IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'A', HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER and
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No. 1054/Hyd/2011
Assessment year 2006-07

M/s. Ninestar Enterprises (P) Ltd., Hyderabad PAN: AAACN8024C Appellant	Vs.	The Asst. CIT Circle-16(1) Hyderabad Respondent

Appellant by: Sri Kalyan Das
Respondent by: Sri M. Ravinder Sai

Date of hearing: 19.11.2012
Date of pronouncement: 31.12.2012

O R D E R

PER CHANDRA POOJARI, AM:

This appeal by the assessee is directed against the order of the CIT-IV, Hyderabad dated 28.3.2011 for assessment year 2006-07.

2. The assessee raised the following grounds of appeal:

1. *The Revision order of learned Commissioner of Income Tax is contrary to law and the facts.*
2. *The Id. CIT erred in setting aside the assessment order u/s. 143(3) of the Act with a direction to re do the assessment.*
3. *The appellant contends that Revision order since is based on surmises, suspicion and guess work and for causing enquires which did not render the assessment order erroneous and prejudicial to the interest of revenue.*
4. *The Id. CIT grossly erred in setting aside the assessment order on presumptions and guess work that the appellant has not furnished the information in the assessment proceedings.*
5. *The Id. CIT further erred in holding that no questionnaire was issued by assessing officer calling for the details of dates of acquisition of shares.*
6. *The Id. CIT erred in holding that the assessing officer omitted to examine the dates of acquisition of shares*

held by the appellant, while the shares were held by the appellant for more than a year, which is evident from the details filed on record.

7. *The Id. CIT is not correct in holding that the assessing officer confirmed that No Demat Account had been filed by the assessee company and that the assessment was completed under scrutiny without bringing on record evidence of date of acquisition of shares.*

8. *The Id. CIT further is not correct in holding that exemption of capital gains was granted to the appellant u/s 10(38) of the act, without the information of date of acquisition of shares.*

9. *The Id. CIT failed to note that assessing officer allowed exemption based on the evidence of Demat account date of acquisition of shares and particulars of sale transaction of shares under securities transaction tax (STT).*

10. *The Id. CIT is not correct in holding that no evidence for receipt of dividends to claim exemption u/s. 10(34) of Act was filed by the appellant. Appellant contends that exemption was allowed on verification of evidence.*

11. *The Id. CIT further erred in dealing on issues in the Revision order which were not raised in the show cause notice dt 04-02-2011. Revision proceedings therefore are bad in law.*

12. *The Id. CIT erred in holding that the appellant purchased 56,400 shares not disclosed to the Income Tax Department and directing the assessing officer to assesses its value Rs. 1,10,48,210 to tax as undisclosed investment against long term capital gains claimed exempt on sale of above shares.*

13. *The Id. CIT failed to note that the above shares are Bonus shares received by the appellant at nil cost on the basis of original shares held in the year 2000 which did not constitute income for assessment.*

14. *The Id CIT further erred in holding that the interest income of Rs 11,89,745 is "Income from other sources" while the same constitute business income and was being assessed as such.*

15. *The Id CIT further erred in holding that expenditure relating to dividends income should not have been allowed u/s. 14A of the Act, while the same was allowed in accordance with law.*

16. *The Id. CIT grossly erred in holding that the assessing*

officer made the assessment without application of mind and omitted to examine the material in the assessment proceedings.

17. *The Id CIT erred in directing the assessing officer to recompute capital gains on wrong assumptions of the facts.*

18. *The Id CIT erred in holding that the assessment order passed u/s. 143(3) is erroneous and prejudicial to the Interest of the Revenue relying upon the decision of Delhi High Court (99 ITR 375), ignoring catena of judgments of several High Courts and Supreme Court that Revision order based on presumption and guess works, suspicion and surmises bad in law.*

19. *For these and other grounds argued at the time of hearing, the appellant prays Revision order u/s. 263 of the Act being bad in law requires to be vacated and cancelled.*

3. Brief facts of the case are that the assessee had filed return of Income for the asst year 2006-07 on 25.11.2006 declaring total income of Rs 17,36,424/-. The Dy. Commissioner of Income Tax, Circle-16(1), Hyderabad had completed the assessment u/s 143(3) on 30.09.2008 assessing the total income at Rs. 21,01,889/- .

4. After examining the assessment records for A.Y. 2006-07, the CIT assumed the jurisdiction u/s. 263 of the I.T. Act. 1961, he had issued a notice, setting out the grounds of error and prejudice and calling upon the assessee to show cause as to why the assessment should not be revised or set aside. The grounds of proposed revision were as under.

(i) The assessee had claimed exemption u/s. 10(38) of the I.T Act in respect of Long Term Capital Gains of Rs. 2,41,99,132 on transfer of equity shares of companies and units of equity oriented mutual funds. The Assessing Officer had omitted to examine the dates of acquisition of these shares and units. No questionnaire was issued by Assessing Officer calling for the details of dates of acquisition. There is no order-sheet entry or other correspondence available on record indicating that the dates of acquisition of shares and units were examined or considered.

(ii) Demat accounts for the years in which shares and units were acquired and also for the financial year 2005-06 were neither called for nor furnished by the assessee. The Assessing Officer has confirmed that no such Demat accounts had been filed by the assessee, that he had completed the scrutiny assessment without bringing on record any evidence regarding dates of acquisition of equity shares etc. The ITO (Hqrs) has examined each of the pages in assessment folder but no Demat account for the material period was found. In other words, the assessment was completed granting exemption without examining material evidence on material points desiderated for granting such exemption. Dates of acquisition are necessary information for deciding whether a particular share/equity sale transaction is long term or short term.

(iii) No evidence for receipt of dividends such as dividend warrants for claim of exemption u/s 10(34) was called for by Assessing Officer or filed by the assessee.

(iv) Interest income of Rs 11,89,745/- should have been brought to tax under the head Income from other sources. But the Assessing Officer, against this income, allowed deduction of expenditure relating to incomes which were claimed and granted as exempt, thereby ignoring the provision of section 14A of the I .T. Act, 1961.

(v) The Assessing Officer had omitted to examine these material points and allowed the assessee's claims without application of mind.

5. In response to notices, the assessee's AR appeared from time to time and made written submissions before the CIT. After going through the relevant records as well as the submissions made by the assessee, the CIT observed as follows:

(i) The first issue is regarding the assessee's claim of exemption u/s 10(38) of the Income Tax Act, 1961 in respect of Long Term Capital Gains of Rs. 2,41,99,132/- on transfer of equity shares/units of equity oriented mutual funds. In the course of the proceeding before the CIT, the assessee submitted the relevant details and copies of some of the relevant documents. Examining such details and documents, the CIT noted that the assessee's claim of Long Term Capital gains i.e., Rs. 2.41 Crores included (erroneously) Short Term Capital gains in respect of sale of bonus shares of IPCA Laboratories Limited. During the assessment year under consideration, the assessee happened to sell 800 bonus shares of IPCA Laboratories Limited on 26.08.2005. The 800 bonus shares were sold in two lots i.e., 20 bonus shares were sold as a part of the lot of 820 shares on 26.08.2005. The rest of the bonus shares i.e., 780 were sold on the same day i.e., 26.08.2005 for the consideration of Rs. 3,48,872/- (the cost acquisition being nil). The sale consideration in respect of 20 bonus shares works out to Rs 8,945.43 (cost of acquisition being nil). Hence, the total sale consideration in respect of 800 bonus shares works out to Rs. 3,57,817/- [Rs. 3,48,872 + 8,945]. The record date mentioned in this letter is 31.01.2005. The date of credit of bonus shares to the Demat A/c of the assessee has been stated as 01.03.05. The date of sale of the bonus shares is admittedly 26.08.05. Hence, the duration of holding of bonus shares is evidently less than one year i.e., the minimum period necessary for characterizing the transaction as 'Long Term Capital Gain'. Hence, the amount of Rs. 3,57,817/- is evidently 'Short Term Capital Gains'. But the assessee has erroneously included it in the Long Term Capital gains exemption of claim of Rs. 2.41 crores. The authorized representative has conceded this point (vide order-sheet noting dated 07.03.2011. Hence, the Assessing Officer is directed to bring the said amount of Rs. 3,57,817/- to tax.

(ii) Another equity transaction of the assessee which was taken up for in-depth enquiry and examination pertains to Visual Soft Technologies Limited. Along with the return filed for the asst. year 2006-07, the assessee had enclosed Annual Report for the period 2005-06 which, inter alia, contained schedule relating to investments. Under the head "Long Term - Non-Trade", the assessee had given particulars of number of shares / bonds / units as at 31.03.2005 and as at 31.03.2006. In this schedule the total number of equity shares of Visual Soft Technologies Limited has been stated as 73,107 as at 31.03.2005 and 13,107 as at 31.03,2006 i.e., at the end of the relevant previous year under consideration. It can be seen from this document that against the equity of Visual Soft Technologies Limited, there is absolutely no indication nor mention of any bonus shares whereas there are clear mentions of bonus shares in respect of Tata Infotec Limited, Tata Iron & Steel company, Unichem Laboratories Limited, Wockhardt Limited and all on the same page along with Visual Soft Technologies Limited. Thus, during the asst year under consideration, the assessee claimed to have sold 60,000 shares of Visual Soft Technologies Limited for a total consideration of Rs. 1,17,53.414/-. The assessee claimed the entire 60,000 shares of Visual Soft Technologies Limited as bonus shares and hence claimed that the cost of acquisition was 'Nil'. It claimed exemption of entire capital gains of Rs. 1.17 crores u/s 10(38) of the Income Tax Act. In the course of proceeding before CIT, the assessee was called upon to produce evidence in support of its claim i.e., 60,000 shares were bonus shares. The assessee submitted the bonus shares allotment letter dated 20.09.2000 issued by Visual Soft Technologies Limited. In this letter, the record date has been stated as 25.08.2000. On the said record date, the number of shares held by the assessee has been stated as 8,209. As per the decision of the Board of Directors, two bonus shares for everyone share

held in the company was the entitlement of a shareholder. Hence, the said letter evidences that the total number of bonus shares credited to the account of the assessee were stated as 16,418 (8,209 x 2). In other words, on record date i.e., 25.08.2000, the assessee had 8,209 shares as per the records of the said company i.e., Visual Soft Technologies Limited. Hence, it was allotted 16,418 bonus shares by the letter dated 20.09.2000. As the assessee's claim was 72,818 bonus shares it was called upon to produce evidence of bonus shares allotment letter in respect of rest of the bonus shares i.e., 56.400. Despite several opportunities given to the assessee by the CIT, the assessee could not produce evidence of bonus allotment letter from Visual Soft Technologies Limited in respect of alleged 56,400 bonus shares i.e., in addition to allotment letter. The authorized representative submitted that the relevant evidence has been lost. In this context, the past assessment records, going back to the asst. year 2001-02, were called for and examined with regard to the Visual Soft Technologies Limited equity. There is no dispute that the year of allotment of bonus shares of Visual Soft Technologies Limited was financial year 2000-01 relevant to the asst. year 2001-02. As on 01.04.2000 the assessee was in possession of 50,100 shares of Visual Soft Technologies Limited, valued by the assessee at Rs. 70,27,453/-. Admittedly, there were absolutely no bonus shares in these 50,100 shares as on 01.04.2000. Along with the return filed by the assessee for the A.Y. 2001-02 on 31.10.2001, the assessee had enclosed 'Annexure-II' containing particulars of Long Term Capital gains which, inter alia, recorded sales of shares of Visual Soft Technologies Limited. As per this document, the total long term capital gains have been shown at Rs. 9,66,37,083/- which includes sale of 10,866 shares of Visual Soft Technologies Limited in the period from 1st April 2000 to 24.08.2000. There were no sales of shares by the assessee of Visual Soft

Technologies Limited after 24.08.2000, in the Financial Year 2000-01 i.e., as per the assessment record of the assessee. But, in the course of the scrutiny assessment proceedings relating to the A.Y. 2001-02, the assessee, once again, submitted particulars of long term capital gains showing the long term capital gains as the same figure i.e., Rs. 9,66,37,083/- (one rupee difference). But, in the second set the total number of shares of Visual Soft Technologies Limited sold during the same period i.e., 01.04.2000 to 24.08.2000 has been claimed at the higher figure i.e., 11,791 as against the earlier claim of 10,866 shares. The total number of Visual Soft Technologies Limited shares in the possession of the assessee as at 31.03.2001 has been shown as 1,11,127 valued by the assessee at Rs. 66,09,317/- and out of the said 1,11,127 the assessee had claimed 72,818 as bonus shares. If one calculates back as per the assessee's claim of 72,818 bonus shares, one will get the following results:

a. In order to get 72,818 bonus shares, the assessee must have had 36,409 shares on the record date i.e., 25.08.2000. Undisputedly, the assessee was having 50100 shares on 01.04.2000 and in the period from 01.04.2000 to 24.08.2000, the assessee had admittedly sold 11,791 shares. Thus, going by the assessee's version, as on record date i.e., 25.08.2000, the assessee would be in possession of 38,309 shares of Visual Soft Technologies Limited (50,100 - 11,791). In that case the assessee should get twice that number of bonus shares i.e., 38,309 x 2 = 76,618. Hence, as on 31.03.2001 the assessee should be having closing stock of Rs. 1,14,927 (76,618 + 38,309) i.e., as against the assessee's figure of Rs. 1,11,127. If one takes the sale of Visual Soft Technologies Limited shares in the period from 01.04.2000 to 24.08.2000 at 10,866 the closing stock would still be higher.

6. The CIT observed that thus, going by the assessee's version, there is clear evidence of unacceptable discrepancy. This discrepancy becomes serious when viewed in conjunction with the bonus shares allotment letter of Visual Soft Technologies Limited which had allotted only 16,418 bonus shares. The serious discrepancies were communicated to the assessee vide his letter dated 18.03.2011. The assessee AR miserably failed to furnish any rational, convincing and acceptable explanation. The contentions canvassed by the assessee are only two – viz.,

(i) that the figure of bonus shares in the assessees Demat Account maintained with Karvy are 16.418 + 56.400. A letter was addressed to Karvy Stock Broking limited Hyderabad calling for relevant information u/s 133(6) of the I.T Act i.e.: relating to Visual Soft Technologies Limited in the case of the assessee. The reply received from Karvy reiterated the assessee's version without throwing illuminating light on the evident discrepancy. In the course of the proceeding before the CIT, the Sr. Manager Sri V Seetharam was summoned u/s 131 of the IT Act. He appeared and narrated the version of the assessee orally. A question was put to Sri V Seetharam as to how the entire alleged bonus shares i.e., 72,818 could be credited in the Karvy Demat A/c when the balance in the said Demat A/c with Karvy as on 14.08.2000 is only 8,209 shares of Visual Soft Technologies Limited. Sri V Seetharam admitted that since the balance of shares of Visual Soft Technologies Limited in the Demat A/c of the assessee as on 14.08 2000 was only 8,209, in normal circumstances, the appropriate credit of bonus shares would have been only 16.418. However, he orally submitted speculative point that the assessee might be having certain Visual Soft Technologies Limited shares in physical form not known to the company i.e., Visual Soft Technologies Limited. This does not at all inspire belief. The CIT had also visited Karvy premises in Hyderabad in order to see firsthand relevant computer screen shots and collected relevant computer screen

shots relating to 16,418 bonus shares. In this, the final remark written is verified relating to the alleged 56,400. In this, there is no such comment as 'verified' and the transaction is recorded as 'closed and settled'. At the time of the CIT visit there was an officer-in-charge, apart from Sri V Seetharam. When asked as to the basis on which the entry regarding the alleged bonus shares of 56.400 has been made in the assessee's Demat A/c., they could not give any reply other than to insist that the basis must have been given by the company Visual Soft Technologies Limited. A letter was duly addressed to Visual Soft Technologies Limited, Hyderabad (Merged since October. 2006 with Megasoft limited), calling for relevant information u/s 133(6) of the LT. Act. The authorities of Visual Soft Technologies Limited failed to give any reply. Strangely, the CIT letter to them was sent by them in turn to M/s. Karvy Stock Broking Limited, Hyderabad for furnishing the necessary reply. Thus, despite strenuous efforts made by the CIT to gather the relevant evidence from objective source, no reliable evidence could be found and the assessee and the authorized representative also miserably failed to produce acceptable evidence in support of the alleged bonus shares i.e., 56.400. In the absence of reliable evidence and in view of the bonus shares allotment letter of Visual Soft Technologies limited dated 20th September, 2000 which had allotted only 16,418/- bonus shares, it has to be taken that the assessee had only got bonus shares of 16,418. As against this, the assessee claimed alleged bonus shares of 56,400/-. The only possible rational information in the given facts and circumstances would be that the assessee must have purchased the shares and not disclosed the same to the Department. It is the matter on record that the assessee's premises had been covered under search operation in 1998-1999

(ii) It is the claim of the assessee that it has sold 60,000 bonus shares during the asst. year under consideration. Out of these 60.000 alleged bonus shares, 56,400 happen to be the alleged bonus shares for which the assessee has no evidence and the only rational inference possible is that these 56,400 shares must have been purchased by the assessee with undisclosed investment. That would leave 3600 genuine bonus shares. At the rate of sale consideration admitted by the assessee, the sale value of 3600 bonus shares would be Rs 7,05,204. The Assessing Officer is directed to treat this amount as genuine claim on Long Term Capital gains and to allow the same as claimed after verifying the STT payment in the original document. The total sale consideration admitted by the assessee is Rs 1,17,53,414/-. After deducting Rs 7,05,204/-. The balance sale consideration will be Rs. 1,10,48,210. This would apparently relate to the alleged bonus shares of 56,400 which are unproved. The market value of Visual Soft Technologies Limited shares peaked in the period May, June, July and August going up to Rs 5,850.04 Ps per share. Hence, in terms of rational probability the assessee would incline to make hay by selling its shareholding i e. 50,100 shares relating to Visual Soft Technologies Limited. But, out of 50,100 shares held as on 01.04.2000 the assessee apparently sold only 11,791 shares, keeping back as many as 38,309 shares. This would be inconceivable. However as on 31 03.2001, the share value had steeply declined to Rs. 223.30 Ps per share. Taking the least possible cost of acquisition during the year 2000-01 i.e., Rs 223.30 Ps the cost of acquisition of 56.400 shares works out to Rs. 1.25,94.120/- This is the least possible cost of acquisition and as the admitted sale consideration is Rs. 1.17 Crores, there ought to have been long term capital loss. But the assessee has disclosed income of Rs. 1,1 0,48,210 relating to these so-called bonus shares i.e., 56,400. Hence, this amount has to be treated

as income from 'Other Sources'. The Assessing Officer is directed to bring this amount of Rs. 1,10,48,210 to tax as 'income from other sources', not as income from long term capital gains/ loss

7. Regarding the **second issue** i.e., regarding the exemption claim of the assessee u/s., 10(34) in respect of the dividends, the CIT noted that the original assessment had been completed without examining or enquiring into the evidence relating to the dividend warrants. The Assessing Officer is directed to examine this matter with reference to original dividend warrants and to allow the exemption claim only, if the assessee discharges the burden of establishing its entitlement to the exemption claimed by producing proper evidence.

8. Regarding the **third issue** i.e., regarding interest income of Rs. 11,89,745/- the CIT observed that there is no dispute that this income falls under the head income from Other Sources'. This ought to have been assessed as income from other sources i.e., the entire amount of Rs. 11,89,745/-. But the Assessing Officer had allowed certain deduction from this income i.e., deduction of expenditure relating to exempt income. Sec 14A of the IT Act does not allow such deduction. Hence, the CIT directed the Assessing Officer to bring to tax the entire amount of Rs. 11,89,745/- as income from 'Other Sources'

9. The CIT observed that while completing the original assessment, the Assessing Officer had not at all enquired into the issues stated in the show-cause notice. He had mechanically completed the assessment on the erroneous assumption of the correctness of the assessee's claims of exemptions and deduction. He had not called for the relevant evidence regarding dates of acquisition of shares, nor the relevant Demat A/c. Etc. These serious omissions on his part have rendered the assessment not only erroneous but also prejudicial to the interest of revenue in the light of the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises vs. Addl. CIT and others 99 ITR 375 (Delhi) as well as in the

light of the decision of Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd. vs. CIT (109 Taxman 66). It is pertinent to extract the relevant portion of the land mark Judgment of Hon'ble Apex Court as under

> *"An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous In the same category fall orders passed without applying the* principles *of natural justice or without application of mind.*
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> xxxx
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> *The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person it will certainly be prejudicial to the interests of the Revenue"*

10. In view of the aforesaid, the CIT held that the assessment completed by the DCIT, Circle-16(1), Hyderabad is erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, he set aside the said assessment order with the direction to the Assessing Officer to redo the same in the light of the above findings, observations and directions. Against this, the assessee is in appeal before us.

11. The learned AR submitted that the Commissioner of Income Tax-IV Hyderabad initiated Revision Proceedings u/s. 263 of the IT Act for the assessment year 2006-07 on the alleged grounds that while the Assessing Officer passed Assessment Order *u/s.* 143 (3) of the IT Act did not consider the following issues:

(i) AO omitted to examine the dates of the acquisition of the bonus shares

(ii) No questionnaire calling for details of dates of the acquisition of shares was issued

(iii) Demat accounts were neither called for nor furnished by the assessee.

(iv) Assessment was completed granting exemption without Examining the material

(v) No evidence of receipt of dividend warrants to claim exemption u/s. 10(34) of the Act was filed.

(vi) Expenditure on exempted income was allowed ignoring provisions of Section 14(A) of the Act

12. The AR submitted that the assessee filed Income Tax Return along with various details and that during the course of scrutiny Assessment Proceedings, as directed by the Assessing Officer, the assessee has filed several details and after due consideration of such details, assessment was made u/s. 143(3) of the Act.

13. The AR further submitted that among various details filed along with the Return of Income for assessment purposes include computation of Income and annexures disclosing acquisition of shares of various companies including equity shares of Visual Soft Technologies Ltd in the year 1998. Further in the course of scrutiny Assessment Proceedings as directed by the Assessing Officer the Assessee filed various details through letters dated 1st and 10th September 2008. Therefore, it is not correct to state that the assessee did not file required details relating to the date of acquisition of shares and other details. The Assessing officer was satisfied with the information filed and based on the above information assessment was completed u/s. 143(3) of the Act and the findings of the Assessing Officer are as follows:

> *"In response to the notice and questionnaire issued, the Authorised Representative of the assessee, Shri A. Prakash, Accounts Manager attended from time to time and filed information called for Books of account produced were verified. After examination of information furnished and considering submissions made by the assessee, the assessment* is *completed* as *under:*
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> *It* is *observed from the profit and loss account that the total income derived from various activities amounts to Rs. 2,63,87,772 out of which Rs. 2,50,99,222* is *claimed* as *exempt income from sale of shares and mutual funds and receipts of dividends. However, the assessee has claimed personal and administrative expenses of Rs. 1,29,487 +* Rs. *9,40,187 respectively. This expenditure* is *in relation to both the activities of earning of taxable incomes and exempt*

incomes as *claimed by the assessee. Hence, the entire expenditure has to be segregated* as *per Notification No. S.O. 547(E) dated 24.03.2008 issued by the CBDT. Accordingly, the disallowable expenditure works out to Rs. 3,66,465* as *given below"*

14. The AR submitted that from the above findings of the Assessing Officer it may be noted that the questionnaire was issued by the Assessing Officer and information called for was filed by the Assessee and Books of account were produced before the Assessing officer which were verified and after examination of information furnished and submissions made by the assessee during Original assessment proceedings, assessment was completed. Further as regards to expenditure on exempted income the Assessing Officer recorded his findings based on CBDT Notification dated 24.3.2008 and disallowed Rs. 3.66 lakh expenditure u/s 14A of the Act. In the above facts and circumstances the allegation that the Assessing officer passed assessment order u/s 143(3) of the Act without calling for details and information is . contrary to the facts on record and, therefore, Revision order u/s 263 of the Act is highly arbitrary and bad in law and requires to be set aside and cancelled.

15. The AR submitted that in the Revision Proceedings one of the allegations made by the Id CIT that the Assessee did not file any evidence in support of receipt of dividends and claimed Exemption u/s. 10(34) of the IT Act and the same was allowed. He submitted that based on dividend warrants, the Assessee made a claim in the return of income and furnished the dividend warrants and after verification exemption was allowed by the Assessing Officer. Further the Id CIT in the Revision Orders u/s 263 of the Act directed the Assessing Officer to examine/investigate the claim and allow exemption u/s 10(34) of the Act. The Assessing Officer accordingly after due verification and examination of the claim with the material on record, allowed exemption of dividends Income u/s 10(34) of the Act which is inconformity with the claim allowed in the Original Assessment Order. Copy of the consequential order passed by the Assessing Officer u/s 143(3) r.w.s. 263 of the Act dated 30.06.2011 is forming Part of Paper Book filed vide Page 50 to 52. It is submitted, in

the above facts and circumstances Revision Orders u/s 263 of the Act have been passed to examine and investigate the claim in respect of dividends income originally allowed. It is settled law Revision u/s 263 of the does not survive where directions are given for examination and investigation of the issues. Revision Order is highly arbitrarily and made on presumption conjectures and suspicion and therefore is required to be vacated and cancelled.

16. The AR submitted that as regards to exemption of long term capital gain on sale of Bonus shares of Visual Soft, the Assessee had filed Statement of acquisition of shares along with the return of Income Vide Page 12 to 21 of the Paper Book. Further Assessee filed copies of Invoices/Brokers Contract Notes and Demat Accounts in respect of sale of the above shares in the Original assessment Proceedings vide letter dated 10.9.2008 Pages 1 to 5 of the Paper Book. From the perusal of Demat Account (Paper Book pages 40-42) maintained by the Assessee company with M/s. Karvy Share Broking Ltd filed on record during Original Assessment Proceedings it may be noted the Demat Account disclosed Bonus shares of Visual Soft received by the Assessee in Sept 2000.

17. The AR submitted that the Assessee was holding originally, equity shares of Visual Soft Technologies Ltd since 1998. At the time of allotment of Bonus shares in September 2000, the Assessee was holding 36,409 original equity shares of the above Company. Out of the above shares, 8209 equity shares were parked in Demat account with M/ s. Karvy Stock Broking Limited and the remaining 28,200 shares were continued to be held by the Assessee in physical form. Further, Visual Soft Technologies Ltd declared Bonus Shares in September 2000 in the ratio of 2 Bonus Shares on each Original Share held by the Shareholders. The Assessee since was holding 36409 Original shares as disclosed above received 72818 Bonus shares and entire Bonus shares issued by Visual Soft Technologies Ltd came to be credited in the Demat Account with M/s. Karvy Stock Broking Ltd vide the following transaction entries on Page 41 of the Paper Book.

1.	On Sept. 21, 200 under transaction No. 319 Bonus shares	16,418
2.	On Sept. 27, 2000 under transaction No. 3238 Bonus shares under caption "corporate Action"	56,400
	Total bonus shares received by the assessee company in September, 2000	72,818

18. The AR submitted that the above facts were brought to the Notice of the Id CIT in the Revision Proceedings through letter dated 16.3.2011 along with statement of Demat Accounts vide Page Nos. 44 to 48 forming part of the paper book. From the above it may be noted that the above 72618 Bonus shares were being held by the assessee in the Demat Account with M/s. Karvy Stock Brokering Ltd since 21.9.2000/27.9.2000. Out of the above Bonus Shares the Assessee Company sold 60,000 Bonus shares in the year relevant to the Assessment year 2006-07 under consideration. The Bonus Shares since were held from Sept 2000 and sale in the Assessment year 2006-07 was charged to Securities Transaction Tax (STT) the Assessee claimed Exemption of Capital Gains u/s. 10(38) of the Income Tax Act. Cost of the Bonus shares since was NIL entire gross sale consideration was disclosed for Capital gains. The above information was filed on record with the Assessing Officer in the Original Assessment Proceedings through letter dated 1st & 10th September 2008 referred to above. In the scrutiny Proceedings the Assessing Officer thus got satisfied about the correctness of the Claim made in respect of long term Capital gains on sale of Bonus shares and allowed Exemption of Capital gains u/s 10(38) of the IT Act. In the above facts and circumstances, allegation of Id CIT that the assessee Company did not file details of acquisition of Bonus shares and sale of Bonus shares is not correct.

19. The AR submitted that in the course of Revision Proceedings the Id CIT made investigation in depth in respect of Sale of Bonus shares and period of acquisition of such shares with references to transactions recorded in Demat Accounts right from 1st January, 1998 to 31st March, 2006 with M/s. Karvy Stock Broking Limited wherein 72818 Bonus Shares were found credited having received by the assessee company in

Sept 2000. He further submitted that out of 72,818 Bonus shares, credited in the Demat Account with M/s. Karvy Stock Broking Ltd in respect of 56,400 Bonus shares entry was made under Caption "Corporate Action". As required by the Id CIT the assessee though provided clarification in respect of Caption "Corporate Action" that the same represented credit in respect of Bonus shares from body Corporate and such Caption "Corporate Action" is commonly used under Commercial terms. The Id CIT required further clarification and confirmation on this Caption "Corporate Action" from M/s. Karvy Stock Broking Ltd. The Assessee Company therefore requested M/s. Karvy Stock Broking Ltd through letter dated 10.3.2011 to clarify and explain the nature of Caption "Corporate Action". M/s. Karvy Stock Broking Ltd accordingly clarified that the above transaction was in respect of allotment of Bonus shares credit entry is through Corporate body. Further for easy understanding purposes issued one more copy of the Demat Account wherein against Corporate action allotment of Bonus shares received from the Company was mentioned there in vide clarification letter and Demat Account page 45 & 47 forming part of Paper Book.

20. The AR further submitted that not being satisfied with the above clarification given by M/s. Karvy Stock Broking Ltd, on suspicion the Id CIT required the Sr. Manager Mr V. Seetharam of Karvy Stock Broking Ltd who had given the letter of clarification, duly signed, to appear before him personally. In pursuance to above, the Manager appeared before the Id CIT and reaffirmed the above clarification. Further not having got satisfied with the testimony of the said Manager, the Id CIT personally visited the office of M/s. Karvy Stock Broking Ltd and verified the correctness of Bonus Share Transactions from the Computer discs and Books of Account.

21. The AR submitted that the assessee-company received 72818 bonus shares of Visual Soft in Sept 2000, which is evident from delivery/allotment recorded in the Demat Accounts as mentioned above. The Id CIT as stated above alleged that the sale of above shares are not

Bonus shares and they have been purchased by the Assessee from their undisclosed income and directed the AO to assess the gross sale consideration received as the undisclosed income of the Assessee for tax purposes. It may be noted that in the event the Id CIT is of the opinion that the shares sold are not Bonus Shares and such shares were acquired from out of undisclosed income, for argument sake it is submitted that the said shares having been received by the Assessee in Se pt 2000, undisclosed income if any, should have been assessed in the Assessment Year 2001-2002 and not in the year of Sale in the assessment year 2006-07. Further the above sale in the Assessment year 2006'-07 since was charged to Securities Transaction Tax (STT) Capital gains in any event are Exempt from tax u/s. 10(38) of the Act. Considered from any point of view the action initiated by the Id CIT u/s. 263 of the Act is highly arbitrary presumptuous and requires to be vacated.

22. The AR further submitted that in the Revision Proceedings the Id CIT again interfered with the method and computation of expenditure determined by the Assessing Officer in the original assessment for disallowance u/s. *14A* of the Act. The Assessing Officer segregated taxable income and the exempted income as per the CBDT circular dated 24.3.2008 and determined the expenditure to be disallowed u/s 14A of the ITA Act in respect of exempted income at Rs. 3.66 lakhs.

23. The AR submitted that for disallowance of expenditure on exempted income u/s 14A of the Act Revenue has to establish that the expenditure sought to be disallowed is based on evidence and not on ad-hoc or estimate basis. Further disallowance of expenditure as required to be made in accordance with Rule 8D of the IT Rules which is effective from 24.3.2008 and applicable from the assessment year 2008-2009 as held by the Hon'ble Bombay High Court in the case of Godrej Co. (328 ITR 81). The assessment under consideration since is related to the Assessment year 2006-07, actual expenditure incurred only is required to be disallowed. Having regard to the above and law bearing on the subject, the Assessing Officer by adopting a particular method determined the

disallowance of expenditure u/s 14A of the Act at Rs. 3,66,465. While the facts on record being as above, the Ld. CIT in the Revision Orders directed the Assessing Officer for disallowance of entire expenditure of the Assessee Rs. 10.69 lakhs with a direction to assess the amount under other sources. It is submitted that the Assessing Officer made assessment on due consideration of the facts of the case and disallowed a part of the expenditure Rs. 3.66 lakhs in the Original Assessment, and the same cannot be substituted under Revision proceedings *u/s 263* of the Act. In the above facts and circumstances we submit the Revision Order u/s. 263 of the Act is highly arbitrary and bad in Law required to be cancelled and vacated.

24. The AR submitted that in the matter of revision u/s. 263 of the Act several courts and Tribunals have laid down the law and having regard to the law relied upon by the Assessee in the following decisions the Revision order u/s. 263 of the Act is highly arbitrary untenable and bad in law and requires to be cancelled and vacated. He relied on the ratio laid down in the following case law:

(a) Cit vs Honda Siel Power Products Limited (333 ITR 547) (Del) wherein held that there was no material to indicate that the AO had not applied his mind to the provisions of the IT Act. Presumption that the Assessment Order passed u/s. 143(3) by the *AO* had been passed upon, application of mind had not been rebutted by the revenue. No additional facts were necessary before AO for allowing exemption - Revision Order was not correct.

(b) CIT vs. Giridhari Lal (258 ITR 331) (Raj) wherein held, AO after going through material on record and after considering the explanation of the assessee assessment was made. It could not be said AO had not applied his mind. ITAT was correct in cancelling the Order u/s 263 of the Act.

(c) CIT vs. Arvind Jewellers (259 ITR 502) (Gauhati): Held, the assessee had produced relevant material and offered explanations in pursuance of the notices issued under section 142(1) as well as section 143(2) of the Act and after considering the material and explanations, the Income-tax Officer had come to a definite conclusion. The mere fact that different view can be taken should not be the basis for an action under section 263. The order of revision was not justified.

(d) CIT vs. Gabriel India Ltd (203 ITR 108) (Bom). The decision of the AO could not be held erroneous simply because in his Order he did not make an elaborate discussion. The CIT after initiating 263 proceedings he could not state about the expenditure. CIT simply asked the AO to re-examine the matter that was not possible. IT AT was right in setting aside the Order u/s 263 of the Act.

(e) Kshatriya Girls School Managing Board vs. CIT (1999) [(151 CTR (MAD) 204]: Exemption granted u/s. 19(22) for earlier and subsequent years Revision Orders not valid.

(f) Ramakanth Singh vs. CIT 137 TTJ (PAT) 67 AO examined books of account details and explanation were given by the assessee and hence cannot be said that no enquiry was made by AO. It can be case a of inadequate enquiry which does not permit action u/s 263 of the IT Act.

(g) CIT vs. Smt. D. Valliammal (230 ITR 695) (Mad): CIT set aside the Order for verification of accounts - Order not valid.

(h) Piem Hotels Ltd. vs. Dy CIT (135 TTJ 228) (Mum): Merely because according to the CIT AO has not examined as to the exemption and not applied his mind Revision Order cannot be sustained.

(i) AP Paper Mills Ltd vs. ACIT 128 TTJ 596 (Hyd) "AO was justified in allowing depreciation on such goodwill and CIT was not correct in invoking the provisions of s. 263 - Moreover AO has followed one of the courses of action permitted by law - Thus, the order cannot be said to be erroneous so far as it is prejudicial to the interest of Revenue".

(j) Smt. Zubi Kochar vs. ACIT (309 ITR 192) (Del): Direction given by CIT u/s 263 of the Act to AO to examine the issue, Revision not tenable in law.

(k)CIT vs Max India Limited (295 ITR 282) (SC): Where 2 views are possible and AO has taken one view with which the CIT does not agree. It would not be treated as erroneous Order prejudicial to the revenue.

(l) Antala Sajay Kumar Ravjibhai vs. CIT (135 ITD 506) (Rajkot))135 ITD 506) : Where AO has taken a particular view consciously after considering the facts of the case. Subsequently CIT wanted to substitute his views with the AO. Revision not permissible and set aside.

25. The DR relied on the order of the CIT.

26. We have heard both the parties and perused the material on record. In view of the foregoing, it can safely be said that an order passed by the Assessing Officer becomes erroneous and prejudicial to the interests of the Revenue under Section 263 in the following cases:

(i) *The order sought to be revised contains error of reasoning or of law or of fact on the face of it.*

(ii) The order sought to be revised proceeds on incorrect assumption of facts or incorrect application of law. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

(iii) The order passed by the Assessing Officer is a stereotype order which simply accepts what the assessee has stated in his return or where he fails to make the requisite enquiries or examine the genuineness of the claim which is called for in the circumstances of the case.

27. We shall now turn to the facts of the case to see whether the case before us is covered by the aforesaid principles. Perusal of the assessment order passed by the Assessing Officer does not show any application of mind on his part. He simply accepted the claim of the assessee with regard to the issues considered by the CIT. This is a case where the Assessing Officer mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. The evidence available on record is not enough to hold that the return of the assessee was objectively examined or considered by the Assessing Officer. It is because of such non-consideration of the issues on the part of the Assessing Officer that the return filed by the assessee stood automatically accepted without any proper scrutiny. The assessment order placed before us is clearly erroneous as it was passed without proper examination or enquiry or verification or objective consideration of the claim made by the assessee. The Assessing Officer has completely omitted to examine the issues in question from consideration and made the assessment in an arbitrary manner. His order is a completely non-speaking order on the issues herein. In our view, it was a fit case for the learned Commissioner to exercise his revisional jurisdiction under section 263 which he rightly exercised by cancelling the assessment order and directing the Assessing

Officer to pass a fresh order considering the issues raised by the CIT. In our view, the assessee should have no grievance in the action of learned Commissioner in exercising the jurisdiction u/s. 263 of the IT Act.

28. It was however contended by the learned Counsel that the Assessing Officer had taken a correct view in accepting the return of the assessee with reference to the issue in dispute and hence, the Commissioner was not justified in assuming the revisional jurisdiction under Section 263. We have given our thoughtful consideration to the aforesaid submissions. As already stated earlier, an order becomes erroneous because inquiries, which ought to have been made on the facts of the case, were not made and not because there is anything wrong with the order if all the facts stated or the claims made in the return are assumed to be correct. Thus, it is mere failure on the part of the Assessing Officer to make the necessary inquiries or to examine the claim made by the assessee in accordance with law, which renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing more is required to be established in such a case. One would not know as to what would have happened if the Assessing Officer had made the requisite inquiries or examined the claim of the assessee in accordance with law. He could have accepted the assessee's claim. Equally, he could have also rejected the assessee's claim depending upon the results of his enquiry or examination into the claim of the assessee. Thus, the formation of any view by the Assessing Officer would necessarily depend upon the results of his inquiry and conscious, and not passive, examination into the claim of the assessee. If the Assessing Officer passes an order mechanically without making the requisite inquiries or examining the claim of the assessee in accordance with law, such an order will clearly be erroneous in law as it would not be based on objective consideration of the relevant materials. It is therefore, the mere failure on the part of the Assessing Officer in not making the inquiries or not examining the claim of the assessee in accordance with law that *per se* renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing else is required to be

established in such a case to show that the order sought to be revised is erroneous and prejudicial to the interests of the revenue.

29. We are unable to accept the submission of the learned Counsel for two other reasons also. First reason is that the view so taken by the Assessing Officer without making the requisite inquiries or examining the claim of the assessee will *per se* be an erroneous view and hence will be amenable to revisional jurisdiction under Section 263. Second reason is that it is not taking of any view that will take the matter under the scope of Section 263. The view taken by the Assessing Officer should not be a mere view in vacuum but a judicial view. It is well established that the Assessing Officer being a quasi-judicial authority cannot take a view, either against or in favour of the assessee / revenue, without making proper inquiries and without proper examination of the claim made by the assessee in the light of the applicable law. As already stated earlier, we are not able to appreciate on what material was placed before the Assessing Officer at the assessment stage to take such a view. The assessee has also not been able to lead enough evidence to show to us that any inquiry was made by the Assessing Officer in this regard. Therefore mere allegation that the Assessing Officer has taken a view in the matter will not put the matter beyond the purview of Section 263 unless the view so taken by the Assessing Officer is a judicial view consciously based upon proper inquiries and appreciation of all the relevant factual and legal aspects of the case. The judicial view taken by the Assessing Officer may perhaps place the matter outside the purview of Section 263 unless it is shown that the view so taken by the Assessing Officer contains some apparent error of reasoning or of law or of fact on the face of it.

30. We have carefully gone through the various case-law cited by the AR. "Adopting" one of the courses permissible in law necessarily requires the Assessing Officer to consciously analyse and evaluate the facts in the light of relevant law and bring them on record. It is only then that he can be said to have "adopted" or chosen one of the courses permissible in law. The Assessing Officer cannot be presumed or attributed to have "adopted"

or chosen a course permissible in law when his order does not speak in that behalf. Similarly, "taking" one view where two or more views are possible also necessarily imports the requirement of analysing the facts in the light of applicable law. Therefore, proper examination of facts in the light of relevant law is a necessary concomitant in order to say that the Assessing Officer has adopted a permissible course of law or taken a view where two or more views are possible. It is only after such proper examination and evaluation has been done by the Assessing Officer that he can come to a conclusion as to what are the permissible courses available in law or what are the possible views on the issue before him. In case he comes to the conclusion that more than one view is possible then he has necessarily to choose a view, which is most appropriate on the facts of the case. In order to apply the aforesaid observations to a given case, it must therefore first be shown that the Assessing Officer has "adopted" a permissible course of law or, where two views are possible, the Assessing Officer has "taken" one such possible view in the order sought to be revised under Section 263. This requires the Assessing Officer to take a conscious decision; else he would neither be able to "adopt" a course permissible in law nor "take" a view where two or more views are possible. In other words, it is the Assessing Officer who has to adopt a permissible course of law or take a view where two or more views are possible. It is difficult to comprehend as to how the Assessing Officer can be attributed to have "adopted" a permissible course of law or "taken" a view where two or more views are possible when the order passed by him does not speak in that behalf. We cannot assume, in order to provide legitimacy to the assessment order, that the Assessing Officer has adopted a permissible course of law or taken a possible view where his order does not say so. The submissions made by the learned Counsel, if accepted, would require us to form, substitute and read our view in the order of the Assessing Officer when the Assessing Officer himself has not taken a view. It could have been a different position if the Assessing Officer had "adopted" or "taken" a view after analysing the facts and deciding the matter in the light of the applicable law. However, in the case before us, the Assessing Officer has

not at all examined as to whether only one view was possible or two or more views were possible and hence, the question of his adopting or choosing one view in preference to the other does not arise. The aforesaid observations do not, in our view, help the assessee; and rather they are against the assessee.

31. It was next contended by the learned Authorised Representative that the Assessing Officer had considered all the relevant aspects of the case carefully while passing the order. According to him, the mere fact that the assessment order passed by the Assessing Officer was short would neither mean failure on his part in not examining the matter carefully nor would render his order erroneous so long as the view taken by him was a possible view. In our view, the aforesaid submission of the assessee must fail for the reasons already explained in the foregoing paras of this order as the order, which is sought to be revised under Section 263 reflects no proper application of mind by the Assessing Officer and thus be amenable to revision under Section 263. In this case before us, the assessment order passed by the Assessing Officer lacks judicial strength to stand. It is not a case where the order is short but is not supported by judicial strength. It is in this view of the matter that we feel that the learned Commissioner has correctly exercised his revisional jurisdiction under Section 263.

32. In our opinion, the Assessing Officer has been entrusted the role of an investigator, prosecutor as well as adjudicator under the scheme of the Income-tax Act. If he commits an error while discharging the aforesaid roles and consequently passes an erroneous order causing prejudice either to the assessee or to the State Exchequer or to both, the order so passed by him is liable to be corrected. As mentioned earlier, the assessee can have the prejudice caused to him corrected by filing an appeal; as also by filing a revision application under Section 264. But the State Exchequer has no right of appeal against the orders of the Assessing Officer. Section 263 has, therefore, been enacted to empower the Commissioner to correct an erroneous order-passed by the Assessing Officer which he considers to be prejudicial to the interest of the revenue. The Commissioner has also been

empowered to invoke his revisional jurisdiction under Section 264 at the instance of the assessee also. The line of difference between Sections 263 and 264 is that while the former can be invoked to remove the prejudice caused to the State the later can be invoked to remove the prejudice caused to the assessee. The provisions of Section 263 would lose significance if they were to be interpreted in a manner that prevented the Commissioner from revising the erroneous order passed by the Assessing Officer, which was prejudicial to the interest of the revenue. In fact, such a course would be counter-productive as it would have the effect of promoting arbitrariness in the decisions of the Assessing Officers and thus destroy the very fabric of sound tax discipline. If erroneous orders, which are prejudicial to the interest of the revenue, are allowed to stand, the consequences would be disastrous in that the honest tax payers would be required to pay more than others to compensate for the loss caused by such erroneous orders. For this reason also, we are of the view that the orders passed on an incorrect assumption of facts or incorrect application of law or without applying the principles of natural justice or without application of mind or without making requisite inquiries will satisfy the requirement of the order being erroneous and prejudicial to the interest of the revenue within the meaning of Section 263.

33. Adverting to the facts of the present case, there is no enquiry by the Assessing Officer whatsoever on the issue in dispute. He just accepted the claim of set off of earlier year unabsorbed depreciation in the assessment year under consideration. Being so, the CIT assumed jurisdiction u/s. 263 of the Act. The argument of the assessee's counsel is that there are decisions in favour of the assessee. Therefore, the view adopted by the Assessing Officer is one of the possible views. The general law on the question of revisional jurisdiction is that an order passed by the Assessing Officer cannot be held to be erroneous, if the Assessing Officer has followed one of the possible views on the subject. But in this case the Assessing Officer not adopted any view on the issue raised by the CIT. Further, the assessee's counsel harped upon that the bonus shares of 56,400 were allotted to the assessee in relation to original equity shares of

28,200 and 14,408 bonus shares were allotted with regard to original shares held by the assessee at 8,209. In support of this, the assessee filed a letter dated 27th November, 2012 from Megasoft Ltd., Chennai.

34. We have carefully gone through the arguments as well as contents of the letter from Megasoft Ltd. We have also compared this letter with the Demat account placed in Paper Book at pages 40 to 42. We have noticed from the Demat account that as on 14th August, 2000 the assessee is holding only 8,209 shares. Consequent to this on 21st September, 2000 the assessee got bonus offer at 16,418 shares. Thus, the total balance on this date is at 24,627 shares. Later, on 27th September, 2000 there was an entry by transaction No. 3238 with narration "by transaction No. 3238 by corporation action" at 56,400 shares. It is to be noted herein that there is no mention of anything about bonus offer or mention of any original shares in relation to which 56,400 shares were allotted. The argument of the assessee's counsel is totally misleading and faraway from truth. Being so, we are not in a position to give any credit to the letter filed by the assessee from Megasoft Ltd., as the Demat account having no mention about the original shares of 28,200 against which purported to be bonus shares were allotted. On this issue, we have no hesitation to confirm the order of the CIT who has taken great pain in bringing the various true facts related with this issue.

35. Regarding the other issue, the CIT has only given the direction to the Assessing Officer to enquire and redo the assessment in accordance with law. We do not find any infirmity in the order of the CIT passed u/s. 263 of the Income-tax Act, 1961 and the same is confirmed.

36. In the result, assessee appeal is dismissed.

Order pronounced in the open court on 31st December, 2012.

Sd/-	Sd/-
(SAKTIJIT DEY)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated the 31st December, 2012

Copy forwarded to:

1. M/s. Ninestar Enterprises (P) Ltd., c/o. M/s. Kalyandas & Co., Chartered Accountants, No. 15, Venkateshwara Colony, Narayanaguda, Hyderabad-500 029.
2. The Asst. CIT, Circle-16(1), Hyderabad.
3. The CIT-IV, Hyderabad.
4. The JCIT, Range-16, Hyderabad.
5. The DR – A Bench, ITAT, Hyderabad.

Tprao