt with this issue in detail. So he relied on the order of learned Commissioner of Income-tax (Appeals) and precisely at Pg.23 of the order. Based on this it was further submitted that the assessee could not prove that the asset is owned by it, used by it for the purpose of the business and therefore the claim of depreciation has been rightly disallowed. Regarding the destruction of the software it was sated that there is no confirmation from Sobha Developers Ltd. that how the software destroyed. Regarding the issue of the cross examination of by the assessee, the he relied on the para No.2.3.2 of the learned Commissioner of Income-tax (Appeals) order and said that independent to the statement of other party, assessee could not establish the ownership and user of the asset purchased and further this fact has been corroborated by the statement of Shri Tarun Goyal. In view of this he submitted that depreciation cannot be allowed to the assessee as the purchase of the asset is shown to be fictitious for the reason mentioned in the order of learned Commissioner of Income-tax (Appeals) and AO.
17. We have carefully considered the rival contentions. The brief facts have already been narrated as above. The Id AO has dealt with this issue at Para No.6 Pg. 2 to Pg 6 of the AO's order as under:-

“6. During the post- search enquiry of the case of Chintels group, it was learnt that in the case of Shri Tarun Goyal, search and seizure operation u/s

132 of the Income Tax Act 1961 had been conducted on 15-09-2008 by the Unit-IV of the Directorate of Income Tax (Investigation), New Delhi. Shri Tarun Goyal has created more than 90 non Prescript companies. The main business of Shri Tarun Goyal, to issue bogus bills and providing accommodation entries in the nature of share capital, share application money, loans and advances etc. and charge commission accordingly. During the post search enquiry in the case of Shri Tarun Goyal, it come to the notice that Shri Tarun Goyal has more than 120 bank accounts and in these bank accounts he had deposited more than 250 crores cash. On the enquiry it was found that all the directors of the companies controlled by the Shri Tarun Goyal were bogus, moreover the addresses of the companies and directors were bogus. The statement of Shri Tarun Goyal was recorded u/s 132(4) of the Income Tax Act 1961. In his statement he had accepted that he has provided accommodation entries and bogus bills to number of persons. Company named M/s. Macro Infotech Ltd. was formed by Shri Tarun Goyal. The main task of the company is to issue bogus bills. On the verification it comes to the notice that M/s. Macro Infotech Ltd. has no expertise in software business. The addresses of the company were also verified during the post search enquiry and it was found that air the addresses were bogus. The information about the beneficiaries had been sent to the office of concerned CITs. When the .search and seizure action conducted against M/s. Chintels India Ltd. the information in respect to this has been sent to the Intelligence unit, New Delhi.

6.1 During the post search enquiries after the search and seizure operation against the Chintels group, the enquiry about the purchase of softwares of Rs. 4,24,24,550/- from the M/s. Macro Infotech Ltd. was made. M/s. Chinteis India had not purchased any are from the Shri Tarun Goyal controlled company M/s. Macro Infotech Ltd, They have taken bogus bills to inflate their expenditures and take back cash after the payment of commission. When the enquiry conducted by the intelligence unit the assessee has not offered explanation in this regard.

6.2 Vide questionnaire dated: 19-08-2011 assesses was asked that: "What is the business of M/s, Marco Infotech Limited? What are the goods and services they are dealing in? Furnish ledger extract of your transactions with M/s. Marco Infotech Limited during the financial years from 2003-04 to 2009-10. Also furnish Nature and description of products/goods purchased from M/s. Marco Infotech Limited. Also furnish copies of purchase bills obtained from M/s. Marco Infotech and copies of bank statement evidencing payments. The head office and site office of M/s, Macro Infotech Limited were shown as Kama/Market (1st floor), Dharmawala, Dehradun and the branch office was shown as 13/34, WEA Chamber No. 404, Main Arya Samaj Road, Karoi Bagh, NBW Delhi. On the verification of both the addresses, it had come to the notice that no such company is running from Dehradun's address and the Delhi's address belongs to one Shri Tarun Goyal, who is a Chartered Accountant. The search and seizure action was also conducted at the office of Shri Tarun Goyal by the

Investigation Wing, Delhi. During the search It was found that numbers of bogus concerns are running from the address 13/34, WEA Chamber No, 404, Main Arya Samaj Road, Karol Bagh, New Delhi and M/s. Macro Infotech Limited is one of the concern. Therefore you have to prove the genuineness of the transactions made with M/s. Macro Infotech Limited. In case your explanation is found unsatisfactory or unconvincing, show cause as to why the transaction made with the M/s. Macro Infotech Limited to the extent unexplained may be treated as undisclosed income and added in your hands for the Assessment Years 2004-05 to 2010-11 as may be applicable."

6.3 *Vide letter dated: 28-11-2011 assessee has submitted*

"M/s Marco Infotech is engaged in the business of supply of various kinds of computer software, graphics and other allied products.

The company during the financial year 2007-08 had purchased software in aggregate Rs.4,24,25,050/- from them. Payment of all the bills for the supply of software were made by the assessee company through payees cheque drawn on Bank of Rajasthan as per confirmation, of account sent by M/s Macro Infotech. These softwares were installed in the company and all the purchases were duly incorporated in the books of account of the company. This sophisticated software was most effectively used as a marketing /sales tool in order to convince Sobha to participate in the development of the Group Housing Projects. It was later handed over to Sobha for joint use of development and marketing upon entering in the Joint Development Agreement dated 25/09/2008 for the 32 acres i.e. (12.306 acres and 19.768 acres) Group Housing Projects.

Later, upon cancellation of the 19.768 acres Project vide agreement dated 8/10/2011, we were informed that it has been damaged/destroyed by Sobha and hence cannot be returned. The aforementioned agreements along with details of supply of software and copy of purchase bills issued by M/s Macro Infotech are enclosed herewith for your ready reference.

The company has debited these purchases in the computer software and claimed depreciation thereon.

As per the bills available with us issued by M/s Macro Infotech, their addresses have been shown as under-

- i) Head Office and site Office
Kamal Market (1st Floor), Dhamawala, Dehradun (Uttranchal)*
- II) Branch Office
13/34, WEA, Chamber No.404, Main Arya Samaj Road, Karol Bagh, New Delhi-110005.*

We have no address available with us other than the above Copy of bank statement of Bank of Rajasthan where the cheque issued by the company in favour of M/s Macro Infotech is enclosed herewith for your ready reference.

In your query, you have mentioned that in case, our explanation is found unsatisfactory and unconvincing, show cause notice is given to explain as to why the transactions made with M/s Macro Infotech to the extent unexplained may not be treated as "Undisclosed Income" and added to in our returned income for assessment years 2004-05 to 2010-11. We hope the above explanation will be up to your satisfaction as the expenditure incurred by the company .in purchase of the softwares, therefore, it cannot be treated as "Unexplained Income" and added to our assessment for block pen'od of assessment. Further this matter is a matter to be dealt with in the regular assessments and not in Block assessments."

6.3 The assessee company has not offered satisfactory explanation. They have not filed any document about the use of the software and when the software put to use. They have not filed any documentary evidence that they have handed over the document to M/s. Sobha Developers Limited. Even they have also not filed any documentary evidence in respect to the software destroyed because of M/s. Sobha Developers. Ltd. The assessee company has taken the bogus purchase bills of software Rs.42424550/-from the M/s. Macro Infotech Ltd. For the payment of these gobus bills they have issued cheques and taken back cash from Shri Tarun Goyal after payment of commission. The assessee company has shown the expenditure of Rs.4,24,24,550/- as capital expenditure and claimed depreciation @ 20% in the year in the place of 40%. The depreciation amount comes to Rs.84,84,910/-. By this way they have inflated their expenditure and reduced their income."

18. On appeal before the learned Commissioner of Income-tax (Appeals) he has dealt with this disallowance in Para 2.3.2 at pg 10 to 14 of the order which is as under:-

"2.3 I have carefully considered the facts of the case, the arguments of the appellant and the position of law. The AO had made the disallowance of the claim of depreciation on software alleged to have been purchased from M/s Macro Infotech Ltd., in the background of the information received from the Investigation Directorate regarding the accommodation entry network being operated by Shri Tarun Goyal through the 90-odd companies and over 200 bank accounts that he formed and controlled for this purpose as admitted by him before the Department at the time of search conducted in his case. The appellant had claimed that it had purchased software worth Rs.4,24,25,050/- from M/s. Macro Infotech Ltd. on the basis of copies of invoice purported to have been issued by that company, which on enquiry was found non-existent at its Head Office and Site Office address as given on the Invoice itself and its Branch Office address as given in the Invoice turned out to be the address of Shri Tarun Goyal, who was the mastermind of the accommodation entry network run from that address. Obviously, the AO gave a specific, show cause .notice to the appellant to prove the genuineness of its claim of depreciation on

software claimed to have been purchased from M/s Macro Infotech Ltd. and used in its business. Relevant portions of this show cause have been extracted by the AO in his assessment order itself. In reply, the appellant reiterated that it had purchased software from M/s Macro Infotech Limited and payments were made through account payee cheques as reflected in the bank account of the appellant. However, no evidence whatsoever regarding the actual user of the software was produced before the AO. When asked to produce evidence that such a software actually existed and was used in the business of the appellant, the appellant stated that it cannot be produced as it got destroyed. This explanation of the appellant clearly indicates that the appellant had produced no evidence of either the existence or the actual user of the software during the previous year relevant.

2.3.1 As per the provisions of the Act, depreciation can be allowed on an asset only if appellant owns it and actually uses it in his business during the previous year relevant. In the instant case, though the appellant, prima facie, produced the invoice as the evidence of purchase of software from M/s Macro Infotech Ltd., but the invoice lost its evidentiary value as soon as it was found that no such company being engaged "in software development business was available on its given address of Dehradun and the address touted as its branch office address was, in fact, "the office address of Shri Tarun Goyal , a chartered accountant, admittedly indulging in the business of accommodation entries to various concerns. The AO had, therefore correctly given specific opportunity to the appellant to justify its claim of depreciation in the light of the results of the enquiry conducted. Therefore, the argument of the appellant that principles of natural justice was not followed by the AO is not acceptable.

2.3.2 The other argument of the appellant that the AO had not given the appellant an opportunity to cross examine Shri Tarun Goyal and had based his conclusions on the information received from the Directorate of Investigation which was obtained at the back of the appellant is also misplaced in view of the fact that the AO had not solely based his conclusions on the information received from the Directorate of Investigation but had further made enquiries and had given an opportunity to the appellant to justify its claim by producing evidence of ownership and user of the software claimed to have been purchased from the said M/s Macro Infotech Ltd. Since the appellant failed to produce any evidence to establish either the existence of the software or its user by the appellant, the AO was well within his rights to disallow depreciation in the appellant's case. The case laws relied upon by the appellant are, therefore, clearly distinguishable on facts from the instant case.

2.3.4 Even during the appellate proceedings, the appellant has only reiterated what it said before the AO. No evidence other than the Invoice which already lost its evidentiary value due to non- existence of its issuer at the given address has been furnished to support either the ownership or user of the software by the appellant. The appellant has claimed that the software claimed to have been purchased from the said M/s Macro Infotech Ltd. was a specialised, sophisticated software which was to be used as a marketing/sales tool in the development of the Group Housing Projects undertaken in joint

venture with one M/s Sobha Developers. A customised software is an intellectual property which requires elaborate documentation to delineate the rights of the developer of the software and the purchaser of the same. It also requires documentation of the hard coding of the software, for future up-gradations or modifications required. No such documentation was ever produced by the appellant either before the AO or before the undersigned. Even when the AO had asked for evidence of the software's user in the appellant's business, the appellant evaded issue by stating that the software was destroyed by M/s Sobha Developers. Thus, no evidence of the existence of the software was ever brought on record. Neither the hardcoded documents were produced nor the digital form was ever shown to have been used by the appellant. The alleged developer of the software was also a physically nonexistent, non-descript company, having no expertise of software development. Therefore, I am of the considered opinion, that the appellant has miserably failed to substantiate its claim of ownership as well as user of the so-called software alleged to have been purchased from M/s Macro Infotech Ltd., a non-descript company, "Welch was found to be one of the 90-odd companies floated by a self-confessed entry operator.

2.3.5 The appellant's AR had placed heavy reliance on the case of CIT v Sangeeta Leasing 343 ITR 428 (Del) to argue that since the AO has not proved any connivance between the appellant and Shri Tarun Goyal, its claim of depreciation should not be disallowed. I have perused the cited case law. In that case, the assessee had entered into a transaction of purchase and lease out of GAS CYLINDERS through a broker. All the documentations were received by her according to which she had purchased the gas cylinders from one Modern Engineering and leased the same to one Seers Leasing Company. Payment for purchase of the gas cylinders were made through account payee cheques to the bank account in the name of Modern Engineering. The goods in question, the gas cylinders, were directly transported by Modern to Seers. She also received through cheque a sum of Rs.13,70,000/- from Seers Leasing as advance lease rent. However, on enquiry it was found that Modern was a nonexistent even the bank account in the name of Modern was not genuine and was opened by persons-connected with Seers. Thus the assessee was cheated by Seers as she never became owner of the Gas cylinders supposed to have been purchased by her from Modern. The AO disallowed depreciation on the gas cylinders and also made addition of Rs.13,70,000/- as income from undisclosed sources in the hands of the assessee. The disallowance of depreciation was upheld in further appeal. However, when the AO imposed penalty for concealment on the same issue, his order was assailed in appeal. The CIT(A) decided the penalty appeal in favour of the assessee on the ground that she! was genuinely cheated by Seers and was not in connivance with Seers and therefore no penalty was exigible. This order was upheld by the Hon. High Court in the cited case. It is clear from the above that the facts of the cited case are very much different from the instant case. In the cited case, the issue to be decided was whether the assessee should be penalised for making a wrong

claim of depreciation in the given facts and circumstances of that case. In fact, as far as the assessment stage is concerned, the depreciation claimed on non-existent gas cylinders was disallowed which was also upheld in appeal. Therefore, to that extent the cited case is in favour of the AO and not in favour of the appellant. Secondly, the issues of assessment and issues of penalty are clearly distinguishable. Further, in the cited case, the assessee might have got cheated because she never physically saw the goods she was purchasing or leasing out, whereas in the instant case, the appellant has claimed that it purchased the -software, installed the same in its computers and used it in its business. So, where was the occasion for the appellant to get cheated by anyone here? "Obviously, the appellant cannot take cover under the cited case law due to the distinguishing features as pointed out above. Furthermore, the very fact that the invoice has been obtained by issue of cheques in the name of a non-descript. Physically non-existent company having no wherewithal to do the software development work itself indicates towards a pre-ordained transaction entered into by the appellant for getting the benefit of depreciation on such non-existent asset.

2.3.6 Taking into consideration the totality of facts and circumstances as discussed above, it is held that the appellant has not been able to establish either the ownership or user of the alleged software on which depreciation of Rs.84,84,910/- was claimed and accordingly the action of the AO in disallowing the claim of such depreciation on software is confirmed."

19. Further facts are required to be marshaled in this case as the tribunal is the final fact finding authority. For the purpose of claim of depreciation assessee has submitted following details before the lower authorities.
- a) Ledger extract of computer, printers and software for the period 01/04/2007 to 31 of March 2008 in respect of software purchased from macro Infotech Ltd.
 - b) Copies of invoices raised by macro Infotech Ltd for purchase of various softwares.
 - c) Details of software purchased from Macro Infotech next details
 - d) details of payment made to the supplier of software showing check number, date, amount and of the SSC reflecting these payments made to the supplier for purchase of software
 - e) Details of payment of tedious on payment made to supplier.

20. Now we proceed to examine each of this evidence furnished by the assessee. Looking at the Ledger of the company of 'computer printers & software' as on 01/04/2007 it has block of this item amounting to Rs. 591229/-. Suddenly in this year from 24th of August 2007 to 29/08/2007 assessee purchased software of Rs. 425 lakhs approximately. After that there is no purchase of any hardware or software items.
21. Macro Infotech has raised invoice number CIL/01/2007-08 dated 02/07/2007 for Rs 95,00,000/- . The amount is paid for cost of software being for main ADC server. The narration also sold that it is client workstation software, media client software including database, single sport disc/tape, multi segment tapes timing/transfer management software, video fileserver, VTR , Sony protocol, venous router, switches etc. This software was purchased for 19 users. Undoubtedly it shows spend number, CST number, UATT number of the supplier.
22. The 2nd software was purchased by assessee by invoice No. 2 dated 16/07/2007 Rs. 75 lakhs/-, the narration of the software purchases web-based managed to monitoring computer software for assignment in his display of analog and digital video embedded audio and computer images. The quantity was fixed.
23. The 3rd software was purchased by assessee by invoice No. 3 dated 30/07/2007 for Rs. 42 lakhs. This software was for graphics – ship saved crash data tapes to the automation Department. It also included transfer the collected subsystem data and assist fault analysis. This software was a multi-user software.
24. The 4th software was purchased by invoice No. 4 dated 01/08/2007 for 19 users . The description of the software is OpenView software with built-in RITE punctuation on Linux platform for building designing architectural construction module Vectastar 3500 print to multilevel radio platform. Cost of this software is Rs. 85, 50, 000.
25. The 5th software was purchased by invoice No. 5 dated 08/08/2007 for 19 users at the rate of Rs. 3,50,000/- per user amounting to Rs. 66, 50, 000/-. The

nomenclature of the software is Open View software with built-in rate fluctuation on Linux platform for sales booking for real estate forms and printing to multilevel radio platform.

26. The 6th software was purchased by invoice No. 06 dated 16th of August, 2007 for 19 users at the rate of rupees 2, 95, 000/- amounting to rupees 56,05,000/-.. The nomenclature of the software is 3 difficulty S Max with subscription consisting of analysis on Linux platform collection of data in peculiar 9000 model multilevel radio platform with multistation function.
27. From the above analysis it is apparent that company has purchased six huge software however there is no expenditure on hardware by the company. Therefore how these softwares are installed and how they were used is not demonstrated by the assessee.
28. The details of payments made to this party are as under.

Cheque no	Date	Amount	Date of clearance
701067	24/08/2007	9595000	27/08/2007
701069	26/08/2007	4242000	27/08/2007
701072	26/08/2007	7575000	27/08/2007
701078	28/08/2007	8635500	30/08/2007
701079	29/08/2007	6716500	30/08/2007
701080	29/08/2007	5661050	30/08/2007

29. From the perusal of a more details of payment it is apparent that all payments have been made in the month of August 2007 where as the three software were purchased in the month of August itself and three in the month of July 2007.
30. On the specific query raised by the assessing officer that what is the business of the supplier of this kind of software, assessee supplied the detail of address of the assessee. On verification of the said address it had come to know that no such companies was running from that address Therefore AO was of the view

that this supplier is non-existent and also the software purchased by the assessee is fictitious. Before CIT (A) assessee was asked to prove the existence of software which was denied by the assessee.

31. For the purposes of the claim of the depreciation u/s 32 of the act the assessee is required to establish following with reference to evidences
 - a. There is a specified assets
 - b. Such assets is partly or fully owned by the assessee
 - c. Such assets are also used by the assessee for the purposes of the business of profession of the assessee.
32. Therefore in the present case it is established that there is no such asset in existence. The reasons for the same areas under :-
 - a) For the existence of the assets, assessee has produced the copies of the bills of the software purchased and details of payments made to the supplier. However the supplier does not have any credential to supply that software as the address provided by the assessee of the supplier is fictitious and assessee could not demonstrate capability of the supplier.
 - b) Further contention of the assessee that the payments are made by cheque does not prove anything about the existence of the asset. It can never be said that transactions made by the cheque are sacrosanct , particularly in the facts of this case. Payments by chaeque are the mode of settlement of the account between the parties.
 - c) It was submitted that these softwares were installed in the company and all the purchases were duly incorporated in the books of account of the company. There is no evidence of software installed in the office of the company such as installation report, test report etc. This is apparent from the facts that though assessee has purchased huge software of approximately Rs 4.25 crores however there is no addition to

the hardware assets of the company. On looking at the balance sheet of the company it is apparent that during the year no such hardware have been purchased. Only addition to the computer is Rs 4,30,53,004/- which consist of the above software of Rs 4.25 Crores. Therefore the fact of installing the software in the office of the company is not proved by the assessee.

- d) Further assessee has purchased the huge software however the assessee could not establish that the software do exists by producing the existence of any 'source code', utility report, Request for proposal etc.
- e) Whenever such software is purchased then the it goes through software development life cycle , none of the life cycle of the software development is demonstrated by assessee.
- f) Further act of providing softwares by the assessee to Sobha Developers Limited is not established i.e. how it was uninstalled and how it was reinstalled in the office of that party.
- g) Further it is also not established that assessee has entered in to any agreement with the Sobha Developers as the cancellation agreement submitted by the assessee shows that the parties to that agreement have entered in to a joint development agreement and in cancellation agreement the assessee is shown as "confirming party". Therefore it is apparent that the assessee is just a confirming party in this cancellation agreement where in it is stated that software is destroyed and no compensation is payable which is waived by party of the first part which is not the assessee but the 7 other persons who are different companies and individuals. It is mentioned in that agreement that right for compensation is waived by those seven persons and not the assessee company. It is also not demonstrated by the company that how the seven persons have got any right to

waive the compensation which is the property of the appellant company and not of those seven persons.

- h) Further according to the cancellation agreement Sobha Developers has refused to provide the “Sophisticated softwares Presentation” as it is damaged. Therefore there is no reference of any software as are purchased by the assessee but it talks about the software presentations. Hence assessee has failed to provide any evidence that it has such software were given to Sobha Developers.
- i) These facts are also coupled with the unusual facts of the case that all these software were purchased by the assessee in a single month and for which payments have also been made immediately. It is also an unusual fact that the date of installation of all the software purchased is shown as 02.10.2008 which is recorded in the ledger account of the Computer printers and software which does not have installation report or testing report etc. Further it is also an unusual facts that despite there being no relationship between the assessee and supplier company the software are development and sold by the supplier without any orders, contracts, agreements and most importantly any advance payments. During the year assessee has purchased / transferred land of Rs. 88,02,64,869/- during the year as per schedule 6 of the balance sheet. It could also not establish that what are the uses of these software purchased by the assessee and what are the functionality of such software.

33. Assessee could not prove the facts that assessee has used these software in the business of the assessee except merely stating that These softwares were installed in the company and all the purchases were duly incorporated in the books of account of the company. Merely such a bald statement coupled with

evidence against the assessee does not prove that an asset if at all owned by the assessee is used for the purposes of the business of the assessee.

34. It is strongly submitted by the assessee that Shri Tarun Goyal 's statement is not given to the assessee and he was also not cross examined by the assessee. In this case assessee has purchased the software therefore it is responsibility of the assessee to prove that assessee has purchased the assets and which are used for the purposes of the business. Statement of Shri Tarun Goyal is not at all relevant for determining the issue of allowance of depreciation on the assets purchased by the company which assessee has failed miserably to prove . Assessee could not prove the strength of the supplier to provide the software mentioned in the bills, assessee could not produce the details whether it has hardware strength of installing such software . it could not also established giving the softwares to sobha developers, It could not establish how the seven other persons have got right to waive the compensations, It is also not established that what are the compelling reasons for the assessee to waive the compensation of the software destroyed which are not of small value. Therefore we are of the view that statement of Shri Tarun Goyal is not at all relevant for claim of depreciation of the assessee which assessee is required to establish independently.
35. In view of above facts we confirm the finding of CIT (A) in confirming the disallowance of depreciation of Rs. 84,84,910/- for AY 2008-09 on software purchased by assessee of Rs. 4,24,25,050/-. In the result ground no 1 to 6 of the appeal of the assessee are dismissed.
36. In the result appeal of the assessee for AY 2008-09 is dismissed.
37. For AY 2009-10 and 2010-11 assessee has raised single ground against the confirmation of disallowance of depreciation on these softwares which have been dealt with by us in assessee's appeal for AY 2008-09. Similarly we also confirm the disallowance of depreciation of Rs. 1.35.75.856/- for AY 2009-10 on the same softwares in appeal of assessee for Ay 2009-10 and Rs

81,14,514/- on the same softwares in appeal of the assessee for AY 2010-11. In the result both the appeals of the assessee for AY 2009-10 and 2010-11 are also dismissed.

38. In the result all the three appeals of the assessee is dismissed.

39. Order pronounced in the open court on 10/03/2016.

-Sd/-
(A.T.VARKEY)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:10/03/2016

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi