

**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'बी', अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ B ” BENCH, AHMEDABAD**

समक्ष श्री एन.एस.सैनी, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य ।
**BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER And
SHRI KUL BHARAT, JUDICIAL MEMBER**

1. आयकर अपील सं./I.T.A. No.3348/Ahd/2010 – A.Y. 2007-08
2. आयकर अपील सं./I.T.A. No.1170/Ahd/2014 – A.Y. 2007-08

M/s.Ruchi Developers C/o.Piyush Mafatlal Shah A/40, Lalita Society Opp.Adarsh Tenement Isanpur, Ahmedabad	बनाम/ Vs.	The Income Tax Officer Ward-9(1) Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADFR 6907 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri M.J. Shah, AR
प्रत्यर्थी की ओर से/ Respondent by :	Shri Roop Chand, Sr.DR

सुनवाई की तारीख / Date of Hearing	28/04/2015
घोषणा की तारीख/ Date of Pronouncement	05/06/2015

आदेश / ORDER

PER SHRI KUL BHARAT, JUDICIAL MEMBER :

These two appeals (quantum and penalty) by the Assessee are directed against the separate orders of the Ld.Commissioner of Income Tax(Appeals)-XV/XX, Ahmedabad ('CIT(A)' in short) dated 18/10/2010 and 13/03/2014 pertaining to Assessment Year (AY) 2007-08 respectively. These appeals were heard together and are being disposed of by this consolidated order for the sake of convenience.

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2. First, we take up the quantum appeal, i.e. ITA No.3348/Ahd/2010 for AY 2007-08. The assessee has raised the following grounds of appeal:-

1. *The Id CIT(A) has erred in confirming that the order u/s 143(3) dated 24-12-2009 and served on the appellant on 1-01-2010 was not time barred as per first proviso to section 153(l)(a) on the ground that the assessment was completed within twenty one months i.e. before 31-12-2009.*

2. *The Id CIT(A) has erred in confirming the addition of Rs. 1,04,16,233/- as bogus purchases from the following five parties as per Para 6 to 11 of the appeal order on the finding that the appellant has not discharged the onus of proving the purchases by furnishing half baked, unreliable, unverifiable papers in support:-*

<i>(1) Jolex Traders</i>	<i>Rs. 24,94,120/-</i>
<i>(2) Umiya Steel Traders</i>	<i>Rs. 19,69,268/-</i>
<i>(3) Rushi Enterprise</i>	<i>Rs. 22,32,310/-</i>
<i>(4) Maruti Traders</i>	<i>Rs. 17,41,950/-</i>
<i>(5) Mahakali Steel Corporation</i>	<i>Rs. 19,78,585/-</i>
	<i>-----</i>
<i>Total</i>	<i>Rs. 1,04,16,233/-</i>

2.1 *The appellant submits that the Id CIT(A) has erred in not appreciating objectively the grounds of appeal, and written submissions, evidences and citations filed with Id CIT(A) wherein the appellant had explained that he had discharged the onus of proving the genuineness of purchases.*

3. *The Id CIT(A) has erred in ignoring the specific grounds of appeal Nos. (XI) to (XIII) of 2.3. and ground No.2.4 which reflect the trading result after addition of Rs.1,04,16,233/-which is abnormal and unjustified and not real and as such not permissible in law.*

4. *The Id CIT(A) has erred in confirming the addition of Rs. 1,04,16,233/- as bogus purchases in trading account without rejecting the books u/s 145, and without the authority of any specific section of I.T.Act, which is illegal and not valid in law.*

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5. *The Id CIT(A) has erred in dismissing the additional ground of allowing higher remuneration payable to partners as per section 40(b)(v)(2) on the basis of the income assessed, by the AO on the ground that payment of remuneration to the partners has to be as per the partnership deed which has not been furnished.*

5.1 *The appellant submits that the remuneration payable to the partners u/s 40(b)(v)(2) has to be calculated as per the definition of " Book Profit" given in Explanation 3 of section 40(b). Also, the copy of the partnership deed was already filed on record. Hence, the Id CIT(A) was not justified in dismissing the additional ground of appeal as per law.*

6. *The Id CIT(A) has erred in confirming the interest of Rs.11,74,658/- charged u/s 234-B and Rs. 10,674/- charged u/s 234-C by the AO which is illegal.*

3. Briefly stated facts are that the case of the assessee was picked up for scrutiny assessment and the assessment u/s.143(3) of the Income Tax Act,1961 (hereinafter referred to as “the Act”) was framed vide order dated 24/12/2009, thereby the Assessing Officer (AO in short) made addition in respect of bogus purchases amounting to Rs.1,04,16,233/-. Against this, the assessee filed an appeal before the Id.CIT(A), who after considering the submissions dismissed the appeal.

3.1. During the course of first appellate proceedings, the assessee has raised an additional ground before the Id.CIT(A) claiming the higher remuneration of Rs.45,77,944/- payable to the partners of firm.

3.2. First ground of assessee’s appeal has not been pressed by the Id.counsel for the assessee and, therefore, the same are dismissed as such.

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3.3. Ground Nos.2 to 4 of assessee's appeal are against confirmation of addition made on account of bogus purchases amounting to Rs.1,04,16,233/-. He submitted that the books of accounts are maintained in the regular course of business and they are audited u/s.44AB of the Act and Audit report is filed on record. The AO has accepted the GP of 10.34% on the receipts of Rs.1,86,50,000/- as noted by him in Para 3 of his order. He submitted that gross receipts from construction business of Rs.1,86,50,000/- declaring net profit of Rs.8,97,380/- which works out to 8.49% as against 8% net profit on receipts as per section 44AD applicable to construction business. In addition the assessee submits that the addition of alleged bogus purchases of Rs.1,04,16,233/- will result in net profit at 64% which is not real. He further submitted that the GP works out to 10.34% i.e. of Rs.19,29,239/- on the receipts of Rs.1,86,50,000/- as noted by the AO. If the alleged bogus purchases of Rs.1,04,16,233/- are added to GP, the GP will work out to 66% which does not reflect the real ratio of GP in construction business.

3.4. On the contrary, the Id.Sr.DR supported the orders of the authorities below and submitted that the AO made addition on the basis that the assessee failed to establish the purchases from the concerned parties with corroborative evidences in spite of various opportunities given to the assessee. He submitted that the AO has also observed that

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the assessee has not maintained any corroborative details regarding purchases and consumption of various items used for construction. Under these facts, disallowance of expenditure is justified.

4. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. We find that the AO made disallowance by observing as under:-

“4.11. The facts emerging from the above discussion can be summarized as under:-

- (i) The assessee claimed to have purchased Rs.1,04,16,233/- from five different parties and shown the entire amount as outstanding as on 31.03.2007.*
- (ii) The assessee has not furnished the item-wise details of purchases, though it was specifically called for.*
- (iii) The letters sent u/s.133(6) of the Act to three of the parties returned unserved by the Postal authorities. The assessee could not furnish the new address of these parties.*
- (iv) Though the letters sent u/s.133(6) sent to Jolex Traders and Umiya Steel Traders, returned unserved, somebody has submitted a statement of transactions on their behalf in the tapal section in a dubious manner.*
- (v) In respect of Rushi Enterprise, as admitted by the assessee itself, the assessee could not furnish any details including address.*
- (vi) Vide letter/notice dated 18.11.2009 and 17.12.2009 and during the course of hearing, the assessee was repeatedly asked to produce the alleged creditors along with various details. However, the assessee could not produce even a single party.*

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- (vii) *None of the above parties have CST/GST/VAT registration though they claimed to have supplied building material on a large scale that too on credit for years.*
- (viii) *Had the assessee actually made purchases from these parties on credit, they would have remained in touch with the assessee, for the payment due. However, the assessee is not in possession of correct addresses of four of the parties.*
- (ix) *The above events show that the assessee had obtained some accommodation bills in the name of above parties, so as to reduce its profit and tax liability.*
- (x) *The assessee has not made any payment to these alleged credit in the subsequent years till date.*
- (xi) *The assessee has not filed its return of income for AY 2008-09 and 2009-10 till date.*
- (xii) *On verification of Bank statement it is noticed that the assessee has not paid outstanding amount to these creditors till date, however, nobody can wait for such huge amount for long period.*
- (xiii) *During the year the partners have withdrawn their capital without settle the accounts of creditors because they know that the creditors are bogus.*
- (xiv) *The assessee has completed the project during the year under consideration and the assessee has sufficient fund to pay the creditors but did not pay the same which prove that the creditors are bogus.*
- (xv) *The assessee also failed to furnish the details of so called goods purchased from these parties.*

4.12. *The onus is totally on the assessee to prove that any expenditure incurred by it was wholly and exclusively for the purpose of business. In the present case, the assessee has failed to produce the alleged creditors and the existence of these suppliers is very much in doubt. In fact no evidence whatsoever kind has been furnished by the assessee to discharge the onus that lies on it. However, instead of bringing any material evidence on record, the assessee merely made the contentions as quoted above. The assessee has also relied on the decision in the*

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case of Vijay Proteins. However, the facts of the present case are different.

4.13. In this connection, reliance is also placed on the decision of ITAT Bombay Bench 'B' (ITA No.614/Bom/87 A.Y. 1983-84) in the case of M/s.Mont Blane Properties and Industries Pvt.Ltd., wherein the Hon'ble Tribunal held that the word 'evidence' as used in sec. 143(3) covered circumstantial evidence also. The word 'evidence' as used in sec.143(3) obviously could not be confined to direct evidence. The word 'evidence' was comprehensive enough to cover the circumstantial evidence also. Under the tax jurisprudence, the word 'evidence' had much wider connotations. While the word 'evidence' might recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, the use of word 'material' in Sec.143(3) showed that the assessing officer, not being a court, could rely upon material, which might not strictly be evidence admissible under the Indian Evidence Act, for the purpose of making an order of assessment. Court often took judicial notice of certain facts which need not be proved before them. The plain reading of section 142 and 143 clearly suggests that the assessing officer may also act on 'the material gathered' by him. The word 'material' clearly shows that the assessing officer is not fettered by the technical rules of evidence and the like, and that he may act on material which may not strictly speaking be accepted evidence in court of law.

4.14 In view of the detailed discussion made in foregoing paras, it is very clear that the assessee has failed to establish the huge purchases of Rs.1,04,16,233/- from above five parties with corroborative evidences inspite of umpteen opportunities given to its. It is also relevant to mention here that the assessee has not maintained any quantitative details regarding purchase and consumption of various items used for construction. In view of these fact, it is clear that the assessee has made an attempt to inflate its purchases by obtaining accommodation bills to reduce the profit and ultimately to reduce the tax liability. Therefore, I have no hesitation to hold that the entire purchases claimed to have made from the above five parties are bogus. I hereby add

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Rs.1,04,16,233/- to the total income of the assessee. Penalty proceedings u/s.271(1)(c) are separately initiated for furnishing inaccurate particulars of income.”

4.1. The contention of the assessee is that it has discharged primary onus by furnishing the details to the AO, therefore the AO was not justified in making the addition. We find that the undisputed fact is that the assessee has claimed purchases from following five parties:-

1. Jotex Traders	Rs.24,94,120/-
2. Umiya Steel Traders	Rs.19,69,268/-
3. Rushi Enterprise	Rs.22,32,310/-
4. Maruti Traders	Rs.17,41,950/-
5. Mahakali Steel Corporation	Rs.19,78,585/-

The total purchases made from these parties is amounting to Rs.1,04,16,233/-. The AO observed that the assessee did not maintain quantitative details regarding purchases and consumption of various items used for construction. The AO has also observed that in respect of Jotex Traders, the summon issued u/s.133(6) of the Act was returned by the postal authorities with remarks “left”. The assessee could not furnish correct/changed address of the party or could not produce the party before the AO. Similarly, in the case of Umiya Steel Traders, summon was issued u/s.133(6) of the Act on 11/09/2009 which was returned by the postal authorities with remarks “left”. In the case of Rushi Enterprise also, the postal authorities returned the summon with remarks “left”. Further, in the case of Maruti Traders and Mahakali Steel Corporation,

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requisite details as sought were not furnished. The AO also observed that there were certain discrepancies with regard to the information submitted by the assessee. The settled position of law with regard to any expenditure claimed to have been incurred by the assessee, the onus is on the assessee to prove that such expenditure was for the business purpose. In the case in hand, the assessee has claimed certain purchases, however, the assessee has not placed any corroborative details of the raw-material so purchased. Moreover, the purchases so made from the parties could not be verified by the AO. The AO has made efforts by sending letters to the given address, but the letters so sent and the information as sought by the AO was not furnished by the assessee or the parties concerned. Under these facts, we do not see any infirmity in the order of the Id.CIT(A), same is hereby upheld. Thus, ground Nos.2 to 4 of assessee's appeal are dismissed.

5. Ground No.5 is against dismissal of additional ground with regard to claim of higher remuneration payable to partners as per section 40(b)(v)(2) of the Act. The Id.counsel for the assessee submitted that the Id.CIT(A) was not justified in rejecting the ground.

5.1. On the contrary, Id.Sr.DR supported the orders of the authorities below and submitted that the assessee has not placed any material on record suggesting that the higher remuneration is payable to the partners.

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6. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. Admittedly, the assessee has not made the claim in the original return in respect of the higher remuneration payable to the partners. The assessee has not revised its return and no correction has been made in the account. We find that the Id.CIT(A) has rejected the ground on the basis that the ground has been raised as an afterthought to negate the tax made by the AO. Therefore, the assessee cannot blow hot and cold, therefore, we do not see any infirmity in the order of the Id.CIT(A), same is hereby upheld. Thus, ground No.5 of assessee's appeal is rejected.

7. Ground No.6 is against confirming the interest of Rs.11,74,658/- charged u/s.234B & Rs.10,6574/- charged u/s.234-C of the Act. This ground being consequential is held accordingly. As a result, assessee's quantum appeal in ITA No.3348/Ahd/2010 for AY 2007-08 is dismissed.

8. Now, coming to the penalty appeal, i.e. ITA No.1170/Ahd/2014 for AY 2007-08. The assessee has raised the following grounds of appeal:-

- 1. The CIT(Appeals) erred in upholding the levy of penalty u/s.271(1)(c) of Rs.35,96,103/-.*
- 2. The CIT(Appeals) failed to appreciate the submissions made before him and in the process erred in upholding the penalty u/s.271(1)(c).*

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The appellant reserves its right to add, amend, alter or modify any of the grounds stated hereinabove either before or at the time of hearing.

8.1. Brief facts of the case are that the AO while framing the assessment vide order dated 24/12/2009 made disallowance of Rs.1,04,16,233/- on account of bogus purchases and initiated penalty proceedings. Subsequently, AO levied a penalty of Rs.35,06,103/- u/s.271(1)(c) of the Act. Against the said assessment order, assessee filed an appeal before the Id.CIT(A), who after considering the submissions, dismissed the appeal. Now, the assessee is further in appeal before this Tribunal.

8.2. The Id.counsel for the assessee submitted that the Id.CIT(A) was not justified in confirming the penalty made by the AO. He submitted that the penalty has been levied on the ground that the Id.CIT(A) has confirmed the bogus purchases. He further submitted that before the Id.CIT(A) one of the grounds was that the assessee was not provided sufficient opportunity. This ground was not adjudicated and summarily rejected considering the same as general in nature. The Id.CIT(A) failed to appreciate the fact that the assessee has provided the addresses, PANs, GST Nos, etc. before the AO. He further submitted that the Id.CIT(A) also failed to appreciate the fact that in case the contention of the AO is accepted, then the GP would be at an unrealistic percentage. The Id.counsel for the assessee placed reliance on the decision of Coordinate

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Bench (ITAT “A” Bench Ahmedabad) rendered in the case of ACIT vs. Manish Organics India Ltd. reported at (2012) 17 taxmann.com 25 (Ahd.). He also placed reliance on the judgement of Hon’ble Gujarat High Court rendered in the case of National Textiles vs. CIT reported at (2001) 249 ITR 125(Guj.).

8.3. On the contrary, Id.Sr.DR supported the orders of the authorities below.

9. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. We find that the Id.CIT(A) has rejected the ground for not providing any opportunity and treated the same as general in nature. The Id.CIT(A) confirmed the penalty by observing as under:-

“5.14. Reliance is also placed on the judgement of Hon’ble Apex Court in the case of MAK Data Pvt.Ltd. Vs. CIT-II in Civil Appeal No.9772 of 2013, whereby it has been held that Explanation to Section 271(1) raises a presumption of concealment when a difference is noticed by the AO between reported and assessed income. The burden is then on the assessee to show otherwise by cogent and reliable evidences. When the initial onus placed by the Explanation has been discharged by him the onus shifts on the revenue to show that the amount in question constituted the income and not otherwise. In the instant case the appellant has failed to discharge the onus cast upon him by adducing cogent and reliable evidences showing that infact losses were genuinely deductible against the current year’s income only and not against preceding year’s income only and not against preceding year’s income.

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5.15. It is noticed that the AO has levied the penalty for concealment of income by way of furnishing of inaccurate particulars of income which is very much apparent from the records. It is also mentioned that as per sub-section (1B) of 271(1) which was inserted by Finance Act, 2008 with retrospect effect from 1.4.1989, if an order of assessment contains direction for initiating of penalty proceedings under clause © of Sub-section (1) then such an order of assessment shall be deemed to constitute satisfaction of AO for initiation of penalty. In the present case, such directions have been given by the AO in the penalty order and there is no default on this count.”

9.1. We find that the assessee has placed on record letter(s) dated 22/12/2009 addressed to ITO with account of Rushi Enterprises with enclosures, letter dated 12/09/2009 addressed to ITO from Jolex Traders with enclosures, letter dated 21/11/2009 addressed to ITO from Umiya Steel Traders with enclosures, letter dated 167/11/2009 addressed to ITO from Maruti Traders with enclosures and letter dated 21/11/2009 addressed to ITO from Mahakali Steel Corporation with enclosures. In the letter dated 12/09/2009 purportedly to have been given the details of M/s.Ruchi Developers by Jolex Traders. PAN is also written in the case of Umiya Traders. Similarly, in the case of Maruti Traders PAN was written. The assessee has also placed on record the confirmations by the concerned parties. The AO made addition on the basis that the assessee failed to produce the parties. However, other details in the nature of PANs and confirmations of concerned parties were furnished. Under these facts, we are unable to accept the argument of Revenue, since the AO has not made further enquiry to verify the correctness of

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confirmations. It is settled law that the quantum proceedings and the penalty proceedings are two separate proceedings. Even if addition is sustained, it is not necessary that penalty would automatically be sustained. If the assessee is able to demonstrate that under the given facts, penalty should not be sustained in the light of judicial pronouncements and the statutory provisions. In the instant case, the addition has been confirmed in the quantum proceedings on the basis that the parties from whom purchases were made is reported to be left by the postal authorities. This reason may be sufficient to sustain the addition, but in our considered view, this basis is not sufficient in the light of the decision of the Coordinate Bench (ITAT “A” Bench Ahmedabad) of this Tribunal rendered in the case of ACIT vs. Manish Organics India Ltd. in ITA No.2155 (Ahd) of 2010, dated 30/11/2011, wherein the Hon’ble Coordinate Bench has held as under:-

“5. We have considered the rival submissions and perused the material on record. The undisputed fact is that the assessee is a Public Limited Company having huge turnover but suffering losses and has ultimately been closed down. The net loss returned is Rs.59,54,460/- and there was no intention to reduce any taxable income. Even after additions the assessed income remained a loss. The accounts are subject to Internal Audit, Statutory Audit and Tax Audit. The AO has levied penalty on the additions Rs. 13,67,594/- sustained by the appellate authorities on the tax worked out thereon. The AO levied minimum penalty of Rs. 6,29,093/-.

This is a case where explanation of the assessee has not been accepted by the Department. The levy of penalty is merely on disallowance of expenditure and not finding of concealment of any particulars or mala fide intention to reduce the taxable income. The Hon'ble Gujarat High Court in the case of National Textiles v. CIT [2001] 249 ITR 125/114 Taxman 203 has held that provisions

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of section 68 permits the AO to treat unexplained cash credits as income for making certain additions if there is failure by the assessee to give an explanation. However, the addition made on this count automatically cannot justify the penalty levied u/s 271(1)(c). Hon'ble High Court further held that for levy of penalty u/s 271(1)(c) two factors must co-exist (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income. It is not enough for the purpose of penalty that the amount has been assessed as income and (ii) the circumstances must show that there was animus, i.e. conscious concealment or act of furnishing of inaccurate particulars on the part of the assessee. Explanation 1 to section 271(1)(c) has no bearing on factor no.1 but has a bearing only on factor no.2. The explanation does not make the assessment order conclusive evidence that the amount assessed was in fact the income of the assessee. No penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the explanation cannot help the Department because there will be no material to show that the amount in question was the income of the assessee. This case is also covered by the decision of the Tribunal, Ahmedabad in the case of ACIT v. Excel Forging (P.) Ltd. in IT Appeal No.1709/Ahd/2005 dated 26.12.2008 wherein it has been held that non-availability of confirmation and other details are valid points for making addition u/s 68. But because the explanation of the assessee with regard to the genuineness of deposits is not accepted, it cannot straight away result into penalty. In the present case the assessee is a public limited company accepting deposit in large number from public. The assessee failed to produce some of the depositors to prove the genuineness and creditworthiness inspite of the efforts made, it resulted into addition u/s 68 but it cannot lead to penalty for furnishing inaccurate particulars of income. Therefore, in our considered opinion the Id. CIT(A) has rightly deleted the penalty. There is no infirmity in his order. We uphold the same. The appeal filed by the Revenue is dismissed.”

9.2. In the light of above, we are of the considered view that the Id.CIT(A) was not justified to confirm the penalty. Therefore, we hereby

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set aside the orders of Id.CIT(A). Accordingly, the AO is directed to delete the penalty. As a result, assessee's appeal(penalty) in ITA No.1170/Ahd/2014 for AY 2007-08 is allowed.

10. In the combined result, assessee's appeal(quantum) in ITA No.3348/Ahd/2010 for AY 2007-08 is dismissed, whereas assessee's appeal(penalty) in ITA No.1170/Ahd/2014 for AY 2007-08 is allowed.

Order pronounced in the Court on Friday, the 5th day of June, 2015 at Ahmedabad.

Sd/-
(एन.एस.सैनी)
लेखा सदस्य
(N.S. SAINI)
ACCOUNTANT MEMBER
Ahmedabad; Dated 05/ 06 /2015

Sd/-
(कुल भारत)
न्यायिक सदस्य
(KUL BHARAT)
JUDICIAL MEMBER

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-XV, Ahmedabad/XX, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER.

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad