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

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER**
**AND**
**SHRI A.T. VARKEY, JUDICIAL MEMBER**

**ITA Nos. 4309 to 4313/Del/2013**
**Assessment Years: 2005-06 to 2009-10**

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| DCIT,<br>Central Circle,<br>Ghaziabad.<br>(Appellant) | vs. | M/s Surya Merchants Ltd.<br>1010, Faiz Road,<br>Karol Bagh, New Delhi.<br>(Respondent) |

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**ITA Nos. 4367 to 4370/Del/2013**
**Assessment Years: 2006-07 to 2009-10**

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| M/s Surya Merchants Ltd.<br>1010, Faiz Road, Karol Bagh,<br>New Delhi-110005<br>(Appellant) | vs. | DCIT,<br>(Central Circle),<br>Ghaziabad.<br>(Respondent) |

Appellant by: Sh. Ramesh Chandra, CIT(DR)
Respondent by: Sh. G.N. Gupta. I.T.P.

## ORDER

**PER BENCH**

These are batch of appeals (five preferred by the revenue and four preferred by the assessee) are relating to A.Y. 2005-06 to 2009-10. Since these appeals arise from a common order dated 28/03/2013 framed by CIT(A)-Meerut and since the issues are common, so, they were heard together and are being decided by this consolidated order. To decide the issues involved in these appeals, appeal preferred by the revenue for the Assessment Year 2005-06 is taken up first. In the appeal for A.Y. 2005-06 the revenue has raised the following grounds:

1. *"That the ld. CIT(A) has erred in law and on facts in allowing deduction u/s 80IB of the Income Tax Act without appreciating the fact that the audit report in Form No. 10CCB was not filed along with the Income Tax Return.*
2. *That the CIT(A) has erred in law and on facts in directing to re-compute the deduction u/s 80IB in respect of disallowance made u/s 40A(3) of the IT Act, 1961 is totally disregard to the provisions of the Income Tax Act which require the exemption to be granted in accordance with the audited account filed alongwith the return in respect of the eligible unit.*
3. *In terms of sub-section 80IB(13) of the Act, the assessee is required to filed audited account of the eligible unit determining the profits thereof and file it alongwith the return of income. This makes mandatory that the deduction u/s 80IB is available only in respect of taxable profit of the eligible unit disclosed in the return of income and not in respect of subsequent enhancement of the income which is made y the AO over and above the returned income of the eligible unit.*
4. *That the order the ld CIT(A) being erroneous in law and on facts which needs to be vacated and order of the AO be restored.*
5. *That the appellant craves leave to add or amend any one or more of the ground of the appeal as stated above as and when need for doing so may arise."*

2. All the aforesaid grounds project the grievance regarding the direction of the CIT(A) to allow deduction u/s 80IB of the Income Tax Act, 1961 (herein after 'the Act').

3. The relevant facts are that the appellant had furnished an original return of income on 18/01/2006 for the instant assessment year declaring income of Rs. 34,89,935/- after claiming a deduction of Rs. 41,83,813/- u/s 80IB of the Act. This claim of deduction u/s 80IB of the Act was allowed by an order dated 10/07/2007 u/s 143(3) of the Act. Pursuant to search on 06/02/2009 u/s 132 of the Act, where incriminating documents were seized, which revealed that the assessee was receiving partially cash on the sale of flats/shops. The documents included agreements for booking of shops/commercial space in Supertech Shopprix Mall located at Vaishali and Kaushambhi. Avante Garde project located at Vaishali and Rameshwar Orchid at Kaushambhi. The original agreement forms were later on cancelled and fresh agreement was prepared showing a much lesser sale consideration. From the seized documents the total undisclosed income was worked out to Rs.32,71,38,984/- out of which Rs. 5,68,80,271/- pertained to the year under consideration.

4. Subsequently the AO issued notice u/s 153A of the Act on 22/02/2010 and pursuant to the same, the appellant furnished a return declaring an income of Rs.94,91,330/- after claiming deduction which included expenses of Rs.3,49,52,193/- and deduction u/s 80IB of the Act of Rs. 60,27,365/-. In the order of the assessment, the AO noted that in the return u/s 153A, the assessee has made an enhanced claim of Rs.18,43,552/- u/s 80IB of the Act. He, therefore, directed the assessee to explain why in the absence of audit report, filed at the time of original return, the additional claim u/s 80IB(10) should not be disallowed. In reply, the assessee submitted that he has got its account audited by a chartered accountant and also got the audit report in the prescribed Form 10CCCB. And the Profit & Loss Account and the balance sheet duly certified by the accountant as defined in explanation below sub-section 2(2) of sec. 288, which was duly filed vide letter dated 19.07.2011.

5. However, the AO, rejected the claim by observing as under:

> *"The above contention of the assessee is not acceptable. The assessee had failed to fulfill the condition as provided under sub-section 13 of sec. 80IB read with sub-section 7 of sec. 80IA that in order to claim deduction u/s 80IB(10), "The deduction under sub-section (1) from profits and gains derived from an undertaking shall not be admissible unless the accounts of the undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub-section (2) of sec. 288, and the assessee furnished, along with his return of income, the report of such audit in the prescribed from duly signed and verified by such accountant."*

6. Apart from the above, the ld. AO, had also made a disallowance of Rs.62,04,510/- on the ground that assessee has made cash payments of Rs.3,10,22,550/- and as such 20% was disallowed u/s 40A(3) of the Act.

7. On appeal the ld. CIT(A) allowed the claim of enhanced deduction u/s 80IB of the Act by observing as under:

> *"The facts of the case have been considered. It is noted that sec. 153A starts with a non-obstante clause meaning thereby that the issue of notice requiring a person to furnish a return of income is in the nature of fresh proceedings. Therefore, while examining claims made in the course of such proceedings, the merits have to be examined afresh and cannot be denied only on the ground that such claim had not been made in the original proceedings/return of income. Secondly, clause (a) of sub-section*

*(1) clearly specifies that the return of income filed in response to the notice issued will be treated as if it were a return required to be furnished u/s 139. This again indicates that a return filed in response to notice u/s 153A stands on equal footing with a return filed u/s 139. If an assessee was eligible to make a claim in a return filed u/s 139, there is no reason why such claim could not have been made in our return filed in response to a notice issued u/s 153A. Finally, clause (i) of the Explanation to that section specifies that "all other provisions of this Act shall apply to the assessments made under this Section". Obviously, such provisions would also include section 80IB, if all other conditions for the eligibility for the deduction are fulfilled. Reference is invited to the decision in the case of Sheth Developers (supra), which dealt with a case where such assessments had been framed under Chapter XIV-B. The Hon'ble Court upheld the observation of the Tribunal that in view of the retrospective amendment to the Explanation to sec. 158BB(1), which laid down that the aggregate of the total income of the previous years falling within the block period has to be computed "in accordance to the provisions of this Act", deduction u/s 80IB would be admissible. By the same logic, full effect has to be given to the almost identical phrase in the Explanation to sec. 153A. As regards not filing of the audit report along with the return of income, in view of the plethora of judicial decisions discussed above, the requirement is not mandatory but directory and as long as such report has been furnished prior to the completion of the assessment proceedings, the provisions will be deemed to have been complied with. Reference is also made to the decision of the Hon'ble High Court of Karnataka in the case of Anriya Project Management Services (2012:209 Taxman 1 : Karnataka), wherein a claim of deduction u/s 80IB(10) had been made and allowed by the department itself in an assessment framed u/s 153A. In the case under consideration, the AO has not questioned the eligibility of the amount for deduction u/s 80IB. Considering the above factors, it is held that the assessee would be eligible for the deduction u/s 80IB.*

*As regards the reliance placed by the AO on the decision in the case of Sun Engineering Works (198 ITR 297), the proposition being advanced is that an enhanced deduction is inadmissible in an assessment framed u/s 153A as such proceedings are not for the benefit of the assessee but for the revenue. The relevant case law has been perused and there does not appear to be any observation which lays down the above proposition. The said case law is with reference to the assessment proceedings initiated u/s 147. The only principle outlined by the Hon'ble Supreme Court is that the reassessment proceedings cannot be allowed to be converted as revisional or review proceedings. The assessee is not permitted to be agitated questions which have been decided in the original assessment proceedings. A matter not agitated in the concluded in the reassessment proceedings "unless relatable to the items sought to be taxed as escaped income." It is noted that the Hon'ble Court observed that it would be open to as assessee to put forward claims for deduction of any expenditure in respect of that income on the non-taxability of the*

*items of all. In brief, it has been held that claims, to the extent that they relate to be additional income brought to tax in the reassessment proceedings, can be entertained in such proceedings. By the same analogy, if additional business income is being brought to tax in an assessment framed u/s 153A and such additional income would otherwise be eligible for deduction u/s 80IB, there can be no reason why such deduction would not be allowable."*

8. Likewise, in respect of the action of AO not allowing deduction u/s 80IB in respect of disallowance made u/s 40A(3) the ld CIT(A) directed that the deduction u/s 80IA be further re-computed, if the disallowance is directly relatable to the eligible project on the basis of records including seized records.

9. The Revenue has challenged the aforesaid conclusion of the ld CIT(A).

10. Before us the ld.CIT DR, Dr Ramesh Chandra contended that the AO has disallowed the enhanced claim made by the assessee u/s 80IB(10) in the return of income filed on 08/04/2010 pursuant to 153A proceedings, on the ground that Form No.10CCB was not filed with the original return of income filed u/s 139(1) of the Act, which the assessee ought to have filed along with the original return during the A.Y. 2005-06. Thus the ld. DR contended that the assessee had failed to fulfill the conditions as provided under sub-section (13) of section 80IB read with section 80IA(7) which stipulates that in order to claim deduction u/s 80IB(10), report is mandatory. Thus according to ld. DR this claim cannot be raised during the assessment/re-assessment initiated u/s 153A read with section 143(3) of the Act. Therefore, according to the ld. DR the deduction u/s 80IB(10) cannot be allowed to the assessee and the ld. CIT(A) has erred in allowing the same. It was also pointed out by the ld. DR that M/s Supertech Estates Pvt. Ltd., Noida which is one of the companies of this group which has also been searched has entirely withdrawn the claim of deduction u/s 80IB on the income additionally shown as a result of search and seizure. Therefore, according to the ld. DR the claim of this enhanced 80IB was disallowed rightly by the AO, however, the ld. CIT(Appeals) has erred in allowing the disallowance. The ld. DR cited the order of the Rajasthan High Court in Jai Steel (India) Pvt. Ltd. vs. ACIT (2013) 259 CTR (Raj.) 281,

Suncity Alloys (P) Ltd. vs. ACIT (2009) 124 TTJ (674) (JD) & Charchit Agarwal vs. ACIT (2009) 34 SOT 348 (Del.).

11. On the other hand the ld. AR Shri G.N. Gupta drew our attention to the language of Section 153A(1)(b) of the Act and explained that the Section itself starts with a non obstante clause. So according to him, when assessment proceedings under Section 153A of the Act is initiated; for six assessment years, for which, a notice under Section 153A(1)(a) of the Act has been issued and a return has been furnished, the AO was bound to assess the 'total income' of six assessment years immediately preceding the assessment year relevant to the previous year, in which, such search is conducted or requisition is made and, therefore, once the requirement of Section 153A(1)(b) of the Act is to assess the 'total income' in contradistinction to 'undisclosed income', the assessee is entitled to seek deduction, which might not have been sought at the time of original assessment proceedings and, therefore, it is open for an assessee to claim a new deduction while filing return under Section 153A of the Act, which deduction was not claimed under the regular assessment. Replying to the contention raised by the ld. AR, the ld. DR contended that a comprehensive reading of the provisions of Section 153A of the Act would reveal that it is not open for the assessee to claim any deduction, which was not claimed in the original assessment proceedings. Attention was drawn to second proviso to Section 153A of the Act, which provided for abatement of only 'pending assessment or reassessment' on the date of initiation of the search and not the concluded assessment proceedings. It was submitted that the assessee having failed to claim the deduction while filing original return under Section 139 and having failed to furnish any revised return under Section 139(5) of the Act and those assessments having become final, it is not open for the assessee to use the proceedings under Section 153A of the Act to reopen the concluded assessments. It was also submitted that the assessee can only claim income or expenditure or deduction in pending assessment or reassessment proceedings, which abate in terms of second proviso to Section 153A of the Act and not otherwise.

12. We have heard both the parties and perused the records and have gone through the case laws cited before us in order to adjudicate the issue in hand. The issue in hand relates to allowability of enhanced claim of deduction of Rs.18,43,552/- u/s 80IB of the Act. It is an admitted position that the assessee is eligible for claim of reduction u/s 80IB of the Act, in as much as deduction claimed of Rs.41,83,813/- stand allowed during the original assessment and the impugned assessment too. However in the return filed in response to notice u/s 153A of the Act, the said claim has been enhanced by Rs,18,43,552/- on account of additional income declared in the return. It is also a matter of record and an undisputed position that the said additional income relates to the eligible projects of Avant Grade, Vaishali as is evident from the inspector's report maintained in the assessment order in Page 6 at Para 10. In such circumstances the AO turned down the claim on the ground that the audit report had not been furnished in respect of the enhanced claim of reduction u/s 80IB (13) read with section 80IA(7) of the Act at the time of furnishing of original return u/s 139(1) of the Act. In our opinion, the said reason of the AO is devoid of any merit for the reason that the income in respect of which enhanced deduction has been claimed has only been declared for the first time in the return furnished in response to notice u/s 153A of the Act. Thus the finding of the AO that in the absence of audit report, the enhanced claim is not maintainable over looks this factual position. It is undisputed that audit report for the enhanced claim had been furnished during the impugned 153A assessment proceedings along with Profit and Loss account and Balance sheet duly certified by the Accountant. No adverse observations have been made vis-à-vis the said audit report/ financial statement. Also the Hon'ble Delhi High Court in the case of Contimeters Electrical Pvt. Ltd 317 ITR 249 (Del) has held that furnishing of audit report is directory and not mandatory. The relevant finding of the Hon'ble Court is as under:-

> *"that the Tribunal had arrived at the correct conclusion that the requirement of filing of audit report along with the return was not mandatory but directory and that if the audit report was filed at any time before the framing of the assessment, the requirement of section 80-IA(7) would be met."*

13. Similar view has been expressed by the jurisdictional High Court in the case of ACIT Vs. Murlidhara Prasad 118 ITR 393 (All) where it was held that filing of declaration before assessment is sufficient. Furthermore, the statutory position for claim of deduction is linked to the profits of the eligible profit. In other words, when the profits of the eligible project have increased then the consequential statutory impact will be on the amount of deduction u/s 80IB. so when the profits increase, the deduction/ incentive envisaged u/s 80IB increases. On one hand when the revenue has accepted the increase in profit though surfaced due to the search, the impact of the said increase in profit has to be also on the deduction allowable under Section 80IB of the Act, more particularly when the mandate on AO u/s 153A is to compute the total income of assessee. In the light of the aforesaid distinguishable facts, the ratio of Jai Steel cited (supra) by the revenue is of no help to the department. In that case, the deduction claimed by the assessee was not in the original return at all and it was made for the first time u/s 153A, which is not the case in hand. It may reemphasized that the assessee's claim was not a new claim but it was only an enhanced claim which is statutorily linked to the eligible profits which get enhanced as result of search. Therefore we do not find any legal infirmity on the finding of the ld CIT(A) and so confirm the same. We also concur with the conclusion of the ld CIT(A) in Page 11, page 3.18 wherein it is observed that if the disallowance u/s 40A(3) is directly relatable to the profit of the eligible projects, then the deduction u/s 80IB be accordingly recomputed, subject to verification of the records including the seized records. In the result the grounds raised by the revenue for Assessment Year 2005-06 stands dismissed.

14. Now taking up the appeal filed by the Revenue for Assessment Year 2006-07 to Assessment Year 2009-10.

15. All the grounds in the aforesaid 4 appeals are identical to the grounds raised by the revenue in Assessment Year 2005-06 except ground No.4 for Assessment Year 2007-08 and 2008-09 and ground No.3 for Assessment Year 2009-10. In so far as the grounds identical to the appeal for Assessment Year 2005-06 are concerned the same are dismissed for the aforesaid reasons in appeal No

4310/Del/2013 for Assessment Year 2005-06. The ground No.4 for Assessment Year 2007-08 and 2008-09 and ground No.3 for Assessment Year 2009-10 are identical and the same reads as under:-

> *"The background of the case is that a search and seizure operation under Section 132 of the Act was conducted on 06.02.2009 in the case of Supertech & Crossing Infrastructure Group of Ghaziabad. The assessee's premises were also covered. Books of accounts and documents were found and seized. Disclosure of additional income of Rs 10,00,00,000/- was made in the case of the assessee on the basis of seized material in the statement under Section 132(4) of the Act. Assessment proceedings were initiated under Section 153A for the A.Y. 2003-04 to A.Y. 2008-09. In compliance to the notice for the year under consideration, a return of income was furnished declaring total income at Rs 94,91,330/- after claiming deduction of Rs 18,32,552/- under Section 801B. During the assessment proceedings, the assessee was directed to get its accounts audited for the A.Y.2005-06 to A.Y.2009-10 under Section 142 (2A) of the Act. Initially, the auditor was required to submit report within 90 days of the relevant order of the AO dated 30.12.2010. Subsequently, the time was extended till 31.05.2011. The auditor submitted its report on 26.05.2011. In the assessment order, the AO has noted that the documents found in seized revealed that the assessee was receiving "on money" on the sale of flats/shops. The documents included agreements for booking of shops/commercial space in Supertech Shopprix Mall located at Vaishali and Kaushambhi Avante Grade project located at Vaishali and Rameshwar Orchid at Kaushambi. These original agreements forms were later on cancelled and fresh agreement was prepared showing a much lesser sale consideration. The sale consideration was partially being received in cash. Form the seized documents, the total undisclosed income comes to Rs.32,71,38,984/- out of which Rs.5,68,80,271/- pertains to the year under consideration. This has been accepted by the assessee. However, the assessee had claimed deduction which included expenses of Rs.3,49,52,143/. Out of the above expenses, the AO noted that expenses to the tune of Rs.3,10,22,550/- had been incurred in cash. A show cause notice was issued why such cash expenses should not be disallowed in view of the provisions of Section 40A (3) of the Act. In response, the assessee claimed that the said provisions was inapplicable since the expenses were made out of own money and were also covered under Rule 6DD. However, the AO proceeded to disallow 20% of the cash expenses and made an addition of Rs.62,04,510/- to the total income of the assessee. Further, as mentioned above, the assessee had claimed deduction under Section 80IB in respect of the income shown additionally as a result of search and seizure. The deduction claimed in the original return of income had been enhanced. However, the AO did not allow the reduction on the ground that the provisions of Section 80 IB (13) read with Section 80IA (7) had not been complied with and also on the ground that*

*the case of the assessee is covered under Section 80A (5) of the Act. Certain other minor disallowances were also made."*

16. The ld CIT(A) has dealt with the same in Page 20, Para 5.5 of the impugned order in which he held as follows:-

*"AO issued a show cause notice dated 22.10.2010 directing the appellant to show cause after referring to the show cause letter dated 09.12.2010 on 27.12.2010 as to why its accounts should not be audited u/s 142(2A) , inter alia, on the ground that a "Perusal of seized documents shows that the same are composite and complex". To This show cause notice, the appellant responded by filing written submissions dated 27.12.2010, a copy of which is placed on the paper Book at pages 69-94.*
*And despite the appellant's objection dated 27.12.2010, obtained the saction of CIT Kanpur on 30.12.2010 when he directed the appellant to get its accounts audited by M/s. Seth and Associates CA of Lucknow within 90 days. Subsequently, the time for getting the accounts audited and furnishing the report was extended up to 31.05.2011 by the AO unilaterally by an order dated 25.03.2011. The report was submitted on 26.05.2011 by the Special Auditor. Incidentally, the Special Auditor was directed to audit only the original books of account and the impugned assessment order dated 22.07.2011 makes no reference to the report of the Special Auditor."*

17. However there is no such issue in Assessment Year 2009-10. Thus the ground raised for Assessment Year 2009-10 is dismissed as infractuous. As regards ground raised in Assessment Year 2007-08 and 2008-09, we hold that the CIT(A) is justified in deleting the disallowance, on the ground that the payment have been made in cash to the Govt, which fact was clarified by the AO by a remand report to ld CIT(A). Since the payment have been made by the cash to the Govt, the CIT(A) was justified in allowing the said claim of the assessee. Therefore we confirm the order of the ld CIT(A) on the said ground. Therefore the ground raised by the Revenue is rejected.

18. Now we will deal with appeals of the assessee. In the first instance, we will deal with the appeal for Assessment Year 2006-07 in ITA No.4367/Del/2013 wherein, the assessee has taken the following ground:-

"*1. That on the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income Tax (Appeals), Meerut has erred in not allowing the expenses amounting to Rs.69,60,469/- paid in excess of Rs.20,000/- which are specifically exempt in view of the Rule6DD(k) of Income Tax Rules, 1962.*

2. *That on the facts in the circumstances of the case and in law, the Hon'ble Commissioner of Income Tax (Appeals), Meerut has erred in not allowing Rs.45,750/- on account of notional interest on the temporary advance given to then director Sh. Arun Kumar Gupta."*

19. As regards to the first issue raised vide Ground No. 1, the ld AR for the assessee submitted that the payments in excess of Rs.20,000/- amounting to Rs.69,60,469/-, in total were made on the dates when banks were closed due to holiday. Therefore the payment were covered under Rule 6DD(k) of the Income Tax Rules, 1962 (herein after 'the Rules) and CBDT Circular No. In his rival submission the ld CIT DR strongly supported the orders of the authorities below and further submitted that the payment were made in excess of Rs.20,000/-, therefore the disallowance was rightly made by the AO u/s 40A(3) of the Act.

20. We have considered the rival submissions of both the parties and perused the material available on the record. In the instant case, we find that the facts are not clear as to whether the payments were made on the holidays when the banks were closed. We therefore set aside the impugned order on this issue and remand the same back to the file of AO for fresh adjudication, in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

21. Ground No.2 relates to the disallowance on account of notional interest on the temporary advance given to the Director for the business purpose. The ld counsel for the assessee submitted that the advance was given to the Director. It was further stated that this was allowed in the original return of income and no disallowance on account of notional interest was made, therefore the ld CIT(A) was not justified in confirming the disallowance made by the AO. Reliance was placed on the case of M/s. All Cargo Global Logistics Ltd. v. Dy. CIT (2012) 137 ITD 287. In his rival submissions ld CIT DR supported the order of the authorities below.

22. After considering rival submissions we are of the view that this issue should also be examined by the AO, as the facts are not clear particularly when it is the contention of the ld AR for the assessee that it was allowed in the original assessment by the AO by considering this fact that the advance was given to the Director for business purpose only.

23. The issues raised in the appeals for the Assessment Year 2008-09 and 2009-10 in ITA No.4269 and 4370-Del-2013 and vide grounds No.1,2 and 3 in ITA No.4368/Del/2013 in Assessment Year 2007-08 are similar to the issues involved in grounds No.1 and 2 of the appeal for the Assessment Year 2006-07 in ITA No.4367/Del/2013, therefore our findings given in the former part of this order shall apply *mutatis mutandis* for these assessment years.

24. Now the only issue remaining for adjudication is the Ground No. 4 for the Assessment Year 2007-08 in which the main grievance of the assessee relates to the confirmation of the disallowance of Rs.21,440/- made by the AO u/s 40A(3) of the Act. Regarding this issue, the ld counsel for the assessee submitted that the cash payment in respect of which the disallowance have been made did not exceed Rs.20,000/- because it was not a single payment but the total of few payments. The ld DR supported the orders of the authorities below. In our opinion this issue also needs to be re-examined by the AO as the facts are not clear.

25. In the result the appeals of the department are dismissed and the appeal of the assessee are allowed for statistical purposes.

**Order pronounced in the open court on 18.02.2015.**

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| **(N.K.SAINI)** | **(A. T. VARKEY)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Dated: 18/02/2015

*A K Keot*

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi