आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री जॉर्ज माथन, न्यायिक सदस्य एवं
श्री रमित कोचर, लेखा सदस्य के समक्ष

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.307/Chny/2010**
&
ITA Nos.1015 & 1016/Chny/2012
निर्धारण वर्ष **/Assessment Year: 2001-02**

Shri K. Srikanth, C/o. Shri S.Sridhar, Advocate New No.14, Old No.82, Flat No.5, 1st Avenue, Indira Nagar, Adyar, Chennai-600 020.	**v.**	The Asst. Commissioner of Income Tax, Company Circle-II(4), Chennai.
[PAN: AAFPS 6375 K]		
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

आयकर अपील सं./**ITA No.1324/Chny/2012**
निर्धारण वर्ष **/Assessment Year: 2001-02**

The Asst. Commissioner of Income Tax, Company Circle-II(4), Chennai.	**v.**	Shri K. Srikanth, C/o. Shri S.Sridhar, New No.14, Old No.82, Flat No.5, 1st Avenue, Indira Nagar, Adyar, Chennai-600 020.
[PAN: AAFPS 6375 K]		
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

Assessee by	:	Mr. S.Sridhar, Adv.
Department by	:	Dr. M.Srinivasa Rao, CIT
सुनवाई की तारीख/Date of Hearing	:	29.01.2020
घोषणा की तारीख /Date of Pronouncement	:	19.05.2020

आदेश / O R D E R

PER RAMIT KOCHAR, ACCOUNTANT MEMBER:

These four appeals filed by assessee as well Revenue are all for assessment year 2001-02 and are taken up together as common issues are involved in these four appeals and hence these appeals were heard together and are disposed off by this common order. The appeal in ITA no. 1015/Chny/2012 is an assessee's appeal while appeal in ITA no. 1324/Chny/2012 is Revenue's appeal, and these cross appeals are both for ay: 2001-02 against appellate order dated 27.03.2012 passed by learned Commissioner of Income-tax(Appeals)-III, Chennai (hereinafter called "the CIT(A)") , the appellate proceedings before learned CIT(A) has arisen from an assessment order dated 31.12.2008 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) read with Section 147 of the 1961 Act. . The appeal in ITA no. 307/Chny/2010 is filed by assessee against an revisionary order dated 22.01.2010 passed by learned Commissioner of Income-tax, Chennai-I, Chennai u/s 263 of the Income-tax Act,1961 for ay: 2001-02 holding that re-assessment framed by learned Assessing Officer u/s 143(3) read with Section 147 of the 1961 Act , vide reassessment order dated 31.12.2008 is erroneous so far as prejudicial to the interest of Revenue for reasons stated therein in the revisionary order. The appeal in ITA no. 1016/chny/2012 is filed by assessee for ay: 2001-02 which has arisen from appellate order dated 27.03.2012 passed by learned CIT(A) , which appeal has arisen before learned CIT(A) from consequential assessment order dated 08.11.2010 passed by AO u/s 143(3) read with Section 263 of the 1961 Act.

2. The grounds of appeal raised by assessee as well Revenue in memo of aforesaid appeals filed with Income-Tax Appellate Tribunal, Chennai (hereinafter called "the Tribunal") with respect to all these four appeals for ay: 2001-02 , read as under:-

a) Grounds in ITA No.1015/Chny/2012 for ay: 2001-02(Assessee's Appeal)

"1. The order of The Commissioner of Income Tax (Appeals) III, Chennai - 600 034 dated 27.03.2012 in I.T.A.No.420/08-09/A.III for the above mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case.

2. The CIT (Appeals) erred in sustaining the re-assessment framed for the above mentioned Assessment Year without assigning proper reasons and justification.

3. The CIT (Appeals) failed to appreciate that the re-assessment under consideration was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.

4. The CIT (Appeals) failed to appreciate that there was absolutely no 'reason to believe' on the escapement of income in the recording of reasons while assuming jurisdiction u/s 147 of the Act and consequently ought to have appreciated that the consequential framing of the re-assessment was wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

5. The CIT (Appeals) went wrong in recording the findings in this regard in para 5 of the impugned order without assigning proper reasons and justification.

6. The CIT (Appeals) erred in sustaining the recomputation of Long Term Capital Gains arising or accruing as a result of sale of shares in so far as the exclusion of the garnishee payment from the cost of acquisition/cost of improvement/expenses incurred in relation to transfer without assigning proper reasons and justification.

7. The CIT (Appeals) failed to appreciate that the recomputation of Long Term Capital Gains arising or accruing as a result of sale of shares in so far as the exclusion of the garnishee payment from the cost of acquisition/cost of improvement/expenses incurred in relation to transfer was wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law,

8. The CIT (Appeals) failed to appreciate that the discharge of encumbrance/lien was erroneously included as part of sale consideration and ought to have appreciated that in the light of the decision of the Jurisdictional High Court referred to, such exclusion in the computation of Long Term Capital Gains was sustainable in law.

9. The CIT (Appeals) went wrong in recording the findings in this regard in paras 7.3 & 7.3.1 of the impugned order without assigning proper reasons and justification.

10. The CIT (Appeals) failed to appreciate that the scope of section 48 of the Act was not considered while erroneously sustaining the exclusion of the garnishee payment to Indian Bank in the computation of Long Term Capital Gains and further ought to have appreciated that the evidence placed on record clearly demonstrated the fact of encumbrance as well as the fact of such payments directly made to M/s Indian Bank.

11. The CIT (Appeals) failed to appreciate that the theory of diversion by overriding title even though brought to his notice as well as in the assessment proceedings, non consideration of the said legal theory to the facts of the case would vitiate their action in re-computing Long Term Capital Gains.

12. The CIT (Appeals) failed to appreciate that there was no proper opportunity given before passing the impugned order and any order passed in violation of the principles of natural justice is nullity in law.

13. The CIT (Appeals) failed to appreciate that the recomputation of Long Term Capital Gains in any event was wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

14. The Appellant craves leave to file additional grounds/arguments at the time of hearing."

b) Grounds in ITA No.1324/Chny/2012 for ay: 2001-02(Revenue's appeal)

"The order of the Learned CIT(Appeals) is contrary to law and facts of the case.

1. The Learned CIT(Appeals) erred in deleting the non compete fee of Rs.7.5 crores treated as sale consideration received in respect of sale of shares by the Assessing Officer;

2.1 The Learned CIT(A) ought to have appreciated the fact that the assessee did not show any evidence other than the Memorandum and Articles of Association of Krish Srikanth Sports Entertainment P Ltd., and there was no specific clause in the agreement regarding the nature of activities carried out by the assessee and the activities which the assessee was refrained from carrying out in future;

2.2 It is submitted that the assessee had been appointed as Director in the Penta Media Group of Companies (Tarachantini Financial Services, ABN Services P Ltd., Foresee Financial & Consultancy P Ltd.) to which the shares of KSSEPL were sold by the assessee;

2.3 The CIT(Appeals) ought to have appreciated the fact that the investment made by Penta Media Group in KSSEL was stated to be Rs.45 crores and it was a joint venture initially promoted by the assessee and the proposal was to build a sports complex as annexe to Mayajaal and Mayajaal Complex was promoted for indoor entertainment and the sports complex was proposed as outdoor entertainment as on 31.03.2005;

2.4 It is submitted that the factual position as on 31.03.2005 proves that as agreed between the parties, the assessee was not refrained from carrying out any activity since he was appointed as one of the Directors of the said company to carry out the Proposal of Sports Complex at Mayajaal and entered into a Joint Venture Agreement with Penta Media, which clearly shows that the assessee within a period of six years engaged in the business activity;

2.5 The CIT(Appeals) ought to have appreciated the fact that the impugned amount was only part of sale consideration received in the form of non-compete fee liable for long capital gains.

2.6 It is submitted that the non compete fee was only a nomenclature to avoid tax as held in the Apex Court's decision in the case of S.A. Builderes reported in 288 ITR 1.

2.7 It is submitted that the decision relied upon by the CIT(A) in the case of M/s Guffic chem Pvt. Ltd vs CIT (332 ITR 602) cannot be applied to the facts of the case since the issue is not whether to treat the non compete fee as capital or revenue receipt.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the Ld.CIT(A) may be set aside and that of the Assessing Officer may be restored."

c) Grounds in ITA No.307/Chny/2010 for ay: 2001-02(Assessee's appea)

"1. The order of The Commissioner of Income Tax, Chennai-I, Chennai - 600 034 dated 22.1.2010 in C.No.218(36)/CIT-l/263/2009-10 for the above assessment year is contrary to law, facts, and in the circumstances of the case.

2. The CIT erred in passing the order u/s 263 of the Act in directing the Assessing Officer to re-examine the computation of Long Term Capital Gains as well as to re-examine the eligibility of the deduction u/s 54F of the Act without assigning proper reasons and justification.

3. The CIT failed to appreciate that the jurisdiction assumed u/s 263 of the Act on the facts of the case was wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

4. The CIT failed to appreciate that hence the order under consideration was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.

5. The CIT failed to appreciate that in any event the findings on the adoption of sale consideration in the computation of Long Term Capital Gains were wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

6. The CIT failed to appreciate that in this regard the reply dated 5.11.2009 was not taken into consideration in proper perspective inasmuch as non realization of the amount of Rs.3 Crores on the facts of the case ought to have been taken note of and further ought not to have been tinkered with in the assumption of jurisdiction of revisional powers in the passing of the impugned order.

7. The CIT failed to appreciate that the findings recorded in this regard in para 3 of the impugned order were wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

8. The CIT failed to appreciate that the Doctrine of Merger on the facts of the case was totally brushed aside and hence the order under consideration was erroneous and invalid.

9. The CIT failed to appreciate that in the process of directing the Assessing Officer to adopt the sale consideration at Rs.15 Crores in the computation of Long Term Capital Gains, the principles of 'diversion of income by overriding title' was totally brushed aside and overlooked in giving such direction in the impugned order.

10. The CIT failed to appreciate that the direction to examine the correctness of the claim of deduction u/s 54F of the Act in the computation of Long Term Capital Gains was wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

11. The CIT failed to appreciate that the deduction u/s 54F of the Act in the computation of Long Term Capital Gains was correct and proper and further failed to appreciate that the said claim was correctly accepted in the scrutiny assessment.

12. The CIT failed to appreciate that in any event the re-assessment order dated 31.12.2008 was subjected to the extra ordinary jurisdiction of the Madras High Court under Article 226 of the Constitution of India and the Writ Petition filed to challenge the reopening proceedings on the facts and in the circumstances of the case is still pending for decision.

13. The CIT failed to appreciate that in the light of the above fact and in the light of the interim order(s) passed by the Hon'ble High Court in W.P.No.49683/2006, the order of revision under consideration was bad in law.

14. The CIT failed to appreciate that there was no proper opportunity given before passing the impugned order and any order passed in violation of the principles of natural justice is nullity in law,

15. The Appellant craves leave to file additional grounds/arguments at the time of hearing."

d) Grounds in ITA No.1016/Chny/2012 for ay: 2001-02(Assessee's Appeal)

"1. The order of The Commissioner of Income Tax (Appeals) III, Chennai - 600 034 dated 27.03.2012 in I.T.A.No.283/10-11/A.III for the above mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case.

2. The CIT (Appeals) erred in sustaining the order giving effect to the revision order passed by the CIT for re-computing the Long Term Capital Gains arising or accruing as a result of transfer of shares without assigning proper reasons and justification.

3. The CIT (Appeals) failed to appreciate that the determination of sale consideration at Rs.15 Crores as against the determination of sale consideration as Rs.12 Crores in the computation of Long Term Capital Gains was wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

4. The CIT (Appeals) failed to appreciate that having not disputed the fact of non receipt of Rs.3 Crores from the transaction under scrutiny, inclusion of the said amount as part of the sale consideration in the recomputation of Long Term

Capital Gains was wrong, incorrect, unjustified, erroneous and not sustainable both on facts and in law.

5. The CIT (Appeals) failed to appreciate that the order of revision passed by the CIT u/s 263 of the Act has not become final and ought to have appreciated that the further appeal against the said revision order is pending before the ITAT, Chennai Bench for decision.

6. The CIT (Appeals) failed to appreciate that having not cross verified with the purchasers, inclusion of the said amount of Rs.3 Crores as part of the sale consideration in the recomputation of Long Term Capital Gains was erroneous and invalid.

7. The CIT (Appeals) went wrong in recording the findings in this regard in para 5 of the impugned order without assigning proper reasons and justification.

8. The CIT (Appeals) failed to appreciate that the appeal proceedings being legally considered as continuation of assessment proceedings, the non consideration of the correct facts in the said Appellate Proceedings would vitiate his action in sustaining the adoption of sale consideration as Rs. 15 Crores as against Rs.12 Crores in the recomputation of Long Term Capital Gains.

9. The CIT (Appeals) erred in sustaining the levy of interest charged u/s 234A, 234B and 234C of the Act in the computation of taxable total income without assigning proper reasons and justification.

10. The CIT (Appeals) failed to appreciate that there was no proper opportunity given before passing the impugned order and any order passed in violation of the principles of natural justice is nullity in law.

11. The Appellant craves leave to file additional grounds/arguments at the time of hearing."

3. Since common issues are involved in all these four appeals , these appeals were heard together and are now disposed off by this common order.

4. First we will take up cross-appeals filed by assessee and Revenue in ITA No.1015/Chny/2012 & in ITA No.1324/Chny/2012, both for ay: 2001-02. Briefly stated facts of the case are that the assessee is engaged in the business of Modelling, Cricket Commentary, Journalism and Consulting & BPCL Dealership. The assessee filed his return of income with Revenue for impugned ay: 2001-02 on 28.03.2002 , declaring an income of Rs.

20,42,510/- . The said return of income was processed by Revenue u/s.143(1) of the 1961 Act and admittedly no scrutiny assessment u/s 143(3) of the 1961 Act was originally framed by Revenue.

The AO observed from enclosures of the return of income filed by assessee with Revenue that assessee has sold shares held in his name, minor children and wife, during the impugned year under consideration. It is stated that the amounts transacted as Restricted covenants arises on the course of sale of shares and hence the same cannot be claimed to be independent of the transaction to be allowed as an exempted income under the provisions of the 1961 Act or capital receipt not chargeable to tax. The AO observed that the assessee has not offered Rs. 4.25 Crs. from the sale proceeds of the shares claimed it to be payment towards overriding garnishee attachment on the shares by Indian Bank . The AO observed that it is not an encumbrance attached to the shares.

The AO observed that the assessee has sold his shares as well shares of his minor children's and wife's shares in Kris Srikkanth Sports Entertainment Private Ltd. To Pentamedia Group Concerns. The gist of agreement and the amount received by assessee are reproduced as under:

> *"Agreement 1. As per the agreement, the assessee entered into an agreement with M/s. FORSEE FINANCIAL AND CONSULTANCY SERVICES PRIVATE LIMITED, No.1, Ramakrishna street, 7th Floor, T.Nagar, Chennai-17. The purchaser propose to purchase 1/3rd of issued, subscribed and paid up shares in KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, (Formerly known as A.A. International Private Limited) from the various shareholders in their name.*

The company was promoted by the assessee who had necessary expertise and contacts relating to the said business and the business,of the company was wholly promoted and developed by the assessee.

As per the agreement, the assessee shall not carry on either by himself or in association with any other person or persons or associate or involve directly or indirectly with any other company, firm or person in a business similar to that carried on by M/s. KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, for a period of 6 years.

In consideration of the above agreement, the purchaser has paid a sum of Rs.2.5 crore (Rupees Two Crores and fifty Lakhs only).

Agreement 2. The assessee entered into an agreement with M/s. TARACHANTHINI SERVICES PRIVATE LIMITED, No. 15, Main Road, Mahalingapuram, Chennai-600 034. The purchaser propose to purchase 1/3rd of issued, subscribed and paid up shares in KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, (Formerly known as A.A.International Private Limited) from the various shareholders in their name.

The company was promoted by the assessee who had necessary expertise and contacts relating to the said business and the business of the company was wholly promoted and developed by the assessee.

As per the agreement, the assessee shall not carry on either by himself or in association with any other person or persons or associate or involve directly or indirectly with any other company, firm or person in a business similar to that carried on by M/s. KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, for a period of 6 years.

In consideration of the above agreement, the purchaser has paid a sum of Rs.2.5 crore (Rupees Two Crores and fifty Lakhs only).

Agreement 3. The assessee entered into an agreement with M/s. ABN FINANCIAL SERVICES PRIVATE LIMITED, No. 13, Rani Annadurai Street, Raja Annamalaipuram, Chennai-600 028. The purchaser propose to purchase 1/3rd of issued, subscribed and paid up shares in KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, (Formerly known as A.A.International Private Limited) from the various shareholders in their name.

The company was promoted by the assessee who had necessary expertise and contacts relating to the said business and the business of the company was wholly promoted and developed by the assessee.

As per the agreement, the assessee shall not carry on either by himself or in association with any other person or persons or associate or involve directly or indirectly with any other company, firm or person in a business similar to that carried on by M/s. KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, for a period of 6 years.

In consideration of the above agreement, the purchaser has paid a sum of Rs.2.5 crore (Rupees Two Crores and fifty Lakhs only).

Agreement 4. The agreement was entered into Minor. Anirudaa Srikkanth, son of Krishnammachari Srikkanth, aged 14 years represented by Mother and Natural Guardian Mrs.Vidyaa Srikanth and with M/s. TARACHANTHINI SERVICES PRIVATE LIMITED, No. 15, Main Road, Mahalingapuram, Chennai-600 034.

It was agreed to transfer 1,25,000/- shares to TARACHANTHINI for consideration of Rs.2.5 crores. (Rupees Two Crores and fifty Lakhs only).

Agreement 5. (i) The agreement entered into by Minor. Adityaa Srikkanth son of SRIKKANTH

(ii) Minor Anirudaa Srikkanth, son of Krishnammachari Srikkanth, aged 14 years represented Guardian Mrs.Vidyaa Srikanth,

(iii) Sri. Krishnammachari Srikkanth son of C.R. Krishnammachari, the assessee,

(iv) Smt. Vidyaa Srikkanth, wife of K Krishnammachari Srikkanth, the shareholders of KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, (Formerly known as A.A.International Private Limited).

And M/s. ABN FINANCIAL SERVICES PRIVATE LIMITED, No. 13, Rani Annadurai Street, Raja Annamalaipuram, Chennai-600 028.

In consideration for the shares proposed to be transferred, ABN agreed to pay a sum of Rs.2.5 crores (Rupees Two Crores and fifty Lakhs only) towards the consideration for the purchase of 1,25,000 shares held by the shareholders of KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED.

Agreement 6. This agreement was entered into by Minor.Adityaa Srikkanth son of Krishnammachari Srikkanth, aged about 17 years represented by Father and Natural Guardian Krishnammachari Srikkanth.

And

M/s. FORSEE FINANCIAL AND CONSULTANCY SEVICES PRIVATE LIMITED, No.1, Ramakrishna Street, 7th Floor, T.Nagar, Chennai-600 017.

M/s. FORSEE agrees to pay a sum of Rs.2.5 crores (Rupees Two Crores and fifty Lakhs only) towards the consideration for the purchase of 1,25,000 shares of KRIS SRIKKANTH SPORTS ENTERTAINMENT PRIVATE LIMITED, (Formerly known as A.A. International Private Limited.

The AO observed that the assessee has received a sum of Rs. 12 Crs. for transfer of the shares and details of payments received by the assessee through banking channel and the details of payments as furnished by assessee was re-produced by AO in its assessment order, as under:

Date	*Bank*	*Amount*
21.09.2000	*UTI Bank*	*10000000*
23.09.2000	*UTI Bank*	*10000000*
08.01.2001	*UTI Bank*	*20000000*
08.01.2001	*UTI Bank*	*5000000*
08.01.2001	*UTI Bank*	*5000000*
08.01.2001	*UTI Bank*	*10000000*
06.02.2001	*UTI Bank*	*10000000*
22.02.2001	*UTI Bank*	*10000000*
01.03.2001	*UTI Bank*	*3500000*
16.03.2001	*UTI Bank*	*1500000*
22.03.2001	*UTI Bank*	
Total up to year ending 31.03.2001	*(A)*	*95000000*
11.04.2001	*UTI Bank*	*2500000*
16.04.2001	*UTI Bank*	*5000000*
17.04.2001	*UTI Bank*	*5000000*
20.04.2001	*UTI Bank*	*2500000*
27.04.2001	*UTI Bank*	*2500000*
30.04.2001	*UTI Bank*	*2500000*
11.05.2001	*UTI Bank*	*5000000*

TOTAL UP TO YEAR ENDING 31 .03.2001	*(B)*	*25000000*
TOTAL RECEIPTS FOR THE TRANSFERE OF SHARE	*(A) + (B)*	*120000000*

The AO observed that the total sale consideration is shown at Rs. 15 Crs. and out of which the assessee has claimed exemption of Rs.7.5 Crs under the restrictive covenant as the assessee was not allowed to compete with the company to which the shares have been sold. Further, the AO observed that the assessee has reduced a sum of Rs. 4.25 Crs. wherein, the assessee had claimed that he has not received the said sum owing to overriding garnishee attachment on the shares by the Indian Bank. The AO observed that the assessee has in fact received Rs. 12 Crs. on various dates and the said sum of Rs. 4.25 crores were paid to the Indian bank for settlement of his dues. The AO observed that these claims of the assessee were found to be not correct and hence in view of the AO the income of the assessee had escaped assessment hence concluded assessment were reopened by issuance of notice u/s.148 of the 1961 Act, dated 30.03.2006 by AO issued to the assessee , which was duly served on assessee by AO on 02nd April 2006. It is pertinent to mention here that the aforesaid notice u/s 148 was issued by AO within 4 years from the end of the assessment year and hence proviso to Section 147 of the 1961 Act is not applicable . The assessee filed Writ Petition before Hon'ble Madras High Court challenging the issue of notice u/s 148 of the 1961 Act wherein Hon'ble Madras High Court vide order dated 14.12.2007 directed the assessee to file return of income and the Department was permitted to proceed with assessment proceedings. Accordingly, the assessee filed his return of income on 08.02.2008 in accordance with the directions of Hon'ble High Court.

The assessee during the course of reassessment proceedings objected to re-opening of the concluded assessment on jurisdictional ground, wherein, it was claimed that the formation of opinion later to the issuance of intimation u/s.143(1)(a) tantamount to change of opinion and hence only on fresh facts coming to the knowledge of the AO, the assessment can be re-opened. Secondly, it was submitted by assessee before AO that the AO should have taken up the case for scrutiny assessment by issuance of notice u/s.143(2) of the Act and notice was issued u/s.148 after expiry of the time as provided u/s.143(2) of the Act and thus the department cannot come through the back door by issuing notice u/s 148 of the 1961 Act as the time limit for framing of scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act has already expired. The assessee also submitted that the reason recorded by AO for re-opening of the assessment by invoking provisions of Section 147 of the 1961 Act do not disclose that the AO had any reason to believe that any income of the assessee had escaped assessment. The assessee also submitted before AO that there was no indication as to on what information or on what material the AO had reasons to believe that the claim of the assessee was incorrect.

The AO dismissed the contentions of the assessee on jurisdictional ground and upheld the re-opening of the assessment as in the opinion of the AO no scrutiny assessment was framed by Revenue against assessee u/s.143(3) of the Act and only intimation was issued u/s.143(1)(a) of the Act. It was observed by AO that from 01.04.1989, the provisions of

Sec.147 has undergone change and intimation u/s.143(1) is not an assessment. The AO relied upon decision of Hon'ble Supreme Court in the case of Delhi Development Authority. It was observed by the AO that no assessment was originally framed by AO u/s 143(3) of the 1961 Act and hence no opinion was formed by AO on the return of income originally filed by assessee, while processing return of income u/s.143(1)(a), there cannot be any change of opinion when provisions of Section 147 are invoked. The AO rejected contentions of the assessee that once notice u/s 143(2) is not issued and time limit to issue notice u/s 143(2) has expired, then no notice u/s 148 could have been issued. The AO relied upon the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Limited reported in [2007] 291 ITR 500 (SC). The AO observed that w.e.f. 01.04.1989, the scheme of re-opening of the concluded assessment has undergone change and even if notice u/s 143(2) is not issued , and no assessment was framed u/s.143(3), then also AO can proceed to initiate re-assessment proceedings u/s.147 & 148 of the Act and the only condition is that the AO should have reasons to believe that income of the assessee had escaped assessment. The AO relied upon decision of Hon'ble Delhi High court in the case of Bawa Abhai Singh v. DCIT reported in 107 Taxman 129(Delhi HC) and also decision of Hon'ble Patna-tribunal in the case of DCIT v. Narendra Mohan Bajri . The AO observed that there has to be reasons to believe that income of the assessee has escaped assessment but sufficiency of the reasons to believe that income of the assessee has escaped cannot be investigated by the

Courts. Further, it was observed by AO that at the time of issuance of notice , it is not necessary for AO to come to conclusive finding that income of the assessee has escaped assessment and what is required is a prima facie belief of the AO that income of the assessee has escaped assessment based on material before the AO. Thus, as per AO at this stage of reopening of the concluded assessment, sufficiency or correctness of the material is not a thing to be considered. Thus, challenge as raised by assessee on legal jurisdictional ground as to legality and validity of issuance of notice u/s 148 of the 1961 Act was repelled by the AO.

On merits of the case, the AO observed that assessee has received a sum of Rs. 7.5 Crs. allegedly to compensate loss of the assessee as he was asked not to compete with company to whom the shares of the assessee and his minor children's were sold . But AO was not satisfied with clauses in the agreement filed by assessee as there was no specific clause in agreements as to what assessee was doing earlier and also that it is not indicated as to what are the present activities of the company which purchased the shares. The AO also observed that mere made to believe agreements were entered into by assessee with Pentamedia Group Concerns to enable recipient of the money to avoid tax on the same and there was no specific restriction on assessee to do professional activity parallel with the company. As per AO, this agreement was entered into without any basis to enable the assessee only to reduce the tax liability. The AO also observed that the assessee is working as Director in the same

company and it was not clear to the AO as to activities undertaken by the said company. The AO also observed that there was no condition as to penalty to be levied in case terms and conditions of the agreement are violated . Thus, as per AO these agreements are sham agreements which are not enforceable at law and entire consideration received by assessee and his minor child were held to be chargeable to tax as capital gains on sale of shares which as per AO was camaflouged as non-compete fee. Thus, the AO rejected the contentions of the assessee and income of the assessee was assessed as capital gains.

The second issue was with respect to receipt of Rs. 4.25 crs. which was claimed by assessee to have been paid to the Indian Bank for clearing bank dues. The AO observed from the details furnished by assessee that the amount has not gone directly to the Indian bank and amount was received by assessee and thereafter it was utilized by assessee for paying to the banker to discharge his liability and hence the same cannot be called as diversion of income by overriding title. The AO observed that even if amount is paid directly to the banker but still said consideration is to be assessed to tax as capital gains. Thus, the AO observed that these receipts by assessee from the company cannot be said to be diverted by overriding title. It was observed by AO that there were some dues payable to Bank by one company namely 'Aditya Leather Exports Private Limited' in which the assessee is Director and the bank has attached his shares of other companies also. The AO observed that these dues are with

reference to other companies and not in individual capacity of the assessee and hence there is no overriding title under which the assessee has not received the money.

The AO also observed that the assessee has excluded a sum of Rs. 3 crs. on the ground that the said amount has not been received. The AO observed that this amount was considered by assesse in his return of income filed u/s 139(1) and this amount was due to the assessee as on 31.03.2001 and hence the entire amount is to be considered for computation of capital gains. But while computing capital gains and tax payable by assessee thereon , the AO took the figure of Rs. 12 cores for computing capital gains on sale of shares instead of an amount of Rs. 15 crores which was total consideration as per agreements entered into with Pentamedia Group of concerns. The aforesaid assessment was framed by AO vide assessment order dated 31.12.2008 passed u/s 143(3) read with Section 147 of the 1961 Act.

5. Aggrieved by an assessment framed by the AO u/s 143(3) read with Section 147 of the 1961 Act, the assessee filed first appeal before Ld.CIT(A) raising both jurisdictional issue challenging legality of reopening of the concluded assessment by invoking provisions of Section 147 of the 1961 Act as well raising challenge on merits of the additions made by the AO. The learned CIT(A) was , inter-alia, pleased to dismiss objections raised by assessee on jurisdictional ground as to legality and validity of reopening of the concluded assessment u/s 147 of the 1961 Act by holding

that re-opening of the concluded assessment by invoking provisions of Section 147 of the 1961 Act was validly initiated by AO u/s 147 of the 1961 Act , by holding as under:

> *"5. I have carefully considered the facts of the case and the submissions of the ld.AR. I have also gone through the decisions and the circular relied on by the AO and AR. In this case the return had only been processed u/s.143(1) of the Act and no assessment order u/s.143(3) was passed. Hence, the fact of the present case is different from the case of Kelvinator of India Ltd (supra) where a regular order of assessment had been passed u/s.143(3) on 17.11.1989 before issue of notice u/s.148 on 20.04.1990. Intimation u/s.143(1) is not an assessment. In similar circumstances, the Hon'ble Supreme Court in the case of ACIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd 291 ITR 500(SC) held that proceedings initiated u/s.147 are valid. As intimation u/s.143(1)(a) is not "assessment", there is no question of treating reassessment in such a case as based on change of opinion. Since no decision had been taken at the first instance, there is no question of reviewing it based on change of opinion. Further, in the case of Sun Engineering Works Pvt. Ltd. 198 ITR 297(SC), the Hon'ble Supreme Court has held that re-assessment proceedings are for the benefit of revenue and are aimed at gathering the escaped income. The Hon'ble Madras High Court in the case of Madras Gymkhana Club v. DCIT, 328 ITR 348 (Mad) has held the reopening to be valid under similar circumstances. In view of the above factual position and authoritative precedents, I am of the considered opinion that the reopening has been validly initiated. The ground is accordingly dismissed."*

On merits of the issue in appeal, the Ld.CIT(A) accepted contentions of the assessee that Rs. 7.5 Crs. was received by assessee towards non-compete fee which is a capital receipt and is exempt from tax , by holding as under:

> *"6.2 I have carefully considered the facts of the case and the submissions of the ld.AR. I have also gone through the decisions relied on by the ld.AR. I have also perused the agreements for sale of shares, non-compete agreements and other details. The appellant was the promoter of the company i.e. Kris Srikanth Sports Entertainment Pvt. Ltd (KSEPL). This company was taken over by three companies of Pentamedia group by purchasing the shares of KSEPL. An agreement was entered into between appellant and the purchasers of shares whereby Sri K. Srikanth (the appellant) was not to engage himself in any competitive activity similar to that carried on by KSEPL for a period of 6 years. A sum of Rs.7.5 crores was paid by the three buyer companies, as consideration for the above restrictive covenant. The appellant has claimed the compensation as a capita! receipt exempt from taxation. There is no dispute regarding the fact that the appellant and the buyers are unrelated parties. Hence, the transaction entered at arm's length cannot be questioned. The agreements entered into between the appellant and the buyers are very clear regarding the purposes for which payments were made to the appellant. The relevant clause in the agreement is reproduced for reference and clarity.*
>
> > *"Whereas the party of the first part has assured the party of the second part that consequent on the purchase of 1/3 of the Issued and subscribed share capital of the company by the party of the second part, the party of the first part shall not carry on either by himself or in association with any other person or persons or associate or involve directly or indirectly with any other company, firm or person in*

a business similar to that carried on by M/s. Kris Siikkanth Sports Entertainment P.Ltd., for a period of 6 years.....

That in consideration of the payment by the party of the Second Part to the party of the First Part of the sum herein stated in the manner herein contained and of mutual covenants of the parties, the party of the First Part Hereby confirms and covenants with the party of the Second Part that he shall not for a period of six years from the date hereof carry on any business similar to that carried on by M/s.Kris Srikkanth Sports Entertainment P Ltd. either by himself or in association with any other person or persons nor shall he involved, or associate himself as Proprietor, Partner, Director, Consultant or Advisor to any Company, Firm or other person carrying on or involved in a similar business.

That in consideration of the above said covenant by the party of the first part, the party of the second part shall pay to the party of the first part a sum of Rs.2,50,00,000/- (Rupees Two Crorss and fifty lakhs only)

The restrictive covenant of the party of the first part as herein contained shall ensure for a period of 6 years from the date hereof and shall cease on the expiry of the said period..."

6.2.1 It is clear from the reading of the above clauses that the compensation for restrictive non-compete covenant is a capital receipt as the income earning apparatus has been taken away from the appellant for a period of 6 years. It is to compensate the loss of income from sports media activities for 6 years that the appellant had received the impugned sum. The Hon'ble Supreme Court in the case of Gillanders Arbuthnot & Co. Ltd v. CIT, 53 ITR 283 (SC) has held that compensation paid for agreeing to refrain from carrying on competitive business in the commodities; in respect of which the agency was terminated, or for the loss of goodwill would, prima facie, be of the nature of capital receipt. The decision of the Hon'ble Supreme Court in the case of Guffic Cham P.Ltd v. CT, 332 ITR 602 (SC) also supports the case of the appellant. Non-compete fee was made specifically taxable by insertion of clause (va) in section 28 by Finance Act, 2002 effective from 1.4.2003. Prior to amendment, it was held to be not taxable where the non-compete fee related to a business as a whole, as for example decided in CIT v. Rai Bahadur Jairam Valji [1959] 35 ITR 148 (SC). In such cases, it would be a capital receipt. In a case, where there was an agreement for transfer of trade mark by the assesses company to Ranbaxy, a pharmaceutical company with the assessee foregoing the right to carry on directly or indirectly the business hitherto carried on by it and the duration of the agreement was twenty years, it was held that it could not be treated as income of a revenue nature, and, therefore, the Supreme Court held it to be a capital receipt in Guffic Chem. P. Ltd v. CIT [2011] 332 ITR 502 reversing the decision of the Karnataka High Court to the contrary in Civil Appeal No. 2522 dated 29.10.2009. In the same common judgment, it also dealt with year another case in CIT v. Mandalay Investment P. Ltd, 332 ITR 602 (SC). wherein it was decided that the amount received for similar circumstances prior to the amendment could not be Taxed upholding the decision of the Delhi High Court in I.T.A.No.728 of 2009 dated 29.7.2009 to this effect. The facts of the appellant are covered by the above decisions. In view of the above factual and legal positions, the addition is deleted and the ground is allowed."

So far as the contentions of the assessee that Rs. 4.25 Crs. received by the assessee from the sale proceeds of shares is to be appropriated in discharge of liability through Indian Bank which was stated to be diversion by overriding title and hence the same cannot be brought to tax

as contended by the appellant , was repelled by Ld.CIT(A) by holding as under:

"7.3 I have carefully considered the facts of the case and the submissions of the Id.AR. I have also gone through the decision relied on by the ld.AR. I have also carefully perused the affidavit filed by Indian Bank, order of DRT in OA No.1642/1998 and 1399/1998 dated 23.2.2001 and other details submitted by the appellant. From the facts on record, it is clear that the appellant was a guarantor in respect of the loan granted by Indian Bank to Aditya Leather Exports P. Ltd. (ALE). The borrower was unable to pay the dues to the bank on account of huge losses. The Bank has a right to proceed against the guarantors if the borrower does not pay the loan. In the instant case, the bank on learning that the guarantor (appellant) was proposing to sell his securities without settling the dues of the bank, had filed an application before Debt Recovery Tribunal at Chennai to grant interim injunction restraining the buyer from making payment to the appellant towards the sale of shares and to direct the buyer to pay the amount directly to the bank towards the loan outstanding. Subsequently, the bank entered into an out of court settlement whereby a sum of Rs. 4.25 cores from sale proceeds was to be paid to the bank.

The appellant has claimed that the above amount of Rs.4.25 crores should be allowed as deduction in computing the capital gain since it was an amount paid for removing the encumbrance on the sale of shares. I am unable to agree with the contentions of the appellant. In this case, the appellant as a guarantor of the loan was legally bound to repay the loan taken by the borrower in case borrower was unable to pay back the amount. When the guarantor (appellant) wanted to sell the shares of KSEPL owned by him, the bank had filed an application before DRT only to have a right to receive the amount realized by way of sale so as to settle its dues. In my considered opinion, it will only be an application of income and not diversion of income by overriding charge. The decision of the Hon'ble Supreme Court in the case of CIT v. Sitaldas Tirathdas, 41 ITR 367 (SC) is relevant. It held that the true test for the application of the rule of diversion of income by overriding charge is whether the amount sought to be deducted, in truth, never reached the assesses as his income. Obligations, no doubt, are there in every case, but it is the nature of obligation that is the decisive fact. There is difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of obligation cannot be said to be part of income of the assessee, Where by obligation the income is diverted before it reaches the assessee, it is deductible; but where the amount is required to be applied to discharge an obligation after such income reaches the assesses, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another person of one's income, which has been received and since applied. The present case is a clear instance of application of money.

7.3.1 Further, the claim of the appellant that there were encumbrances in the property to be sold and therefore the amount paid was towards clearing these encumbrances, in my opinion, cannot be accepted. This was not the case of any encumbrance created on the property sold, the sale of which will necessarily presuppose clearing of those encumbrances. In fact, in this case there was no specific encumbrance: on the said shares. Even, when there are specific encumbrances like that of a loan that has been obtained on the said shares, the clearances of the loan by way of sale of shares would only be an application of income that is received by way of sale of share and cannot be in any way said to be an expenditure incurred towards sale or improvement in the cost of the asset. The decision relied upon by the ld.AR in the case of Bradford Trading Co. Pvt. Ltd. (261 ITR 222), in my opinion, Is not applicable to the facts of this case since the decision related to clearance of specific encumbrances on the assets sold. A suit was filed by one of the shareholders when the assessee company transferred a building belonging to it. The Hon'ble Court held payment of ₹2 lakhs over and above return of share capital was deductible. The facts of the present case are totally different. Indian Bank was neither a shareholder of KSEPL nor it had any interest in KSEPL. Further, the application filed by the bank before DRT clearly shows that what is sought is only clearance of dues of the bank and not any restrain on sale of the shares. In fact, the bank could not have restrained the sale of shares as long as its interest was protected. Therefore, in my considered opinion,

the amount paid to Indian Bank towards settlement of its dues is only an application of income. Hence, the AO has rightly made the addition which is upheld. Accordingly, this ground is dismissed. "

6. Before we proceed further, it is to be stated that this order is being pronounced beyond 90 days from the date of hearing. The hearing of the appeals were concluded on 29th January 2020. There were extraordinary situation prevailing in the country owing to Covid19 disease wherein Government of India announced first National lockdown effective from 25th March 2020. There are further lockdowns announced from time to time by GOI thereafter. The fourth lockdown is announced on 17th May 2020 by GOI which will be effective from 18th May 2020 till 31st May 2020. The State Governments are also announcing their further stringent conditions for implementing these lockdown in their respective states. These lockdowns have crippled the normal functioning of the country. The order is to be pronounced within 90 days from the date of conclusion of hearing and this order is pronounced , much after the expiry of 90 days from the date of conclusion of hearing. Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963 will come into play. Co-ordinate Division Bench of ITAT, Mumbai in DCIT v. JSW Limited in ITA no. 6264/Mum/2018 vide orders dated 14th May 2020 has dealt with the delay in pronouncement of the orders by tribunal in these extraordinary period, by holding as under:

"7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with

pronouncement of orders, provides as follows: (5) The pronouncement may be in any of the following manners :—

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein Their Lordships had, inter alia, directed that "We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there

was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made timebound by this

Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during whichlockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case."

We have also observed that Hon'ble Supreme Court has passed an order whereby in exercise of its powers under Article 141/142 of Constitution of India has extended limitation period in suo motu case , effective from 15th March 2020 by holding as under:

> "To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings."

The State of Tamil Nadu is also hit by Covid19 disease as could be seen from the data of positive cases emerging in State of Tamil Nadu. Thus, even if we exclude period of first national lockdown from 25.03.2020 to 19.04.2020, when offices were not allowed to be physically opened , the period with in which this order is now pronounced is within 90 days.

7. Both assessee and Revenue are aggrieved by appellate order dated 27.03.2012 passed by learned CIT(A) who have come in appeal before the tribunal and we shall take up the contentions of the assessee as well Revenue after discussing factual back ground of appeal filed by assessee in ITA No.307/Chny/2010 and ITA No.1016/Chny/2012 , for ay: 2001-02.

8. Now we take up appeal filed by assessee in ITA No.307/Chny/2010 for ay: 2001-02. The learned Commissioner of Income-tax on perusal of the record observed that AO has stated in its assessment order dated 31.12.2008 that entire sale consideration of Rs. 15 crores should be considered in the computation of capital gains and he has stated in his assessment order that the assessee has excluded a sum of Rs. 3 crores stating that amount was not received and the assessee in his return of income filed u/s 139(1) considered total consideration of Rs. 15 crores for capital gains and as on 31.03.2001 , the amount was due to the assessee and hence the entire amount of Rs. 15 crores is to be considered for computation of income from capital gain. The learned CIT observed that however , while computing sale value of each share, the AO has adopted gross sale consideration of Rs. 12 crores and divided the same by 375000 shares sold by the assessee and his minor sons. Thus, he has erroneously arrived at sale price of each share of Rs. 320 instead of Rs. 400 per share(Rs. 15 crores/375000 shares), which led to invocation of revisionary powers u/s 263 by learned CIT. The second issue on which learned CIT invoked revisionary powers u/s 263 was with respect to the deduction

allowed by AO u/s 54F of the 1961 Act . The learned CIT observed that in computation of income filed by assessee with revised return of income , the assessee has claimed deduction u/s 54F of the 1961 Act to the tune of Rs. 35,62,189/- while the AO has allowed deduction u/s 54F of the 1961 Act to the tune of Rs. 43,69,613/-. It was also observed by learned CIT that AO has failed to get facts of the investment and whether the assessee claim is in accordance with Section 54F of the 1961 Act read with the proviso. The aforesaid reasons led to the invocation of revisionary powers by learned CIT u/s 263 of the 1961 Act by considering that assessment order dated 31.12.2008 passed by AO u/s 143(3) read with Section 147 of the 1961 Act was erroneous so far as prejudicial to the interest of Revenue, which led to issuance of notice dated 13.10.2009 issued by learned CIT u/s 263 of the 1961 Act. The assessee in response to notice dated 13.10.2019 issued by learned CIT u/s 263 of the 1961 Act submitted in its reply vide letter dated 05.11.2009 that the assessee has not realized the sale consideration of Rs. 3 Crs. and hence the net realization has been correctly taken in the workings of the assessment order passed by AO. It was submitted that when return of income was originally filed u/s.139(1) of the 1961 Act , the assessee has assumed the possibility of realizing Rs. 3 Crs. eventually but when revised return of income was filed , it was certain that said sum had become irrevocable and bad. Thus, the assesse submitted that the AO has correctly taken net consideration of Rs. 12 crores instead of Rs. 15 crores. The Ld.CIT rejected contentions of the assessee and observed that the AO had

already rejected contention of the assessee that the sale consideration is to be taken as only Rs. 12 crores instead of Rs. 15 crores , while framing assessment order dated 31.12.2008. Thus, learned CIT observed that the AO had rejected the contention of the assessee that sale consideration be adopted at Rs. 12 crores on account of bad debts being Rs. 3 crores and it is only by mistake the AO adopted sale consideration of Rs. 12 crores instead of Rs. 15 crores which is purely a mistake on the part of the AO and was blatantly erroneous so far as prejudicial to the interest of the Revenue and therefore directions were issued by learned CIT to compute value of each share by taking total sale consideration of Rs. 15 crores and dividing the same by 375000 shares which gives value of Rs. 400 per share . Similarly for claiming deduction u/s.54F , the assessee submitted that deduction was rightly allowed by AO and there is no error in assessment order passed by AO. The learned CIT rejected contentions of the assessee as in view of learned CIT, the assessee has claimed lower deduction of Rs. 35,62,189 u/s 54F in revised return of income as actual investment made in house property as also that the AO has not verify as to whether conditions as prescribed u/s 54F were fulfilled by the assessee or not. Thus, learned CIT vide revisionary order dated 22.01.2010 passed u/s.263 of the 1961 Act held that assessment order dated 31.12.2008 passed by AO as erroneous so far as prejudicial to the interest of Revenue. The assessee being aggrieved by revisionary order dated 22.01.2010 passed by learned CIT u/s 263 of the 1961 Act has filed an appeal with tribunal in ITA no. 307/Chny/2010 for ay: 2001-02.

Further, vide appeal in ITA No.1016/Chny/2012 for ay: 2001-02, the assessee has challenged consequential assessment order dated 08.11.2010 passed by AO u/s.143(3) r.w.s.263 which assessment order was consequential to revisionary order dated 22.01.2010 passed by learned CIT u/s 263 of the 1961 Act , vide assessment order dated 08.11.2010 , wherein sale consideration for sale of shares was taken to be Rs. 15 crores as against Rs. 12 crores which was earlier erroneously adopted by AO while farming assessment u/s 143(3) read with Section 147 of the 1961 Act but , however, AO while framing assessment order u/s 143(3) read with Section 263 of the 1961 Act, allowed deduction u/s.54F to the tune of Rs. 43,69,613/- . Thus, the second ground for invocation of Section 263 of the 1961 Act by learned CIT was held by AO to be in favour of assessee while framing consequential assessment order u/s 143(3) read with Section 263 of the 1961 Act. The claim of the assessee that he has not received Rs. 3 Crs. and hence same should be excluded from sale consideration was rejected by AO while passing consequential order u/s 143(3) read with Section 263 of the 1961 Act and hence this differential amount of Rs 3 Crs. was also brought to tax by the AO. The assessee being aggrieved by an assessment order dated 08.11.2010 passed by AO u/s 143(3) read with Section 263 of the 1961 Act filed first appeal with Ld.CIT(A) who rejected contentions of the assessee and adopted gross sale consideration of Rs. 15 Crs. for computing capital gains and ground of the appeal raised by assessee to

that effect were dismissed by Ld.CIT(A) , vide appellate order dated 27.03.2012 by holding as under:

> *"5. I have carefully considered the facts of the case and the submissions of the ld.AR. I have also gone through the order passed u/s.143(3) r.w.s.147 dated 31.12,2008 and the order of CIT u/s 263 dated 22.1.2010. The AO, in the order passed u/s.143 r.w.s.147 dated 31.12.2008, has stated that the entire sale consideration of Rs.15 crores should be considered in the computation of capital gains. He has stated as under:*
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> > *"The assessee has excluded a sum of Rs.3 crores stating that the amount has not been received. In fact, the assessee in the return of income filed u/s.139(1) has considered for capital gain. As on 31.03.2001, the amount is due to the assessee. Hence, the entire amount has been considered for capital gain."*
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> *However, while computing the sale value of each share he has adopted the total sale consideration at Rs.12 crores only. The CIT-I, Chennai in his order u/s 263 dated 22.1.2010 has discussed the facts narrated above and has held that it was mistake on the part of AO which was blatantly erroneous and prejudicial to the interest of revenue on the basis of his own decision in principle that the sale consideration was Rs.15 crores. The AO, in the order u/s 143(3) r.w.s.263, has considered the submission of the assessee and held that the AO has wrongly computed the value of shares by taking the total consideration at Rs.12 crores instead of Rs.15 crores. It is clear from the agreement of sale entered into by the appellant and his family members with three concerns of the Pentamedia group that the sale consideration was Rs.15 crores. The agreements were made on 27.11.2000. The previous year relevant to the subject assessment year ended on 31.3.2001 i.e., only after four months from the date of agreement. The appellant has not brought on record any evidence or compelling circumstance which made him reduce the sale consideration by Rs.3 crores. Therefore, the AO has rightly taken Rs.15 crores as the total sale consideration. The appellant had a right to receive Rs.15 crores as per the agreement dated 27.11.2000. The agreement itself speaks that "both parties, however agreed that their share holders will have a lien over the said shares till such time as the payments are realized.... The parties hereto agree that any dispute, difference or claim arising from out of this agreement including any difference in any opinion regarding interpretation of the terms of this agreement or the non-payment of sale consideration shall be referred to an Arbitration consisting of a Sole Arbitrator to be named and appointed by the Shareholder..." Nothing has been brought on record to show that the total consideration was disputed or was not due as at the end of the year. Under the Income-tax Act, liability to pay income tax arises on the accrual of the income. The appellant acquired the right to receive Rs.15 crores on entering into the agreement on 27.11.2000 and, therefore, the income has accrued during the year. Hence, the AO has rightly made the addition. The ground is accordingly dismissed."*

The assessee being aggrieved by consequential assessment order dated 08.11.2010 passed u/s 143(3) read with Section 263 of the 1961 Act

against which appeal stood dismissed by learned CIT(A), has filed an appeal before the Tribunal which is listed in ITA no. 1016/chny/2012 for ay: 2001-02.

9. Coming back, as we could see that all the issues in these four appeals revolves around taxability of gains arising from sale of share of the Company 'Kris Srikkanth Sports Entertainment Private Limited' held by assessee and his minor sons , to three entities belonging to Pentamedia Group of Concerns and the alleged claim of the assessee that it entered into non-compete agreement with these purchasing entities and an amount of Rs. 7.50 crores was received towards non-compete fee by assessee for not competing with these entities for a period of six years and the same could not be brought to tax for impugned ay:2001-02 as amendment in Section 28 of the 1961 Act wherein clause (va) was inserted by Finance Act, 2002 w.e.f. 01.04.2003. Further there is a claim of the assessee that income to the tune of Rs. 4.25 crores being allegedly diverted by overriding title to 'Indian Bank' owing to bank loan availed by a company namely 'Aditya Leather Exports Private Limited' in which the assessee was Director and also guarantor for the said loan which claim of deduction was repelled by Revenue. Further, the assessee is also claiming that assessee only received Rs. 12 crores under the agreement as against stated consideration of Rs. 15 crores and an amount of Rs. 3 crores was never realized by the assessee and hence same could not be brought to tax. Thus, as could be seen all issues are integrated and interwoven and

revolves around agreements entered into by assessee with respect to sale of shares held by him and his minor children in the company called 'Kris Srikkanth Sports Entertainment Private Limited' with Companies belonging to Pentamedia Group Concerns and simultaneous non compete agreements entered into by assessee with these entities, thus all these appeals were heard together and are adjudicated by this common order.

10. The Ld.Counsel for the assessee opened arguments before the Bench with respect to ITA no. 1015/Chny/2012 which is an assessee's appeal and submitted that Ground No.1 is general in nature and does not require separate adjudication. The Ld.CIT-DR did not raise any objection to dismissal of ground No. 1 raised by assessee in its appeal in ITA no. 1015/ Chny/2012 for ay: 2001-02 filed with tribunal. After hearing contentions of the both the parties and perusing material on record , Ground No.1 raised by assessee in its appeal filed with tribunal stands dismissed as being general in nature which in our considered view does not requires separate adjudication. We order accordingly.

The learned counsel for the assessee submitted that in aforesaid assessee's appeal in ITA no. 1015/ Chny/2012 for ay: 2001-02, Ground Nos.2-5 concerns with challenge to re-opening of the concluded assessment by AO by invoking provisions of Sec.147 r.w.s.148 of the Act. It was submitted by Ld.Counsel for the assessee that original return of income was filed by assessee with Revenue on 28.03.2002 along with enclosures. The learned counsel for the assessee drew our attention to

acknowledgement of return of income along with enclosures which is stated to have been filed by assessee with Revenue, which are placed on record at Pg.No.1-17/paper book. It was submitted that the return of income was processed by AO u/s.143(1) of the Act , vide intimation dated 26.03.2003 , wherein an amount of refund of Rs. 94,24,254/- was found to be payable to the assessee. The said intimation issued by AO u/s 143(1) of the 1961 Act is placed at paper book at Page No.18. It was submitted by ld. Counsel for the assessee that the return of income was manually processed u/s 143(1) of the 1961 Act as it was for a period prior to when e-processing of return of income was started by Revenue. It was further submitted by Ld.Counsel for the assessee that reopening of the concluded assessment u/s 147 of the 1961 Act was done by AO within four years from the end of the assessment year as notice u/s.148 of the 1961 Act dated 30.03.2006 was issued by AO to the assessee which notice was issued within four years from the end of assessment . The said notice issued by the AO u/s 148 of the 1961 Act to the assessee is placed in Paper Book at Page No.19. It was further submitted by learned counsel for the assessee that in response to aforesaid notice issued by AO u/s 148 of the 1961 Act, the assessee filed letter on 12.06.2006 with AO objecting to reopening of the concluded assessment u/s 147 of the 1961 Act. The said letter filed by assessee with AO on 12.06.2006 is placed in paper book at page 20. The AO issued letter dated 10.08.2006 asking assessee about objections to chargeability to tax of Rs. 7.50 crores claimed by

assessee to be consideration for restrictive covenants, which is placed in paper book at page 21. It was also submitted by learned counsel for the assessee that objections to reopening of the concluded assessment by invoking provisions of Section 147 of the 1961 Act and also chargeability to tax of Rs. 7.50 crores on merits having been received as non compete fee which as per assessee is capital receipt not exigible to tax were filed on 20.09.2006, which are placed in Page No. 22/paper book. It was submitted by learned counsel for the assessee that the AO issued fresh notice dated 18.10.2006 asking assesse to file relevant order of garnishee attachment and other material w.r.t. claim made by assessee for excluding Rs. 4.25 crores being paid to Indian Bank. The said notice dated 18.10.2016 is placed in paper book/page 23. It was submitted by learned counsel for assessee that the assessee objected to reopening of the concluded assessment u/s 147, vide letter dated 04.11.2006, on the grounds that the assessee has made all disclosures in original return of income filed before Revenue before regular assessment was completed, which reply dated 04.11.2006 is placed in paper books at page 24. The AO issued two further letters show-causing assessee as to why an amount of Rs. 7.50 crores received as consideration for Restrictive covenants be not treated as income chargeable to tax , the said notices are placed in paper book/page 25 and 26. It was submitted by learned counsel for the assessee that the assessee filed letter dated 20.12.2016 with AO submitting that the return of income filed u/s 139 may be treated as return of income filed in pursuance to notice u/s 148 of the 1961 Act ,

subject to permitting assessee to file a revised return of income before the assessment is completed and after knowing the reasons for reopening of the concluded assessment which led to issuance of notice u/s 148 of the 1961 Act . The asessee's counsel claimed that the assessee also asked AO vide letter dated 20.12.2006 to furnish reasons for reopening of the concluded assessment u/s 147 of the 1961 Act. The said letter dated 20.12.2006 is filed in paper book at page 27. It was submitted by learned counsel for the assessee that the assessee filed Writ Petition before Hon'ble Madras High Court and the Hon'ble Madras High Court was pleased to stay proceedings u/s.147 of the Act invoked by Revenue for a period of two weeks by order in MP No.1/2006 in WP No.49683/2006, vide Interim orders dated 21.12.2006 . It was submitted by learned counsel for the assessee that thereafter, vide interim order dated 08.01.2007, the interim order earlier granted by Hon'ble Madras High Court was further extended. Thereafter vide order dated 14.12.2007, the Hon'ble Madras High Court was pleased to observe as under:

> *"2. What is challenged in the writ petition is the notice issued under Section 147 of the Income-tax Act,1961 . The petitioner has already filed a letter dated 20.12.2006 stating that the return filed under Section 139 of the Act may itself by treated as one filed under Section 148 of the Act for the present.*
>
> *3. Therefore, suffice is to permit the petitioner to confirm whether the return filed under Section 139 of the Act is the return proposed to be submitted to the impugned notice or the petitioner proposed to submit a fresh return within a period of eight weeks from today. On completion of eight weeks, the respondents are permitted to proceed with the assessment proceedings. However, the final decision shall be given effect to subject to the result in the above writ petition."*

The aforesaid order dated 14.12.2007 passed by Hon'ble Madras High court is placed in paper book/page 32-33. The learned counsel for the assessee submitted that the assessee exercised its right conferred by Hon'ble Madras High Court and submitted fresh return of income with Revenue without prejudice to his rights in the above writ petition , vide letter dated 07.02.2008, wherein, gross total income was declared to the tune of Rs. 20,42,510/- and income claimed to be an exempt income was to the tune of Rs.12,41,65,190/- , as against earlier claimed exempt income to the tune of Rs. 11,98,48,643/-. The learned counsel for the assessee submitted that said return of income filed on 08th February 2008 is placed in Paper Book at Page No.35 to 57, along with enclosures filed by assessee with AO. The Ld.Counsel for the assessee submitted that reasons for reopening of the concluded assessment u/s 147 of the 1961 Act were furnished by AO vide letter dated 26.12.2008 , which is placed in Paper Book-Vol.III at page 5 . It was submitted by learned counsel for the assessee that objections were filed by assessee on 30.12.2008 to reopening of the concluded assessment with AO which are placed in page number 6-8/Paper Book-Vol.III . It was brought to the notice of the Bench that Hon'ble Madras High Court has dismissed the writ petition filed by assessee in W.P.No. 49683 of 2006 and M.P.No.1 of 2006 vide orders dated 23.01.2019 , with following observations:

> *"4. This apart, the final assessment order passed by the Assessing Officer was taken by way of an appeal to the Appellate Authority and thereafter,*

to the Income Tax Appellate Tribunal and the said appeal is now pending adjudication.

5. Under these circumstances, all the grounds raised in the present writ petition as well as the additional grounds , if any shall be raised before the Appellate Tribunal by the writ petitioner by producing documents or other materials.

6. With the above liberty, the writ petition stands dismissed . However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed."

The ld.Counsel for the assessee submitted that the AO framed reassessment u/s.143(3) r.w.s.147 , vide orders dated 31.12.2008. It was submitted by learned counsel for the assessee that the company whose shares were transferred was engaged in coaching of cricket. It was also explained by the Ld.Counsel for the assessee that the total sale consideration as stated in the agreements was to the tune of Rs.15 Crs. , out of which consideration for restricted covenant was to the tune of Rs. 7.5 Crs. It was also submitted by learned counsel for the assessee that Rs. 4.25 Crs. was paid by assessee to 'Indian Bank' to clear Bank liabilities as there was an overriding garnishee attachment. It was also submitted that assessee only received Rs.12 Crs. out of Rs. 15 Crs. stated to be total agreed amount payable by three entities of Pentamedia Group of concerns with respect to transfer of shares and towards Restrictive covenants and an balance amount of Rs. 3 Crs. was never received by assessee. It was submitted by learned counsel for the assessee that notice was issued by AO u/s.148 of the 1961 Act on 30.03.2006 which was served on the assessee on 02.04.2006. it was submitted that at that

time old provisions of Sec.143(1)(a) of the 1961 Act were prevalent and no adjustment could have been made in 2002. There was a failure on the part of the AO to issue notice u/s.143(2) of the 1961 Act within stipulated time prescribed under law and there was no fresh incriminating tangible material available with AO to reopen concluded assessment by invoking provisions of Section 147 of the 1961 Act and hence no reopening of the concluded assessment could have been made by AO within provisions of Section 147/148 of the 1961 Act. It was submitted that even to reopen concluded assessment within four years from end of assessment year, the AO should have in his possession tangible incriminating material which led to formation of belief that income of the assessee had escaped assessment necessitating invocation of provisions of Section 147 of the 1961 Act. Our attention was drawn to appellate order dated 27.03.2012 passed by Ld.CIT(A) and it was submitted that there was no fresh tangible incriminating material available before the AO to reopen the concluded assessment within 4 years. It was submitted that reasons recorded by AO for reopening of the concluded assessment are silent and our attention was drawn to Page No.5 of the Paper Book Volume III, wherein, reasons for reopening of the concluded assessment were recorded. It was submitted that dispute is with respect to non-compete fee which was treated by AO as part of sale consideration of shares and accordingly brought to tax. The reliance was placed by learned counsel for the assessee on the decision of Hon'ble Supreme Court in the case of Guffic Chem Private Limited v. CIT reported in (2011) 332 ITR 602(SC) . The

learned counsel for the assessee relied upon decision of Hon'ble Delhi High Court in the case of CIT v. Orient Craft Ltd., reported in (2013)354 ITR 536(Del.) and submitted that reopening of concluded assessment u/s 147 of the 1961 Act was bad in law. The said decision is placed in Paper Book/Volume II at page 5-13. The assessee also relied upon decision of Hon'ble Madras High Court in the case of Tanmac India v. DCIT , reported in (2017)78 taxmann.com 155(Mad.). It was submitted by learned counsel for the assessee that there should be reasons to believe that income of the assessee has escaped assessment and that there should be fresh tangible incriminating material available with the AO before reopening of the concluded assessment by invoking provisions of Section 147 of the 1961 Act. It was submitted by learned counsel for the assessee that Explantion-2 to Sec.147 creates a deeming fiction as to escapement of income wherein , inter-alia, it provides that in case return of income is filed but no assessment is framed, then in that case if the assessee has understated its income or has claimed excessive loss, deduction , relief or allowance, then it is deemed that income of the assessee has escaped assessment . The assessee's counsel submitted that there was no fresh tangible material before the AO to reopen the concluded assessment. The assessee's counsel submitted that time limit for invoking provisions of Section 143(2) of the 1961 Act for framing scrutiny assessment u/s 143(3) against original return of income filed by assessee, has expired and now time limit cannot be extended by adopting indirect route by invoking provisions of Section 147 of the 1961 Act,

relying on decision of Hon'ble Delhi High Court in the case of Orient Craft(cited supra). The assessee also relied upon the decision of Hon'ble Madras High Court in the case of Tenzing Match Works v. The DCIT in TCA no. 702 of 2009, vide judgment dated 11.07.2019. The assessee relied upon decision in the case of Jayaram Paper Mills Limited v. CIT reported in (2010) 321 ITR 56(Mad.). It was submitted by learned counsel for the assessee that there was lack of fresh information before the AO as also there was lack of application of mind by the AO. Our attention was drawn to page number 18/paper book-1 wherein intimation dated 26.03.2003 issued by AO u/s 143(1) of the 1961 Act for ay: 2001-02 is placed , wherein the AO has undertaken a manual processing of return of income. It was submitted by learned counsel for the assessee that refund of Rs. 94,24,254/- was granted by department while processing return of income u/s 143(1) of the 1961 Act. It was submitted by learned counsel for the assessee that there was clearly an application of mind by AO while granting refund to the assessee. It was submitted by learned counsel for the assessee that notice u/s.143(2) was not issued to the assessee by AO against original return of income filed by assessee and clearly there is a change of opinion by the AO , as the AO changed his opinion by invoking provisions of Sec.147 of the Act. The Ld.Counsel for the assessee submitted that AO made roving enquiries to fortify his assumption of jurisdiction that he has reasons to belief that income has escaped assessment. It was submitted by learned counsel for the assessee that original return of income was filed by assessee in time. It was submitted

by learned counsel for the assessee that AO asked for copies of agreement to reopen concluded assessment which clearly leads to one and only one conclusion that the AO made roving enquiries to reopen concluded assessment , which is not permissible. Our attention was also drawn to Page No.3 of the Paper Book Volume III, wherein, the assessee has claimed some expenses in connection with the sale of the shares. The total sale consideration as per agreement was Rs.15 Crs. , out of which Rs. 3 Crs. were never received by the assessee. Our attention was also drawn to Page No.2 of the Paper Book Volume III, wherein, reconciliation between original return and revised return of income filed with Revenue, is placed. It was submitted that the return of income u/s 148 was filed in February, 2008 and assessment was completed on 31.12.2008. It was submitted that no fresh tangible incriminating evidences were available with AO and the re-opening of concluded assessment was done wrongly wherein roving enquiries were made by the AO to justify reopening of concluded assessment by invoking provisions of Section 147 and there was clearly a change of opinion by the AO . It was submitted by learned counsel for the assessee that original return of income was processed u/s.143(1) of the 1961 Act and manual processing of return of income was done by the AO and there was an application of mind by the AO while initially processing return of income u/s 143(1) of the 1961 Act. Our attention was also drawn to the decision of the Hon'ble High Madras Court in CIT v. S&S Power Switchgear Limited (2018)92 taxmann.com 429 (Madras). It was submitted by learned counsel for the assessee that the

assessee participated in proceedings to protect its interest and it was submitted the provisions of Section 292BB of the 1961 Act will not come to rescue of the Department. It was submitted by learned counsel for the assessee that reasons recorded for reopening of the concluded assessment were furnished by AO to assessee on 26.12.2008 and objections were filed by assessee on 30.12.2008 . It was submitted that assessment was framed by AO u/s.143(3) read with Section 147 of the 1961 Act, on 31.12.2008. It was submitted that it is not known to assessee as to when the assessee asked AO to furnish reasons for reopening of the concluded assessment u/s 147 of the 1961 Act . It was submitted that revised return of income was filed by assessee on 08.02.2008.

On merits of the case, it was submitted by learned counsel of the assessee that Ground Nos.12-14 are general in nature, which need to be dismissed as being general in nature. The learned CIT-DR did not raise any objections to the dismissal of Ground No. 12-14 raised by assessee in its appeal filed with tribunal, being general in nature. After hearing both the parties, Ground No. 12 -14 raised by assessee in its appeal filed with tribunal are dismissed as being general in nature. We order accordingly.

It was submitted that Ground Nos.6-11 raised by assessee in its appeal filed with tribunal deals with merits of the issue in appeal. It was submitted by learned counsel for the assessee that payments were made

to 'Indian Bank' to the tune of RS. 4.25 Crs. to settle loan and lien was created on the shares of 'Kris Srikanth Sports Entertainment Private Limited' for a loan taken by 'Aditya Leather Exports Private Ltd.'. It was submitted that assessee was guarantor for loan taken by 'Aditya Leather Exports Private Limited' and there was a lien on the shares of' 'Kris Srikanth Sports Entertainment Private Limited'. Our attention was drawn to Para Nos. 7-7.2 of the appellate order passed by learned CIT(A) and it was submitted that learned CIT(A) held that it is application of income and not diversion of income by overriding title. It was submitted by learned counsel for the assessee that these expenses were incurred in connection with the transfer of shares. The learned counsel for the assessee relied upon decision of Hon'ble Madras High Court in the case of CIT v. Bradford Trading Co. Pvt. Ltd., reported in (2003) 261 ITR 222(Mad. HC). It was submitted that there was an impediment to transfer of shares of 'Kris Srikanth Sports Entertainment Private Limited' and the assessee paid an amount of Rs. 4.25 crores to remove that impediment and hence, it is a diversion of income by overriding title. The learned counsel for the assessee relied upon decision of Hon'ble Supreme Court in the case of DCIT v. T.Jayachandran reported in (2018) 406 ITR 1(SC) and submitted that only real income of the assessee can be brought to tax and this amount of Rs. 4.25 Crs. has to be treated as an expenditure u/s.48(1) of the 1961 Act and is not taxable and it was submitted that it was rightly excluded by assessee while computing income of the assessee. It was

submitted that the AO did not consider submissions of the assessee while deciding whether Rs. 4.25 Crs. was expenses u/s.48(1) of the 1961 Act . Our attention was drawn by learned counsel for the assessee to the order passed by learned Debt Recovery Tribunal in O.A. No. 1642/1998 & O.A. No. 1399/1998 , dated 23.02.2001, which is placed in Paper Book at Page No.125-132. It was also explained by learned counsel for the assessee that an amount of Rs. 4.25 crores never reached assessee and hence the same cannot be brought to tax.

The ld.CIT-DR in rebuttal submitted that the assessee's concluded assessment was reopened by invocation of provisions of Section 147/148 of the 1961 Act. It was submitted by learned CIT-DR that return of income was originally filed on 28.03.2002 which was beyond the due date prescribed for filing of return of income u/s.139(1) of the Act as due date for filing of return of income was 31.07.2001 and hence return of income was filed belatedly beyond the time prescribed u/s 139(1) of the 1961 Act. It was submitted that return of income was initially processed u/s.143(1) of the 1961 Act. It was submitted by learned CIT-DR that enclosures were claimed to have been filed along with return of income and it was submitted that Form No.30 was filed along with return of income and the assessee sought refund from department for which form number 30 was enclosed with return of income. It was submitted that return of income was initially processed u/s 143(1) of the 1961 Act. Our attention was drawn by learned CIT-DR to list of enclosures which are claimed to have

been filed by assessee along with return of income which are at Page No.4-17 of the Paper Book. It was submitted that at page number 4 is the list of enclosures which were claimed to have been filed by assessee along with return of income. Our attention was drawn to Page No.5-7 of the Paper Book and it was submitted that this is the statement of income of the assessee . It was submitted by learned CIT-DR that Page No.15 is not signed by the assessee nor Page No.15 is referred to in the list of documents attached with Return of Income . It was submitted that the assessee did not furnish any details of the exempt income along with return of income and the AO did not had details of exempt income available with it as claimed to have been filed along with return of income filed by assessee with the Revenue. It was also submitted by learned CIT-DR that in this document at S.No. 15 of the Paper Book there is a mention about garnishee attachment by 'Indian Bank' , and if this document at S.No. 15/PB is excluded which is a suspect document , the AO did not had any information about 'Indian Bank' overriding garnishee attachment. It was submitted by learned CIT-DR that originally assessment was framed u/s 143(1)(a) of the 1961 Act. Thus, in nutshell it was submitted by learned CIT-DR that this document number 15 is a dubious/suspect document which is planted by the assessee subsequently and the AO had rightly invoked provisions of Section 147 of the 1961 Act. The assessment was originally not framed u/s 143(3) of the 1961 Act but return of income was processed u/s 143(1)(a) of the 1961 Act and the AO did not had any evidence of two claims of exemption made by assessee in the return of

income. The notice u/s 143(2) of the 1961 Act was not originally issued and return of income was manually processed by invoking provisions of Section 143(1) of the 1961 Act . It was submitted that department has all the right to invoke provisions of Section 147 of the 1961 Act. The learned CIT-DR relied upon decision of Hon'ble Delhi High Court in the case of CIT v. Orient Craft Limited (2013) 354 ITR 536(Del HC) and also decision of Hon'ble Supreme Court in the case of ACIT v. Rajesh Jhaveri Stock Brokers Private Limited (2007) 291 ITR 500(SC). It was submitted by learned CIT-DR that the AO was required to record reasons for reopening of the concluded assessment which were duly recorded by AO. It was submitted by learned CIT-DR that AO was having reasons to believe that income of the assessee has escaped income. It was submitted by learned CIT-DR that the AO was having cogent material to come to belief that the income of the assessee has escaped assessment. It was submitted by learned CIT-DR that merely because notice u/s Sec.143(2) of the 1961 Act was not issued and regular scrutiny assessment was not framed will not preclude AO from proceeding u/s.147/148 of the 1961 Act. It was submitted by learned CIT-DR that return of income was filed by assessee on 28.03.2002 and time limit for issuing notice u/s 143(2) was 12 months from the end of the month in which return of income was filed by the assessee. The learned CIT-DR relied upon the decision of Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd.(2010) 320 ITR 561(SC), and submitted that rigors of Sec.147 was rightly applied by the AO. It was submitted by

learned CIT-DR that there were tangible material before the AO to come to conclusion that the income of the assessee has escaped assessment and the reasons for reopening of concluded assessment were having live link with t formation of belief that income of the assessee has escaped assessment. The learned CIT-DR relied upon decision of the Hon'ble Supreme Court in the case of Rajesh Javeri Stock Brokers Private Limited(supra) . It was submitted by learned CIT-DR that in the case of judgment of Hon'ble Delhi High Court in the case of CIT v. Orient Craft Limited(supra), only tangible material is required and it is not necessary that there should be a fresh material for assuming jurisdiction u/s.147 of the Act. Our attention was drawn to para 18 of the judgment of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) and it was submitted by learned CIT-DR that failure to take steps u/s 143(2) will not make AO remediless u/s 147/148 of the 1961 Act. The learned CIT-DR relied upon decision of Hon'ble Supreme Court in the case of CIT v. P.V.S.Beedies Private Limited reported in (1999) 237 ITR 13(SC) and it was submitted that even objections raised by internal audit party could be basis for reopening of the assessment u/s 147/148 of the 1961 Act. It was submitted by learned CIT-DR that the assessee has not furnished full and true particulars in the return of income filed by the assessee. Our attention was drawn by learned CIT-DR to Page No.15 Volume-1 of the Paper Book and it was submitted that the assessee has not furnished full and true particulars before the AO. The learned CIT-DR also relied upon decision of Hon'ble Supreme Court in the case of Girilal &

Co. v. ITO, reported in (2016) 387 ITR 122(SC). It was submitted by learned CIT-DR that the assessee has furnished information only after Hon'ble High Court allowed proceedings u/s 147 of the 1961 Act to go ahead. Our attention was drawn by learned CIT-DR to Page No.32 of the Paper Book, wherein, decision of Hon'ble Madras High Court is placed. Our attention was also drawn to Page No.27 of the Paper Book wherein, assessee has asked for reasons recorded for issuance of notice u/s.148 of the Act , vide communication dated 20.12.2006. It was submitted that fresh return of income was filed by assessee u/s.148 of the Act , on 08.02.2008. Our attention was drawn to Page No.35 of the Paper Book, wherein, revised return of income u/s.148 is placed, filed on 08.02.2008. It was submitted that in original return of income, exemptions were claimed by assessee to the tune of Rs.11.98 Crs. , while in the revised return of income, exemptions were claimed to the tune of Rs.12.41 Crs. Our attention was drawn to Page No.36 of the Paper Book, wherein, details of exempt income as claimed by the assessee in the notes to the return of income filed on 08.02.2008 are placed. It was submitted that this information was not placed before the AO when original return of income was filed, and the AO had rightly brought to tax income claimed as exempt on the grounds of restrictive covenants and also on account of garnishee payments to the bank. Our attention was drawn to Page No.4 of the reassessment order passed by the AO. It was submitted that total consideration in the agreement was Rs. 15 Crs. while it is claimed by the

assessee that they had only received Rs. 12 Crs. It was submitted that assessee received Rs. 4.25 Crs. and then paid to 'Indian bank' to clear the loan taken by 'Aditya leather Exports Private Limited' and there was no overriding garnishee attachment which was rightly rejected by the AO . The Ld.CIT-DR relied upon decision of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) and submitted that there was no formation of opinion while processing of return of income u/s.143(1) of the Act and hence there is no change of opinion merely because notice u/s.143(2) of the 1961 Act was not issued to the assessee while processing original return of income , which cannot preclude AO to reopen assessment u/s.147 of the Act. Our attention was drawn by learned CIT-DR to Page No.5 of the Paper Book/Vol.III, where the reasons for reopening of the concluded assessment were recorded. It was submitted that original return of income was filed and thereafter revised return of income was filed , which is different from the original return of income filed by the assessee. Our attention was drawn to Page No.2 of the Paper Book-III wherein reconciliation statement reconciling both the return of income(s) are filed. It was submitted that the assessee was only holding 125 equity shares in the company namely 'Kris Srikanth Sports Entertainment Private Limited', while majority of shares are held by other shareholders which mainly consisted of minor children of the assessee whose income were clubbed with the income of the assessee as per provisions of the 1961 Act. Our attention was drawn to Page No.42 of the Paper Book and Page No.104 of the Paper Book. Our attention was

drawn by learned CIT-DR to the decision of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited (supra) , Para No.18. Our attention was also drawn to Explanation-1 to Sec.147 and Explanation 1(b) to Sec.147 of the 1961 Act. It was submitted that if the income is assessed u/s.143(1)(a) , then Explanation 2(c) to Section 147 will come into play and only tangible material is required to reopen the concluded assessment and there is no requirement of having fresh material to reopen concluded assessment. It was submitted that if audit objections is based on factual errors, then it can be a valid ground for reopening of the concluded assessment u/s 147 of the 1961 Act. Reliance was placed by learned CIT-DR on the decision of Hon'ble Supreme Court in the case of CIT v. P.V.S. Beedies Pvt. Ltd.(1999) 237 ITR 13(SC). Thus, learned CIT-DR would contend that factual error was brought to the notice of the AO and hence reopening of the concluded assessment by invoking provisions of Section 147 is justified , by relying on the decision of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) ,para 18 and it was submitted by learned CIT-DR that even in the cases covered u/s.143(1) wherein no assessment is framed under Sec.143(3) of the 1961 Act , if ingredient of Section 147 are fulfilled, reopening of the concluded assessment u/s 147 of the 1961 Act is justified. It was submitted that under assessment of income/excessive loss deduction/relief can lead to invocation of Sec.147 of the Act. The learned CIT-DR submitted that there has to be live link to form a belief that income of the assessee has escaped assessment which would justify

reopening of the concluded assessment u/s 147 of the 1961 Act . It was submitted that any material which would lead to forming of a belief that income of the assessee is under-assessed or excessive loss was claimed or excessive deduction/relief was claimed by tax-payer would be sufficient to invoke provisions of Section 147 of the 1961 Act. Our attention was drawn by learned CIT-DR to Para No.16 & 17 of the decision of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited (supra) and it was submitted that in the instant case proviso to Section 147 is not applicable as no scrutiny assessment was framed u/s 143(3) of the 1961 Act. It was submitted that intimation u/s.143(1) is not assessment and the only requirement is that reasons are to be recorded for reopening of the concluded assessment and then Sec.147 can be invoked. It was submitted by learned CIT-DR that factual error can be pointed out by anybody and if there is a live link with income escaping assessment and reasons to believe, Section 147 can be invoked. Reliance was placed by learned CIT-DR on the decision of Hon'ble Supreme Court in the case of CIT v. P.V.S.Beedies Private Limited(supra). The reliance was also placed by learned CIT-DR on the decision of Hon'ble Supreme Court in the case of Girilal & Co., v. ITO reported in (2016) 387 ITR 122(SC) and also upon the decision of Hon'ble Madras High Court in the case of Smt. A. Sridevi v. ITO reported in (2018)409 ITR 502(Mad. HC) . The learned CIT-DR would also rely on decision of Hon'ble Madras High Court in the case of Jayaram Paper Mills Limited v. CIT reported in (2010) 321 ITR 56(Mad.) . It was submitted by learned CIT-DR that garnishee payments

to 'Indian Bank' is not connected with earning of capital gains and disclosure made by assessee was not true and correct. The ld.CIT-DR relied upon the decision of Hon'ble Madras High Court in the case of CIT v. Ideal Garden Complex Private Limited reported in (2012) 340 ITR 609(Mad.) and also decision of Hon'ble Supreme Court in the case of Honda Siel Power Products Limited v. DCIT reported on (2012) 340 ITR 64(SC). The learned CIT-DR would also rely on decision of Hon'ble Bombay High Court in the case of Hinduja Foundaiton v. ITO in WP No.2866/2018, vide order dated 15.02.2019. The ld.CIT-DR also relied upon decision of the Hon'ble Delhi High Court in the case of Consolidated Photo and Finvest v. ACIT reported in (2006) 281 ITR 394(Delhi) The learned CIT-DR summarized his contention as to validity of reopening of the concluded assessment, as under:

a.The assessee has not furnished any material before AO, wherein the AO could come to know whether the assessee has received non-compete fees or garnishee payments were made by the assessee. Therefore, he relied upon the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) and Calcutta Discount Company Limited v. ITO reported in (1961) 41 ITR 191(SC) and submitted that key ingredients for invoking provisions of Sec.147 are fulfilled in the instant case and hence reopening of the concluded assessment be upheld .

b. It was also submitted by learned CIT-DR that the material with AO was sufficient to reopen the concluded assessment u/s 147 of the 1961 Act . The learned CIT-DR relied upon decision of Hon'ble Delhi High Court in the case of CIT v. Orient Craft Limited reported in (2013) 354 ITR 536(Del. HC) and submitted that there is a requirement of having tangible material to come to conclusion that income of the assessee has escaped assessment and there is no requirement of having fresh material to reopen the concluded assessment u/s 147 of the 1961 Act. He also relied upon decision(s) of Hon'ble Madras High Court in the case of Mrs. A. Sridevi(supra) and also in the case of Jayaram Paper Mills Pvt. Ltd.(supra) and submitted that if the assessee has made claim which is not supported by material , then AO can make re-assessment. The learned CIT-DR would submit that decision(s) of Hon'ble Madras High Court in the cases of TANMAC India v. DCIT reported in (2017)78 taxmann.com 155(Mad. HC) and also decision in the case of Tenzing Match Works v. DCIT in TCA No. 702/2009 be not taken into consideration.

The learned CIT-DR would submit that original return of income was filed by assessee on 28th March, 2002. The learned CIT-DR submitted that return of income was originally processed u/s.143(1) of the Act on 26th March 2003 and reopening of the concluded assessment was done u/s 147 of the 1961 Act, vide notice dated 30.03.2006 issued u/s 148 of the 1961

Act. Our attention was drawn to Page Nos.19 & 20 of the Paper Book Volume-1, wherein the aforesaid notice is placed. The learned CIT-DR would also draw our attention to various orders passed by Hon'ble Madras High Court in writ petition file by assessee challenging reopening of the concluded assessment. We have already referred to these orders in the preceding para's of this order and for sake of brevity they are not repeated. It is claimed by learned CIT-DR that in the return filed in pursuance to notice issued u/s 148 of the 1961 Act, the assessee is claiming higher exemption than what was claimed by it earlier in the original return of income filed with the Revenue. It was submitted that proceedings u/s 147/148 are for the benefit of Revenue and the assessee cannot now challenge reopening of the assessment u/s 148 of the 1961 Act. It was submitted that the assessee is indulging in approbation and reprobation at the same time which is not permissible. It was submitted by learned CIT-DR that the assessee can claim deduction for non recovery of dues of Rs. 3 Crs. in subsequent years but the assessee cannot challenge the proceedings u/s.148 of the Act. The Ld.CIT-DR submitted on the merits of the issue that the assessee has claimed garnishee deduction on account of payments made to 'Indian Bank' . Our attention was drawn to re-assessment order passed by the AO and it was submitted that the assessee infact received the amount and then it was paid to the banker namely 'Indian Bank' , hence there is no diversion of income by overriding title. Our attention was also drawn to the appellate order

passed by ld. CIT(A). It was submitted by learned CIT-DR that the shares were not pledged with 'Indian Bank' but since 'Indian Bank' came to know about the sales of shares by assessee to Pentamedia Group of Concerns through media reports and hence the said 'Indian Bank' stepped in to protect its interest. It was submitted that there was no overriding title over the shares as the shares were never pledged with the bank and overriding title is where the property is encumbered. It was submitted that the assessee namely Mr. K. Srikanth was only guarantor for certain loans availed by 'Aditya Leather Exports Private Limited' and to recover their money from the said 'Aditya Leather Exports Private Limited', the bank namely 'Indian Bank' issued garnishee notice and the assessee was merely guarantor and the shares were never in the picture when the assessee stood guarantor. It was submitted by learned CIT-DR that it was a liability of the assessee to repay the loans availed by the said 'Aditya Leather Exports Private Limited' as the assessee was guarantor , and since the assessee was selling the shares of 'Kris Sriknanth Sports Entertainment Private Limited', the assessee entered into deal with 'Indian Bank' to settle the bank loan, for which the assessee paid Rs. 4.25 Crores to Bank. . The learned CIT-DR submitted that this settlement will not impinge upon the sale consideration as the shares were not carrying any obligation to be discharged. It was submitted that Garnishee has come at a later date only when 'Indian Bank' came to know that the assessee is selling his shares. It was submitted by learned CIT-DR that the title of the share was perfect with Mr. K Srikanth(assessee) and/or minor

sons. Our attention was drawn by learned CIT-DR to Hon'ble DRT Order of 2001 which is placed in Page No.125-132 of the Paper Book and was submitted that compromise petition was filed and shares were not impugned by any of the proceedings . It was submitted that the money was received by the assessee and then discharged to the bank. It was submitted that memo of compromise was entered into with Indian Bank, which was settled out of Court, and there was no order of Court of garnishee and it was settlement out of court entered into by assessee with the 'Indian bank'. It was submitted by learned CIT-DR that there is no garnishee order of court but rather it was only a threat of garnishee . At this stage learned counsel for the assessee placed on record letter in File No. 2/5/2016-Recovery , issued by Government of India , Ministry of Finance, Department of Financial Services and contended that all properties of guarantor is subject to charge and the DRT can order for attachment and sale of such property u/s 19(12) to (18) of the RDDB & FI Act 1993 and prayers were made to allow deduction (the said letter is placed in file) . The Ld. CIT- DR drew our attention to Para No.7.3 of the appellate order passed by Ld.CIT(A) and submitted that there were no encumbrance on sale of shares. It was submitted that learned CIT(A) has clearly held that decision of Hon'ble Madras High Court in the case of CIT v. Bradford Trading Co. Private Limited, reported in 261 ITR 222 shall not be applicable as facts in that case were different. It was submitted that garnishee application was to recover the amount due to the bank and rather it is application of income and not diversion of income by

overriding title. The learned CIT-DR relied upon decision of Hon'ble Supreme Court in the case of CIT v. Sitaldas Tirathdas reported in (1961)41 ITR 367(SC) and submitted that there were no diversion of income by overriding title rather it was only application of income. The learned CIT-DR would also draw our attention to provisions of Section 48(1) of the 1961 Act and submitted that deduction from capital gains can only be allowed when the amount is incurred wholly and exclusively in connection with transfer of shares. It was submitted by learned CIT-DR that the decision of Hon'ble Madras High Court in the case of Bradford Trading Company Private Limited(supra) is different and not applicable to the facts of the case in the instant case. It was submitted that approbation and reprobation is not allowed as in the original return of income filed with the department , the assessee has declared sale consideration to the tune of Rs. 15 crores while it was claimed at Rs. 12 crores in the return of income pursuant to orders passed by Hon'ble Madras High Court in writ proceedings. It was submitted that sale consideration was not considered at Rs. 15 crores by the AO but was considered at Rs. 12 crores and hence learned CIT had rightly invoked proceedings u/s 263 of the 1961 Act and brought to tax remaining Rs. 3 crores.

The Ld.Counsel for the assessee drew our attention to Page No.1 & 35 of the Paper Book, which is the acknowledgement of the original return of income filed by assessee as well revised return of income filed by assessee u/s 147 of the 1961 Act, in pursuance to orders of Hon'ble Madras High

Court. It was submitted that in original return of income , exemption claimed was Rs. 11.94 Crs. , while in the revised return of income, the exemption claimed was Rs. 12.41 crores and the difference was on account of dividend income received which was in any case exempt from tax and there was no income tax impact owing to such differential . Our attention was drawn to page 36 of the paper book and it was submitted that dividend income of Rs. 66,65,190/- was received by son of the assessee namely Mr. Adityaa Srikanth. It was submitted that there is no difference in the Income Tax liability owing to such differential in the exempt income owing to dividend income received by minor son of the assessee. The assessee relied upon decision in the case of CIT v. Orient Craft Limited (2013) 354 ITR 536(Del. HC) and also decision in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) and it was submitted that the information was received from Revenue audit which is fresh material . It was submitted that Revenue missed to frame scrutiny assessment u/s 143(2) read with Section 143(3) of the 1961 Act and reasons to believe which formed basis of invoking provisions of Section 147 for reopening of the concluded assessment were based on old material and once no notice u/s 143(2) of the 1961 Act was issued at that time for framing scrutiny assessment, the Revenue has missed the bus and now it cannot rely on stale material to get extended limitation period by invoking provisions of Section 147 of the 1961 Act. It was submitted that the assessee made full and true disclosure in the return of income

filed with department originally. It was submitted that Revenue can no doubt invoke provisions of Section 147 of the 1961 Act , if there are factual errors in disclosures as held by Hon'ble Supreme Court in the case of PVS Beedies(supra) and in that case reopening was done after four years based on audit objections and Revenue is empowered to see that there is true and full disclosure. The assessee's counsel also submitted that Revenue is empowered to reopen concluded assessment after four years by invoking provisions of Section 147 of the 1961 Act and to see that there is true and full disclosure as held in the case of Girilal and Company (supra) . The assessee's counsel also tried to distinguish the case laws relied upon by learned CIT-DR to contend that reopening of the assessment was not done properly within the provisions of Section 147 of the 1961 Act and it was submitted that there was no triggering point for invoking provisions of Section 147/148 of the 1961 Act in the instant case. It was submitted that three separate agreements were entered into by assessee for sale of shares and three agreements for non-compete fees. It was submitted that there was a diversion of income by overriding title relying on real income theory . The learned counsel for the assessee relied upon decision of Hon'ble Supreme Court in the case of CIT v. Sitaldas Tirathdas reported in (1961) 41 ITR 0367(SC) and decision of Hon'ble Supreme Court in the case of DCIT v. T. Jayachandran (2018) 406 ITR 1 (SC) . It was submitted by learned counsel for the assessee that only real income can be brought to tax. It was submitted that the sale was made under compelling circumstances and it was court monitored

sale of share and hence payment of Rs. 4.25 crores to 'Indian Bank' is an expense in connection with transfer of shares and was rightly claimed by assessee. The prayers were made by learned counsel for the assessee to quash the assessment. It was submitted that contract of minor was entered into through the assessee who is natural guardian of the minor sons being father and income is to be clubbed for tax purposes. On being asked by the Bench, the learned counsel for the assessee submitted that minor money being sale consideration of shares were diverted towards payment of loan due from 'Aditya Leather Exports Private Limited' without any orders of the Court for using minor's money for payment of aforesaid dues to Indian Bank. On being confronted, the learned counsel for assessee admitted that page 15 of the paper book is an unsigned page which is claimed to be attached to return of income , while rest of the enclosures were signed, thus strengthening doubt on the claim of the assessee that said document was at all attached with the return of income originally filed by assessee. The assessee was also present during the course of hearing before the Bench on 17.10.2019. The Ld.CIT-DR relied upon the decision of Hon'ble Supreme Court in the case of R.N. Gosai A v. Yashpal Dhir, judgment dated 23.10.1992 and decision of Hon'ble Madras High Court in the case of G. Kumar v. Samuthiradevi , vide judgment dated 19.12.2012. The ld.CIT-DR submitted that in the case of share agreement, there are no consequences provided for making default in payment of sale consideration of shares. The learned counsel for the assessee submitted that no basis for valuation of shares and of compete

fees is there and it was a negotiated price between the buyer and seller. It was submitted by learned counsel for the assessee that it is only because of Mr. K. Srikanth, the assessee who was a renowned cricket player in Indian team that non compete fees was paid by the Pentamedia Group Concerns. The Ld.CIT-DR submitted at this is point of time that it is merely a tax avoidance scheme and non-compete fees is nothing but sale consideration of shares and the AO had rightly included the same as income of the assessee while computing capital gains . The ld.CIT-DR referred to Para No.6.1 of the appellate order passed by Ld.CIT(A) and submitted that learned CIT(A) allowed relief to the assessee. It was submitted that neither ld.CIT(A) nor the assessee has furnished any reply to issues raised by the AO. It was submitted that there is no specific clarification as to what the assessee was doing earlier and what assessee was doing later and this is merely an agreement to avoid tax and assessee is continuing as Director in the new company. It was brought to notice by learned CIT-DR that non compete fee was brought to tax by provisions of Section 28(va) read with Section 2(24)(xii) of the 1961 Act by Finance Act, 2002 w.e.f. 01.04.2003 and submitted that prior to that reasonableness is to be seen for which quantum is to be found out and basis of computing non-compete fee is to be seen. The learned CIT-DR relied upon decision of Hon'ble Madras High Court in the case of CIT v. Chemech Laboratories Limited, dated 23.12.2016.11.2016. The learned CIT-DR would also rely on the decision in following case laws:

a) CIT v. Mediworld Publications Private Limited

b) Mrs. Hami Aspi Balsara v. ACIT

c) Ramesh D. Tainwala v. ITO (TS-594-ITAT-2011(Mum.)

It was submitted by learned CIT-DR that if consideration is paid to the shareholders then capital gains are to be computed and brought to tax and not non-compete fee as contended by assessee. It was submitted by learned CIT-DR that if only business is snatched away, then non-compete fee will come into picture otherwise it is business receipt which is to be brought to tax in the hands of the assessee . The Ld.CIT-DR submitted that the assessee is continued with the company even after transfer of shares as Director and hence there is no question of non compete fee being claimed as an exempt income by the assessee and entire consideration of Rs. 15 crores is to be brought to tax as per provisions of the 1961 Act. The learned CIT DR relied upon decision of Hon'ble AAR in the case of H M Publishers Holdings Limited in AAR No. 1238 of 2012.

The Ld.AR submitted that reasoning of Ld.CIT(A) is sound and needs to be confirmed and no substance in the arguments of Revenue and the decisions relied upon by Revenue are all after the insertion of Sec.28(va) by Finance Act, 2002 w.e.f. 01.04.2003 while presently we are concerned with ay: 2001-02 and the amendment brought in by Finance Act, 2002 by introducing Section 28(va) are prospective in nature. The learned counsel relied upon decision of tribunal in the case of R. K. Swamy v. ACIT

reported in (2004) 88 ITD 185(Chennai-trib.) and decision in the case of G.Raveendran v. CIT reported in (2015)375 ITR 326(Mad. HC) and it was submitted that there was no need to interfere with the orders of the Ld.CIT(A) so far as department appeal is concerned and prayers were made to dismiss the appeal filed by Revenue. It was submitted that there is a separate contract between unrelated parties for non compete fee. It was submitted that the wisdom of businessmen should prevail as it is a contractual transaction between unrelated parties which is at arms length price. It was submitted that shareholders who transferred shares are minor and assessee is a separate 'person' under the 1961 Act albeit father of the minor sons. The learned CIT-DR relied on the grounds of appeal and it was submitted that non-compete fees is in context of sale of share and it was submitted that it is immaterial whether assessee sold shares or minors son shares were sold , these shares are to be treated as assessee's share and the assessee sold the shares of minor children . The learned counsel for the assessee submitted that in the year ended 31.03.2001 , the assessee and minor children received Rs. 9.50 crores while Rs. 2.5 crores was received in year ended 31.03.2002. Thus, it was submitted by learned counsel for the assessee that only Rs. 12 crores was received while Rs.3 crores was never received and hence the same cannot be brought to tax as only real income can be brought to tax. Our attention was drawn to page 53 of the Paper book , wherein sundry debtors as at 31.03.2001 were to the tune of Rs. 5.51 crores. On Being asked and directed to produce the bounced cheque of Rs. 300 lacs , the learned

counsel for the assessee submitted that the assessee does not have bounced cheque of Rs. 300 lacs and the same cannot be produced.Thus, the learned counsel for the assessee expressed inability to produce the bounced cheque of Rs. 300 lacs. It was also submitted that no proceedings for recovery of said Rs. 300 lacs was initiated by assessee/minor sons against Pentamedia Group Concerns for bouncing of cheque. It is also submitted that 99% shares in 'Kris Srikanth Sports Entertainment Private Limited' were held by his minor sons. It was also explained that as on 31.03.2002, sundry debtors included said sum of Rs.3 Crores . The assessee has filed Balance Sheet as on 31.03.2002 wherein sundry debtors to the tune of Rs. 300.66 lacs are reflected and assessee is claiming said amount of Rs. 3 Crs. is still receivables as on 31.03.2002. It was submitted that AO has recognized that Rs3 Crs. was not received by the assessee and AO took a view which is a plausible view and Ld.CIT cannot substitute its view with its opinion by invoking provisions of Section.263 of the 1961 Act, which is not permissible. The Ld.AR relied upon the decision of A.R. Real Estate Developers Pvt. Ltd. v. ITO in ITA No.804/Chny/2019 , dated 18.09.2019 for ay: 2014-15. The Ld.DR submitted that an amount of Rs.5.5 crs. was receivable by assessee as on 31.03.2001 and an amount of Rs. 3.00 crores was receivable as on 31.03.2002. It was submitted by learned CIT-DR that this amount of Rs. 300 lacs was due to assessee as per its Balance Sheet as good money

and hence the entire amount of Rs. 15 crores including an outstanding amount of Rs. 3 crores is chargeable to tax. It was submitted that it was AO's mistake that he took total consideration at Rs. 12 Crs. as chargeable to tax instead of Rs15 Crs. which was rectified by learned CIT by invoking provisions of Section 263 of the 1961 Act. It was submitted by learned CIT-DR that the assessee has accounted for his income on accrual basis and it was submitted that invocation of provisions of Section 263 is valid. The learned CIT-DR submitted that the assessee has not submitted that there is any error on the basis of accounting followed by the assessee viz. cash or mercantile. So far as regards computation of deduction u/s 54F of the 1961 Act , the learned CIT-DR submitted that learned CIT invoked provisions of Section 263 of the 1961 Act and directed AO to verify the claim of the assessee u/s.54F of the Act . The learned CIT-DR submitted that the AO verified and allowed the claim of deduction u/s 54 F to the tune of Rs.43 lakhs , instead of Rs. 35 lakhs, even while framing assessment u/s.143(3) r.w.s.263 of the Act. The case of the assessee was re-fixed for clarification to find out as to the basis / quantification of valuation of shares and as to whether any valuation report at the behest of the contracting parties, was prepared to value shares. The assessee has filed written submissions and it was submitted by learned counsel for the assessee that it was a contractual agreement between the parties to value the shares and no valuation report was prepared nor any basis for valuation of shares is available with the assessee, rather it is submitted

that it was a negotiated price entered into between two parties to the contract. The assessee's counsel also relied upon decision of Chennai-tribunal in the case of Empee Holdings Limited v. DCIT in ITA no. 1503/chny/2014 for ay: 2005-06, dated 07.11.2019 to which both of us were part of the Division Bench who pronounced the said order. It was also submitted that in ay: 2001-02 with which we are concerned, Section 50C and 43CA of the 1961 Act were not in statute and hence actual sale consideration entered into between two contracting parties voluntarily cannot be substituted by invoking deeming fiction of the said sections . The learned CIT-DR submitted that assessee has himself admitted that there was no quantification/valuation report for valuing the shares and hence the entire amount of Rs. 15 crores be treated as consideration for sale of shares. It was also submitted that so far as reopening of the concluded assessment u/s 147 is concerned , it will not make any difference between manual processing of return of income and electronic processing of return.

11. We have considered rival contentions and perused the material on record including case laws cited by both the rival parties and impugned order of the authorities below. We have observed that the assessee is engaged in the business of modelling, cricket commentary , Journalism, consulting and BPCL dealership. It is an admitted fact that the assessee is an renowned cricketer of international fame and was at one point of time part of Indian/National Cricket team and later also rose to become Captain

of Indian Cricket Team. It is also admitted fact that later on after retiring from cricket team, the assessee turn to cricket commentary and other activities associated with sport of cricket. Thus, undisputedly the assessee is a known name the field of sports of Cricket. It is also an admitted fact that in India , Sport of Cricket is one of the frontline sporting activity and large number of people are keenly interested in the sport of Cricket. With this background now , we will proceed to adjudicate all these four appeals. The assessee originally filed its return of income u/s 139 on 28th March 2002 for impugned ay: 2001-01. The said return of income was not filed within the prescribed time u/s 139(1) of the 1961 Act but was admittedly filed belatedly , albeit within time prescribed u/s 139(4) of the 1961 Act. The income declared by assessee under the said return of income was to the tune of Rs. 20,42,507/- . The exempt income claimed in the said return of income originally filed by the assessee u/s 139 of the Act was to the tune of Rs. 11,98,48,643/- as per acknowledgement of return of income placed in paper book at page 1, wherein the column of exempt income , the aforesaid amount of Rs. 11,98,48,643/- is duly filed in at column 24(page 1/pb). The assessee also filed a claim for refund of an amount of Rs. 85,20,565/- which was filed along with return of income in Form No. 30,placed at page 3 of the Paper Book. Along with this return of income filed by assessee, it has claimed to have filed a covering letter which specify the list of enclosures to return of income. The said covering letter did not specify about the enclosure as to details of exempt income being furnished , but however it is now claimed by assessee that details of

the aforesaid exempt income claimed by him were filed , which is stated to be placed at page 15 of the paper book which on our perusal we found that it is an unsigned enclosure. The Revenue on its part is averring that this document stated to be placed at page 15/paper book is a suspect document which is planted by the assessee and was not part of the return of income originally filed by assessee. We will see at later point of time in this order as to the validity of reliance on this document and whether the disclosure of exempt income even if it was made by assessee was sufficient on the part of the assessee to discharge primary onus cast on it to make true and full disclosure to come out of clutches of Section 147/148 of the 1961 Act . The return of income was admittedly originally processed by Revenue u/s 143(1) of the 1961 Act and intimation dated 26.03.2003 was issued to assessee by AO u/s 143(1) of the 1961 Act computing refund of Rs. 94,24,254/- being made payable to the assessee. This processing of return of income was done manually prior to introduction of e-processing of return of income by department. If we refer to Section 143(1) of the 1961 Act as it was existing in the statute at that point of time , it is clear that the scope of Section 143(1) is very restrictive and is limited to correcting any arithmetical errors or to an incorrect claim apparent from any information in the return of income filed by assessee . The provision of Section 143(1) of the 1961 Act as were applicable at that point of time when return of income was processed on 26.03.2003 are reproduced below:

"Assessment.

143. [(1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142,—

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2) , an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee :

Provided that except as otherwise provided in this sub-section, the acknowledgement of the return shall be deemed to be an intimation under this sub-section where either no sum is payable by the assessee or no refund is due to him :

Provided further that no intimation under this sub-section shall be sent after the expiry of [one year from the end of the financial year in which the return is made :]

[Provided also that where the return made is in respect of the income first assessable in the assessment year commencing on the 1st day of April, 1999, such intimation may be sent at any time up to the 31st day of March, 2002.]"

Thus, the AO cannot go into merits of the claim made by assessee and such corrections are limited to correcting any arithmetical errors and to correcting incorrect claims apparent from any information in the return. Thus, even if the return of income was processed manually in the instant case, the AO had a restrictive powers to correcting only arithmetical errors in the return of income and to an incorrect claim which is apparent from any information in the return of income and it cannot be equated with scrutiny assessment framed u/s 143(3) read with Section 143(2) of the

1961 Act. It is an admitted position that in the instant case, no scrutiny assessment was framed by AO originally u/s 143(3) of the 1961 Act. It is also an admitted position that reopening of the concluded assessment in the instant case by AO by invoking provisions of Section 147 of the 1961 Act was done in the instant case by Revenue within four years from the end of assessment year viz. notice of reopening of the concluded assessment was issued on 30.03.2006 while we are presently seized of ay: 2001-02. It is also admitted position that the return of income was not originally securitized by Revenue u/s 143(2) read with Section 143(3) and merely processing of return of income was done with in provisions of Section 143(1) of the 1961 Act , which cannot be equated with scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act. The ratio of decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) shall be clearly applicable and the Revenue can validly reopen the concluded assessment by invoking provisions of Section 147 of the 1961 Act . In the instant case return of income was not originally scrutinised u/s 143(2) read with Section 143(3) and reopening of the concluded assessment was done within four years from the end of the assessment, clearly proviso to Section 147 is not applicable and reopening of the concluded assessment can be done within a period of four years from the end of assessment year by invoking provisions of Section 147 of the 1961 Act . Moreover, first of all the disclosure as is contemplated to have been made by the assessee in the instant case has been doubted by Revenue to be suspect and it is claimed

by Revenue that document at page 15 of the paper book is a planted document which is planted after words and this document was never part of the return of income originally filed by assessee with Revenue u/s 139(4) of the 1961 Act on 28.03.2002. It is also claimed by Revenue that this document was also not specified as one of the enclosed document in the list of documents enclosed with return of income . It is also claimed by Revenue that this is the only document which is not signed by assessee , while rest of the other documents as were made part of the return of income as enclosures were signed by assessee. Now let us see the content of this document which is placed at paper book/page 15 which is claimed by Revenue to be a planted document, and while going through the aforesaid document , it is observed that following disclosure was made by assessee, as under:

"***K.Srikanth***
Assessment Year 2001-02

Annexure to Statement of Income

a, Income claimed to be exempt and not included in total income – consideration for restrictive covenant Rs. 7.50 Crores.

b. Residuary sale proceeds of shares after mandatory diversion of Rs. 4.25 crores by Indian Bank overriding garnishee attachment-Rs. 3.25 Crores.

K.Srikanth
Assessment Year 2001-02

Income claimed to be Exempt	*Rs.*
a. Restrictive Covenant	*75,000,000*
b. Indian Bank Overriding Garnishee attachment	*42,500,000*

c. Dividend : Minor Adityaa	*2,348,643*
	---------- 119,848,643
	---------- "

Perusal of the above disclosure as was allegedly claimed to have been made by assessee which is albeit disputed by Revenue to be planted/suspect document, it clearly appears that these are bald disclosures made by assessee and it cannot be said that the assessee has made true and complete disclosure of the primary facts and in our view clearly primary onus cast on the assessee is not discharged. Reliance is made to decision of Hon'ble Supreme Court in the case of New Delhi Television Limited v. DCIT reported in (2020) 116 taxmann.com 151(SC). The above disclosure do not give complete disclosure of the loans availed by a company named 'Aditya Leather Exports Private Limited' from 'Indian Bank' which was in default by said company . The above disclosure also did not disclose that the assessee was a Director of the said company namely 'Aditya Leather Exports Private Limited' and also stood guarantor of the loan availed by said company 'Aditya Leather Exports Private Limited' . It also did not disclose that the shares of 'Kris Srikanth Sports Entertainment Private Limited' were not subject matter of charge with 'Indian Bank'. It also did not mention that it is under memo of compromise that the said amount of Rs. 4.25 crores was paid by the assessee to 'Indian Bank' in settlement of the aforesaid defaulted loan by 'Aditya Leather Exports Private Limited' and the payments were never made under direction of any Court Orders but were made under a

compromise arrangement entered into by assessee voluntarily with the said 'Indian Bank' . The aforesaid disclosure also did not mention about the agreements made simultaneously by assessee and his minor sons (through assessee) for transfer of entire shareholding of said company 'Kris Srikanth Sports Entertainment Private Limited' for an aggregate value of Rs. 7.50 crores (wherein majority shareholding to the tune of 99% was held by minor sons of the assessee), and that also assessee entered into non compete agreement with the buyers namely Pentamedia Group of Concerns , of the entire shareholding of said company 'Kris Srikanth Sports Entertainment Private Limited' agreeing not to compete for a period of six years with the said company 'Kris Srikanth Sports Entertainment Private Limited' for a non compete fee of Rs. 7.50 crores. This disclosure also did not specify that minor sons of the assessee who were holding 99% of shareholding of 'Kris Srikanth Sports Entertainment Private Limited' were never guarantor of loan availed by said 'Aditya Leather Exports Private Limited' from 'Indian Bank' nor they were Directors of Aditya Leather Exports Private Limited and he being natural guardian of minor sons were under duty under law relating to Minors and Guardianship as are applicable in India to protect interest of Minor sons who infact were holder of share capital of 'Kris Srikanth Sports Entertainment Private Limited' which was a subject matter of transfer . The assessee as per laws applicable to minor and guardianship In India could not have diverted sale proceed of shares held by Minor Sons to repay Indian Bank for loan of Rs. 4.25 crores availed by 'Aditya Leather

Exports Private Limited' , to the prejudice of minors interest without permission of Courts as per laws applicable to Minors and Guardianship in India. It was a blatant illegal act and Income-tax Act, 1961 Act cannot be read in vaccum dehors other prevailing laws in India. The assessee if so desire could have always contended that proceeds of non compete fee received by him was utilized for payment of dues to Indian Bank but to claim that the assessee appropriated proceeds of sale of shares of minor sons for the purposes of payment to Indian Bank while utilizing non compete fee received by him , which he is claiming as an exempt income , for other purposes is a perversity which cannot be accepted. The assessee has not come to court with clean hands and courts cannot be party to such an act of the assessee. Further, the assessee is claiming that he has not received Rs. 3 crores out of total consideration of Rs. 15 crores. The said consideration of Rs. 15 crores is bifurcated into sale of shares of 'Kris Shrikant Sports Entertainment Private Limited' to the tune of Rs. 7.50 crores while rest of Rs. 7.50 crores is claimed towards non compete fee. The assessee did not produced bounced cheque of Rs. 3 crores despite being directed by Court and secondly , the assessee is claiming that Rs. 3 crores which is not received shall be attributed towards sale of shares of 'Kris Srikanth Sports Entertainment Private Limited' and not towards non compete fee, which is claimed as an exempt income. It is again a perverse claim as the assesse has duly transferred entire shareholding of 'Kris Srikanth Sports Entertainment Private Limited' to the buyers Pentamedia Group of Concerns and later no legal suit was filed for non payment of

alleged part sale proceeds of shares of 'Kris Srikanth Sports Entertainment Private Limited' . The majority of shares of 'Kris Srikanth Sports Entertainment Private Limited' to the tune of 99% were held by minor sons of the assessee and the assessee is natural guardian of the minor sons was duty bound to protect the interest of minor as per law prevailing in India as to minors and guardianship. Reference is drawn to provisions of The Hindu Minority and Guardianship Act, 1956 especially to provisions of Section 8. The assessee has claimed that Rs. 12 crores in all was received as against total consideration in both the agreements of Rs. 15 crores, out of which Rs. 7.50 crores being for sale of shares and Rs. 7.50 crores being towards non compete fee. Thus, the proceeds of sale of shares shall be deemed to have been fully received to the tune of Rs. 7.50 crores firstly being belonging to minor and secondly the entire shareholding stood transferred to the buyers. It is again a perversity to claim that sale proceeds of shares of 'Kris Srikanth Sports Entertainment Private Limited' held by minor sons under a simultaneous agreements made for sale of shares as well non compete fee, was not received but the entire non compete fee was received which is claimed as an exempt income. It is clearly visible that an attempt is made by assessee to evade taxes. Thus, we reject the claim of the assessee and hold that entire sale proceeds of sale of shares by minor sons of the assessee of the company namely 'Kris Srikanth Sports Entertainment Private Limited' to Pentamedia Group of Concerns to the tune of Rs. 7.50 crores was received by assessee which shall be brought to tax under the provisions of the

1961 Act including provisions of Section 60-64 of the 1961 Act. Further, we hold that non receipt of Rs. 3 crores (out of total non compete fee of Rs. 7.50 crores) as was the claim set up by assessee was towards non compete fee payable by Pentamedia Group of Concerns to assessee for not competing with them for a period of six years . Further, we also hold that proceeds of non compete fee of Rs. 4.50 creores actually received by assessee was utilized by assessee to pay 'Indian Bank' an amount of Rs. 4.25 crores towards defaulted loan availed by 'Aditya Leather Exports Private Limited' of which assessee was Director as well Guarantor . As we will also see in the later part of this order that claim of exemption/deduction made for payment of Rs. 4.25 crores to Indian Bank by diversion by over-riding title was a wrong claim made by assessee even on merits and he was not entitled for deduction / exemption of said income even within the provisions of the 1961 Act. Thus, we hold that the primary facts were not completely , correctly and truly disclosed by assessee in the return of income originally filed by assessee with Revenue and there is clearly an attempt to evade taxes, even if we accept the contention of the assessee that the disclosure of exempt income was made by assessee in the return of income originally filed with Revenue, as is placed in paper book /page 15 (although it is a suspect disclosure as Revenue is alleging that this document is planted by assessee before ITAT and this document was never filed by assessee along with original return of income filed by assessee with Revenue). Thus, we hold that the Revenue has rightly invoked provisions of Section 147 of the 1961 Act and

we uphold reopening of the concluded assessment within four years from the end of the assessment as was made by Revenue in the instant case and more-so even scrutiny assessment was not framed by Revenue initially u/s 143(3) of the 1961 Act and return was merely processed u/s 143(1) of the 1961 Act. Thus, we reject the contentions of the assessee and uphold the reopening of the concluded assessment by Revenue u/s 147 of the 1961 Act. While upholding reopening of the concluded assessment u/s 147 in the instant case, we note that there was tangible material before the AO to reopen the concluded assessment as the assessee is claiming huge exemption of income by making incomplete, untrue and wrong claim before the AO and scrutiny assessment having not been made earlier by Revenue by invoking provisions of Section 143(3) read with Section 143(2) of the 1961 Act while originally processing return of income , and reopening of the concluded assessment u/s 147 of the 1961 Act is sought to be done within four years from the end of assessment , the Revenue is within its right to reopen the concluded assessment u/s 147 of the 1961 Act. The ratio of decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited(supra) shall be clearly applicable as processing of return of income u/s 143(1) cannot be equated to scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act. It is also laid down by Hon'ble Supreme Court in the case of P.V.S. Beedies(supra) that reopening of concluded assessment u/s 147 of the 1961 Act can be made by AO based on factual errors pointed out by audit team of department. Hence, in the

instant case, we hold that the Revenue was within its right to reopen the concluded assessment u/s 147 of the 1961 Act and we uphold the reopening of the concluded assessment by Revenue in the instant case. We order accordingly.

Now , coming to merits of the issues before us. We have observed that the assessee along with his minor sons has entered into sale of entire shareholding of 'Kris Srikanth Sports Entertainment Private Limited' with Pentamedia Group of Concerns. It is observed that almost entire shareholding to the tune of 99% was held by minor sons of the assessee and assessee merely held 125 shares of the said company. The clubbing provisions as are contained in Section 60 to 64 of the 1961 Act are attracted and income of the minor sons are to be clubbed with the income of the assessee. The perusal of these agreements will reveal that the assessee has entered into agreement of sale of shares to the tune of Rs. 7.50 crores by virtue of which entire shareholding in the said company 'Kris Srikanth Sports Entertainment Private Limited' will stand transferred to Pentamedia Group of Concerns. Simultaneously, there were agreements entered into by assessee with said Pentamedia Group concerns for non compete by assessee with the said company namely 'Kris Srikanth Sports Entertainment Private Limited' for a period of six years for total consideration of Rs. 7.50 crores . The said company namely 'Kris Srikanth Sports Entertainment Private Limited' is engaged in providing cricket coaching through electronic media. The said agreements are claimed to be

entered into based on negotiated price between two independent parties. It is also a matter of fact that the assessee is a renowned cricketer who was part of Indian/national cricket team at one point of time and also was captain of Indian Cricket Team. It is also fact that the assessee resorted to cricket commentary and other activities associated with sport of cricket after retiring from cricket team . The assessee undoubtedly enjoys reputation and brand value in sporting activities more specifically in Cricket. The name of the assessee is also part of the name of the company namely 'Kris Srikanth Sports Entertainment Private Limited' whose shares are transferred . The assessee has agreed not to compete with the said company 'Kris Srikanth Sports Entertainment Private Limited' for a period of six years for a total consideration of Rs. 7.50 crores . The said company is engaged in the business of providing cricket coaching through electronic media. The period of six years for not competing with the said company 'Kris Srikanth Sports Entertainment Private Limited' by assessee vide non compete agreement is by no means a small period. The Revenue has merely rejected non compete fee charged by the assessee and no cogent reasons are provided . The Revenue has also not brought on record cogent reasons for discarding the valuation of shares of Rs. 7.50 crores for sale of entire shareholding of 'Kris Srikanth Sports Entertainment Private Limited'. The assessee has discharged its primary onus and now it was for revenue to have rebutted the said primary onus by bringing on record cogent material to dislodge the claim of the assessee. For the relevant year under consideration , there were no

specific provision/section in the 1961 Act brought to our notice by Revenue which debarred negotiated price for the valuation of share or which created a deeming fiction for valuing shares. Thus, we accept the valuation of shares and non compete fee charged by assessee, based on negotiated agreement as we donot find them to be unconscionably or patently wrong requiring interference in the business deal entered into by and between willing parties , as there is no material brought on record to take a contrary view. Now, coming to sale consideration of Rs. 7.50 crores for sale of shares of 'Kris Srikanth Sports Entertainment Private Limited', we have observed that majority of shares exceeding 99% were held by minor sons . It is the assessee who was natural guardian for his minor sons of the assessee and the assessee executed agreement for sale of shares on behalf of his minor sons.The assessee being natural guardian was duty bound to protect the interest of minor sons. There are Minority and Guardianship laws prevalent in India which protects the interest of minors and the guardians are duty bound to protect interest of minors and if the proceeds belong to minor are to be diverted or minor are to be divested of their assets then permission of Court is required. Attention is drawn to The Hindu Minority and Guardianship Act, 1956 especially to provisions of Section 8 of the said act. The purpose and intent of these laws and indulgence by Courts as provided under law is to protect the interest and welfare of minor which is paramount. The assessee being natural guardian was duty bound to protect the interest of his minor sons. The shares held by minor sons in 'Kris Srikanth Sports Entertainment

Private Limited' were divested for a total consideration of Rs. 7.50 crores . The shares in ' Kris Srikanth Sports Entertainment Private Limited' to the tune of 99% were held by minor sons of the assessee. The shares of the minor stood transferred to Pentamedia Group Concerns and minors were divested of their shareholding in 'Kris Srikanth Sports Entertainment Private Limited'. There are simultaneous agreement for sale of shares as well for non compete which were simultaneously entered by the assessee on his behalf as well on behalf of the minor, of which total value was Rs. 15 crores out of which Rs. 12 crores stood realised.Thus, it is to be held that the entire consideration of Rs. 7.50 crores towards sale of shares of minor in 'Kris Srikanth Sports Entertainment Private Limited' stood realized and to be brought to tax within provisions of the 1961 Act including provisions of Section 60-64 of the 1961 Act. It is admitted fact that no permission of Court for selling/divesting of shares of minor is brought on record. Under these circumstances, we are of the considered view that the assessee was duty bound to protect the interest of the minor sons. Thus, we hold that sale consideration of Rs. 7.50 crores towards sale of shares stood fully realized and it is required to be brought to tax by invoking provisions of the 1961 Act including clubbing provisions as are contained in Section 61 to 64 of the 1961 Act. So far as consideration of Rs. 7.50 crores towards non compete fee is concerned which is for non competing by assessee with 'Kris Srikanth Sports Entertainment Private Limited' , we are of the considered view that the said amount is not chargeable to tax as in the impugned ay: 2001-02, the said amount was

not chargeable to tax as amendment in Section 28 wherein clause (va) was inserted by Finance Act, 2002 w.e.f. 01.04.2003 and prior to that , it could not be brought to tax as it was held to be capital receipt. The ratio of decision of Hon'ble Supreme Court in the case of Guffic Chem Private Limited(cited supra) is applicable, as we are presently dealing with ay: 2001-02 which is prior to aforesaid amendment made by Finance Act, 2002 which is applicable from 01.04.2003. Thus,an amount of Rs. 7.50 crores which was purportedly towards non compete fee is not chargeable to tax within provisions of the 1961 Act as were applicable for ay: 2001-02. Under these circumstances once it is held that Rs. 7.50 crores which was towards non compete fee is exempt from tax in the instant case , it will not matter as to how this is applied by assessee as the income at source is held to be exempt from tax. Thus, even if an amount of Rs. 3 crore is not received , it will not matter as the income at source of Rs. 7.50 crores towards non compete fee is held to be exempt from income-tax and at the same time even if Rs. 4.25 crores is paid to Indian Bank to clear the loan of 'Aditya Leather Exports Private Limited', then also it is an application of exempt income which will not have bearing on the taxability of assessee's income. However for sake of completeness, it is held that the assessee has paid an amount of Rs 4.25 crores to Indian Bank under a memo of compromise with said Bank and there was no garnishee attachment of the bank on said shares. The shares of 'Kris Srikanth Sports Entertainment Private Limited' were never subject matter of charge with Indian Bank. The shares were held by minor sons of the assessee in 'Kris

Srikanth Sports Entertainment Private Limited' and minor sons were not the guarantor of the said loan availed by 'Aditya Leather Exports Private Limited' from Indian Bank which stood defaulted. The minor sons of the assessee also could not be made to pay for the default of the said Aditya Leather Exports Private Limited of which the assessee was Director/Guarantor not the minor sons. The assessee was the Director of the said company namely 'Aditya Leather Exports Private Limited' as well guarantor of the said loan , but the assessee had no right to transfer the proceeds of sale of shares held by his minor sons in 'Kris Srikanth Sports Entertainment Private Limited' to Indian Bank , except with permission of Courts. No such permission was obtained by assessee. The said act of claiming deduction for amount paid to Indian Bank out of sale proceed of shares held by minor sons is clearly an act of perversity/illegality as well an attempt made to evade taxes. The assessee also simultaneously received non compete fee to the tune of Rs. 4.50 crores out of total agreed non compete fee of Rs. 7.50 crores and the said proceed shall be deemed to have been applied for payment to Indian Bank. The said amount of Rs. 4.50 crores is already held by us to be exempt from tax and it will not matter even if the said sum was paid to discharge to loan of Indian Bank . Further, there was no charge held by Indian Bank on shares of 'Kris Srikanth Sports Entertainment Private Limited'. In any case as discussed above, the shares were held by Minor sons of the assessee. The minor sons of the assessee were neither Director of Aditya Leather Exports Private Limited nor guarantors for the said loan granted by Indian

Bank to Aditya Leather Exports Private Limited. The assessee being natural guardian of minor son has no right to use sale proceeds belonging to minor sons to discharge Indian Bank Loan without permission of the Court and then turn back and say that the said amount paid to Indian bank is to be allowed deduction on the ground of diversion of overriding tittle, which will lead to traversity of justice and illegality. The assessee has not come to Court with clean hand and we cannot be party to such illegal and perverse act of the assessee. Thus, we hold that the said amount of Rs. 4.25 crores was paid by assessee out of non compete fee received by assessee and further it is mere application of income and there is no diversion by overriding title as the shares were never part of the charge in favour of Indian Bank. The said amount of Rs. 4.25 crores was paid by assessee to Indian Bank to settle defaulted loan obligation of Aditya Leather Exports Private Limited. Further, the assessee has entered into simultaneous agreement for sale of shares as well for non compete fee and Indian Bank was also in a position to exercise restraint over non compete fee which belonged to assessee and even Indian Bank could not have exercised any extended lien over shareholding of minor sons in 'Kris Srikanth Sports Entertainment Private Limited' without permission of Court keeping in view laws prevailing in India relevant to minor and guardianship . No such permission was ever taken from Courts by Indian Bank or by assessee under the laws applicable to minor and guardianship and hence extended lien if at all it is available was over non compete fee which in any case is held to be an exempt income. Thus, the assessee will

not get any deduction from taxable income of amount paid to Indian Bank to discharge liability of 'Aditya Leather Exports Private Limited' of the misconceived cannot be part of scheme of illegitimate tax evasion undertaken by assessee. Further , we also hold that payments made to Indian Bank by assessee to the tune of Rs. 4.25 crores was merely an application of income. Reference is drawn to decision of Third Member of ITAT , Mumbai in case of Perfect Thread Mills Limited v. DCIT reported in (2020) 181 ITD 1(Mum-trib.)(TM). We order accordingly.

Thus, we summarize and conclude our decision as under:

a) We uphold reopening of concluded assessment by AO invoking provisions of Section 147 of the 1961 Act.

b) We hold that sale consideration of Rs. 7.50 crores was duly received for sale of shares of 'Kris Srikanth Sports Entertainment Private Limited' which is to be brought to tax under provisions of 1961 Act including Section 60-64 of the 1961 Act.

c) We hold that non compete fee of Rs. 7.50 crores was exempt from tax being capital receipt.

d) We hold that payment of Rs. 4.25 crores was made by assessee to 'Indian Bank' to settle loan availed by 'Aditya Leather Exports Private Limited' which was in default , out of non compete fee earned by assessee which we have already held to be exempt

from tax and now it is academic whether there was any diversion of income by overriding title or not. In any case for completeness, we hold that the assessee was not entitled for deduction by way of diversion by overriding title as there was no charge held by 'Indian Bank' and there was merely a compromise entered into by assessee with Indian Bank voluntarily to pay defaulted loans availed by said 'Aditya Leather Exports Private Limited' . Thus, the payment to Indian Bank was merely an application of income and that too of an exempt income.

e) The question of taxability of Rs. 3 crores which was not received by assessee is again an academic question as we have already held that this non receipt of Rs. 3 crores was on account of non compete fee which is held to be exempt income.

12. In the result, all the four appeals adjudicated by us in this order are partly allowed.

Order pronounced on the 19th May , 2020 in Chennai.

Sd/-	***Sd/-***
(जॉर्ज माथन**)**	**(**रमित कोचर**)**
(GEORGE MATHAN)	**(RAMIT KOCHAR)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 19th May, 2020.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF