आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI P.M. JAGTAP, VICE-PRESIDENT
AND MS. MADHUMITA ROY, JUDICIAL MEMBER

ITA No. 1410/Ahd/2014
Assessment Year : 2009-10

Shri Vishal Dilip Palani, C/o. Ketan H. Shah, Advocate, 903, Sapphire Complex, C.G. Road, Navrangpura, Ahmedabad-380009 PAN : ALOPP 0931 E	Vs	Income Tax Officer, Ward 9(4), Ahmedabad
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri M.J. Shah & Shri Rushin Patel, ARs
Revenue by :	Shri R.R. Makwana, Sr. DR

सुनवाई की तारीख/**Date of Hearing** : **08/09/2022**
घोषणा की तारीख /**Date of Pronouncement:** **12/10/2022**

आदेश/O R D E R

PER P.M. JAGTAP, VICE-PRESIDENT :

This appeal filed by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-XV, Ahmedabad ["CIT(A) in short]" dated 04.02.2013.

2. At the outset, it is noted that there is a delay of 357 days on the part of the assessee in filing the appeal before the Tribunal. In this regard, the assessee has filed an affidavit giving details of the deteriorating health of his father as well as financial problems faced during the relevant period which resulted in the said delay. Keeping in view the same, we are satisfied that there was a sufficient cause for the delay of 357 days on the part of the assessee in filing the appeal before the Tribunal. The learned Departmental Representative has not raised any objection in this regard. We, therefore,

condone the said delay and proceed to dispose of the appeal of the assessee on merit.

3. The assessee, in the present case, is an individual who is engaged in transportation business. The return of income for the year under consideration was filed by him on 30.09.2009 declaring a total income of Rs.4,54,720/-. The case of the assessee was selected for scrutiny and a notice under Section 143(2) of the Income-tax Act, 1961 ("the Act" in short) was issued by the Assessing Officer to the assessee on 25.08.2010. Thereafter, the assessment under Section 143(3) of the Act was completed by the Assessing Officer vide an order dated 05.12.2011 determining the total income of the assessee at Rs.3,49,14,986/- after making, *inter alia,* the following additions/disallowances:-

i)	Disallowance of freight charges under Section 40(a)(ia) of the Act for the alleged failure of the assessee to deduct tax at source	- Rs.2,81,54,400.00
ii)	Unexplained cash deposits found to be made in the bank accounts of the assessee	- Rs. 55,33,807.00
iii)	Unexplained unsecured loans	- Rs. 8,55,310.00
iv)	Unexplained investment in gold	- Rs. 31,639.00

4. Against the order passed by the Assessing Officer under Section 143(3) of the Act, an appeal was filed by the assessee before the learned CIT(A) and after considering the submissions made by the assessee as well as the material available on record, the learned CIT(A) confirmed the disallowance made by the Assessing Officer on account of freight charges under Section 40(a)(ia) of the Act amounting to Rs.2,81,54,400/- as well as the addition made on account of unexplained investment in gold. As regards the additions made on account of unexplained cash deposits found

to be made in the bank accounts of the assessee amounting to Rs.8,55,310/-, the learned CIT(A) sustained the said additions to the extent of Rs.15,93,081/- and Rs.3,41,000/- respectively. Aggrieved by the order of the learned CIT(A), the assessee has preferred this appeal before the Tribunal on the following grounds:-

> *"In view of the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred -*
>
> 1. *In confirming the disallowance in reference to freight charges payment by applying section 40(a)(ia).*
> 2. *In not giving relief in reference to addition made on account of cash deposit at Rs.55,33,807/- instead erred in giving partial relief of Rs,39,40,726/-.*
> 3. *In not giving total relief in reference to addition made towards unsecured loan at Rs.8,55,310/- instead of giving partial relief at Rs.5,14,310/-.*
> 4. *In not deleting the addition made in reference to investments in gold at Rs.31,369/-."*

5. We have heard the arguments of both the sides and also perused the relevant material available on record. As agreed by the learned representatives of both the sides, the issue raised in Ground No.1 of this appeal is squarely covered in favour of the assessee by the order of the ITAT passed in the case of father of assessee Shri Dilip C. Palany Vs. ITO in ITA Nos. 1393 to 1399/Ahd/2014 rendered vide its common order dated 06.07.2017 passed for AYs 2005-06, 2007-08 to 2009-10, wherein a similar issue was decided by the Tribunal vide paragraph Nos.6 & 7 as under:-

> *"6. We have heard Shri Shah representing assessee and Shri Madhushudhan appearing as Senior Departmental Representative reiterating their respective stands against and in support of the impugned disallowance. It is an undisputed fact that the assessee has not deducted TDS upon the freight payments in question. Both the lower authorities invoke Section 194C of the Act in treating the said payments to be contractual in nature whose non deduction of TDS invites Section 40(a)(ia)*

disallowance. We proceed to examine the basic facts in this backdrop. The assessee admittedly has collected the impugned payments from its payers thereby undertaking all the risk involved in the transportation of the goods in question. He has thereafter engaged his payees' vehicles numbering more than 3500 to perform the said transportation job in lieu of the impugned freight payments. The Assessing Officer as well as the CIT(A) in this backdrop of facts conclude that there existed oral contract (s) between assessee and his payees u/s.194C of the Act. We find no reason to agree to such a conclusion. We observe that both the lower authorities have not demonstrated by way of a single documentary evidence revealing the payees concerned to have undertaken any risk involved in performing the transportation duty in question. Nor have they called any payee to depose in the same tune that the assessee had paid them in the capacity of a sub-contractor. This tribunal's decision in ITA No.3536/Mum/2011 M/s. Bhail Bulk Carriers vs. ITO decided on 07.03.2012 deletes an identical disallowance on the same lines as under:

> *"8. We have heard the parties at length and also gone through the findings of the authorities below and the case laws as have been referred in the appellate order as well as relied upon by the learned counsel. The relevant facts for adjudication of the issue are that the appellant is carrying out the business of transportation of oil through tankers. It entered into a contract with various companies (here mainly BPCL) for transporting the oils to various destinations as per the agreement entered into by the said company. The appellant was solely responsible for executing the contract on behalf of its principal. For fulfilling its transportation commitment, the appellant besides using its own tankers was also hiring the tankers from outside parties as and when required. In such a case of hiring from outside, the responsibility of successful completion of transportation work rested upon the appellant. From the record or the findings of the authorities below no where it is borne out that there was any kind of written or oral contract with the principals by such outside tank owners that they will share the risk and responsibility with the appellant.*
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> *8.1 At this stage, it is not in dispute that the department's case is that in the present case provisions of section 194C(1) are applicable and not section 194C(2). Once it is held that it is a case of 194C(1) then it would be sent that this section applies to any payment made to a person for carrying out any work in pursuance of a contract between the contractor and the person making the payment. If the condition of "carrying out any work in pursuance of a contract" is not fulfilled then the provisions of this section will not be applicable at all. Here in this case, the contract for carrying out the work was between the BPCL and the appellant. The appellant alone had risk and responsibility for carrying out the contract work as per the agreement entered into by it with its principal i.e. BPCL. There is no material on record to suggest that there was any contract or sub-contract*

whether written or oral with the outside tank owners and the appellant, whereby the risk and responsibility which is associated with a contract has also been passed on to these outside parties. Once the CIT(Appeals) has accepted the fact that the outside tank owners do not had any responsibility or liability towards the principal, then it cannot be held that these outside parties were privity to the contract between the appellant and its principal. Thus the payment made to the outside parties do not come or fall within the purview of section 194C, as the "carrying out any work" indicates doing something to conduct the work in pursuance of contract and here in this case, it was solely between appellant and its principal.

8.2 The judgment of Hon'ble Madras High Court in the case of CIT vs. Pompuhar Shipping Corporation Ltd. (supra) also fortifies the case of the appellant. In this case the assessee which was a Tamil Nadu Government undertaking was engaged in the business of transportation of coal from the ports of Haldia, Visakhapatnam and Paradeep to Chennai and Tuticorin under contracts executed with the Tamil Nadu Electricity Board. The assessee owned three ships. Since three ships were not sufficient to carry out the contracts entered into with Tamil Nadu, the assessee hired ships belonging to other shipping companies and paid hire shipping charges for using the ships. The assessee, however, did not deducted tax under section 194C before the making payment of hire charges to the shipping companies. The Assessing Officer directed the assessee to pay tax u/s.201(1) and levied interest u/s.201(1A) on the ground that TDS should have been deducted u/s.194C of the Act. On the these facts, the Hon'ble High Court observed and held as under :-

"We heard the arguments of learned counsel. Under section 194C, the tax is to be deducted when a contract was entered into for carrying out any work in pursuance of a contract between the contractor and the entities mentioned in sub-

section (1) of section 194C. In the present case, there was no contract between the assessee and the shipping companies to carry out any work. On the other hand, the assessee-company hired the ships belonging to other shipping companies for a fixed period on payment of hire charges. The hired ships were utilised by the assessee in the business of carrying the goods from one place to another in pursuance of an agreement entered into between the assessee and the Tamil Nadu Electricity Board. There was no agreement for carrying out any work or transport any goods from one place to another between the assessee and the other shipping companies. The assessee-company simply hired the ships on payment of hire charges and it was utilised in the business of the assessee at their own discretion. It is not the case of the Revenue that the assessee entered into the said contract with the shipping company for transport of coal from one place to another. The hiring of ships for the purpose of using the same in the assessee's business would not amount to a contract for carrying out any work as contemplated in section 194C. The term "hire" is not defined in the Income-tax Act. So,

we have to take the normal meaning of the word "hire". Normal hire is a contract by which one gives to another temporary possession and use of the property other than money for payment of compensation and the latter agrees to return the property after the expiry of the agreed period. Therefore, in our view, when the assessee entered into a contract for the purpose of taking temporary possession of ships in the shipping company it could not be construed as if the assessee entered into any contract for carrying out any work, and when the contract is not for carrying out any work, the Revenue cannot insist the assessee ought to have deducted tax at source under section 194C of the Act. Further, the other argument of counsel was, section 194C was amended with effect from July 1, 1995, incorporating the Explanation and the said Explanation clarifies the existing provision of section 194C of the Act. Hence, it would be applicable retrospectively. We are concerned with the assessment year 1994-95. In a recent judgment, the Supreme Court in the case of Sedco Forex International Drill Inc. v. CIT [2005] 279 ITR 310, considering the scope of the Explanation, held that there is no principle of interpretation which would justify reading the Explanation as operating retrospectively, when the Explanation comes into force with effect from a future date. In this case, the Explanation introduced is with effect from July 1, 1995. Hence it will be applicable only for the future assessment orders and it will not be applicable to the assessment year in consideration. The Tribunal also considered the fact that the shipping companies which received the hire charges are also income-tax assessees and they had shown the hire charges in their respective income-tax returns and paid the taxes on the same. The said fact was also not disputed by the Revenue. So, we are of the view that the payment of hire charges for taking temporary possession of the ships by the assessee-company would not fall within the provision of section 194C and hence no tax is required to be deducted, and there is no error or infirmity in the order of the lower authorities. Hence, no substantial question of law arises for consideration of this court. Hence, we dismiss the above tax case. No costs. Consequently, the connected TCMP No. 1253 of 2005 is closed.

8.4 Thus in view of the findings given above and the law laid down by the Hon'ble High Court as above, we are of the considered opinion that the appellant was not liable to deduct TDS u/s. 194C(1) for payments made to the outside parties and consequently the disallowance made u/s.40(a)(ia) by the authorities below are deleted. The appellant thus gets relief of Rs.56,03,210/-."

7. We also adopt the same reasoning to conclude that both the lower authorities have erred in making the impugned Section 40(a)(ia) disallowance on the freight payment in question without indicating any material that assessee's payees had made themselves liable for any risk involved in transportation of goods concern. We therefore delete the abovestated disallowance of Rs.5,50,10,978/-."

5.1 As the issue involved in the present case as well as all the material facts relevant thereto are similar to the case of Dilip C. Palany (supra), we respectfully follow the decision rendered by the Co-ordinate Bench of this Tribunal in the said case and delete the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) under Section 40(a)(ia) of the Act.

6. As regards the issue raised in Ground No.2 relating to the addition on account of cash deposits found to be made in the bank accounts of the assessee, it is observed that the said addition of Rs. 55,33,807/- made by the Assessing Officer was restricted by the learned CIT(A) to Rs.15,93,081/-, thereby giving relief of Rs.39,40,726/- to the assessee for the following reasons given in his impugned order:-

> *"Ground No.2 is related to addition of Rs.55,33,807 as unexplained cash deposited in the bank. The A.O. contended that he was in receipt of information through Annual Information Return (AIR) that appellant deposited cash amount totaling to Rs.39,40,726 at Kotak Mahindra Bank and Rs.15,93,081 at ICICI bank. Since appellant failed to submit source of such cash with documentary evidences despite being specific show cause, even books of accounts or cash book was also not produced hence the appellant was held to be failed in discharge of his onus for explaining source of such cash deposit. The A.O. relied on Hon'ble Calcutta High Court decision in the case of CIT vs. United Comm. and Industrial Co. Pvt. Ltd. (supra) and made the addition u/s.68 of the Act.*
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> *I am partly inclined with the contention of the A.O. that appellant has not submitted complete detail. But, as evident from the letter dated 8.11.2011 submitted by appellant to A.O. that a complete statement of bank account with bank book was submitted to A.O. The appellant has S.B. account No.08100120019760 and current account in the name of prop. concern M/s. Ideal Cotton Carrier with No.08102000005417 at Kotak Mahindra Bank. Both these banks account is disclosed bank account. Further, the appellant's books of accounts are subject to audit u/s.44AB of the Act and no adverse comments are mentioned by tax auditor in this regard. The verification of case record reflects that appellant filed a reconciliation of freight receipt and claim of TDS made from it as schedule TDS-2, As per this reconciliation the total freight receipt of Rs.2,16,14,344 is such that the payer deducted TDS*

out of it. The audited P&L account reflect freight receipt of Rs.2,81,54,400 and commission income of Rs.9,62,500. It is therefore a huge sum of Rs.65,40,056 (2,81,54,400-2,16,14,344) was received by appellant. Considering the nature of appellant's business as that of transporter, it can very well be assumed that a sizable receipt out of it is received in cash. Further, the appellant made cash withdrawals from both the current account and saving accounts from time to time. It is in this regard, with the help of bank statement, the working of excess cash deposit could have been done by A.O. to show at least an instance of negative cash balance. It is therefore, I am not inclined with the A.O. that source of such cash deposit in the bank is entirely unexplained. This addition is based on an assumption that since appellant has not submitted any detail, cash book, the same is unexplained. But, when appellant submitted complete bank statement, an exercise to show an instance of negative cash balance should have been done by A.O. on the basis of available material. Considering these facts, total volume of appellant's business, prevalent practice in transport business of cash payment and higher N.P. rate, the addition so made is not justified. The deposit of such cash is duly explained with the total receipt and giving telescoping of cash withdrawals by appellant from bank. However, the appellant's audit report and audited balance sheet does not reflect the bank account at ICICI bank, drive-in-cinema, Ahmedabad. The appellant also not submitted any details (bank statement) of this account. It is therefore, the cash deposited in this account cannot be held as having explained source. The A.O. made the addition u/s 68 instead of section 69 of the Act. The same being rectifiable mistake at appeal level and therefore I using my jurisdictional power, held that the cash deposited in ICICI bank of Rs.15,93,081 is held as unexplained to be added u/s.69 of the Act. The A.O. is therefore directed to delete the addition of Rs.39,40,726 out of total Rs.55,33,807. The appellant gets part relief accordingly."

6.1 After considering the rival submissions and perusing the relevant material available on record, it is observed that cash deposits to the tune of Rs.39,40,726/- and Rs.15,93,081/- were found to be made by the assessee in his bank accounts maintained with Kotak Mahindra Bank, Nariman Point Branch, Mumbai and ICICI Bank, Drive-in-Cinema Branch, Ahmedabad respectively. Out of these two bank accounts, the bank account with Kotak Mahindra Bank, as found by the learned CIT(A) on verification of relevant evidence, was regularly maintained by the assessee and the same was duly reflected in the books of account. After taking into consideration all the

facts including the total volume of the assessee's business, prevalent practice of making cash payments in the transportation business, higher net profit rate declared by the assessee etc., the learned CIT(A) held that the cash deposits found to be made in the bank account of the assessee with Kotak Mahindra Bank were duly explained. He also noted that there were substantial cash withdrawals made by the assessee from his bank account for which telescoping effect was required to be given. He further noted that there was not even a single instance pointed out by the assessee on verification of the cash book showing a negative cash balance at any point of time. The learned CIT(A), however, found that the bank account with ICICI Bank was not reflected in the books of account of the assessee. As noted by the Assessing Officer, the assessee also failed to give any details in respect of the said account and failed to furnish the source of cash deposits found to be made in the said bank account. He accordingly confirmed the addition made by the Assessing Officer on account of cash deposits found to be made in the said bank account amounting to Rs.15,93,081/- by treating the same as unexplained. At the time of hearing before us, the learned Counsel for the assessee has not filed any details or documents to explain the cash deposits found to be made in the bank account of the assessee with ICICI Bank which was an undisclosed bank account not being reflected in the books of account of the assessee regularly maintained by the assessee. We, therefore, find no infirmity in the impugned order of the learned CIT(A) sustaining the addition made by the Assessing Officer on account of cash deposits found to be made in the bank account of the assessee to the extent of Rs.15,93,081/- by treating the same as unexplained and upholding the same, we dismiss the ground No.2 of the assessee's appeal.

7. As regards the issue involved in Ground No.3, it is observed that the addition of Rs.8,55,310/- made by the Assessing Officer on account of

unexplained unsecured loans was sustained by the learned CIT(A) to the extent of Rs.3,41,000/- thereby giving a relief of Rs. 5,14,310/- to the assessee for the following reasons given in his impugned order:-

> *"Ground No. 3 is against the disallowance and addition of Rs. 8,55,310 out of unexplained unsecured loan. The A.O. contended that during the year the appellant claimed to have taken unsecured loan of Rs. 8,55,310/- but assessee failed to submit any confirmation for the same. The appellant failed to submit Name, address, PAN, Source of fund of such loan etc. to discharge his onus as casted u/s 68 of the Act to prove identity, genuinity and creditworthiness. The A.O. therefore added the same u/s 68 of the Act.*
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> *I am not inclined with the A.O. completely. For making this addition, he has not applied his mind. It is nowhere claimed that appellant has received the unsecured loan of Rs. 8,55,310/- during previous year. It is the outstanding balance as on 31/03/09 under the head "unsecured loan". The appellant's tax audit report being the correct source of such detail / information but the same is not used by AO. The Tax audit report dated 28.9.2009, at cl.24(a) & 24(b) given the details in Annexure 'B' & Annexure 'C' (copy of such Ann.'B' & Ann.'C' enclosed for ready reference). These table reflect that appellant borrowed money from M/s.Ideal Roadways Corporation which is a prop. concern of appellant's father Shri Dilip Palany, assessed to tax with same A.O. and for A.Y. 2009-10, scrutiny asstt. completed simultaneously by same A.O. on same date u/s. 144 o the Act. In the case of other four parties, the loan accepted was of as follows:*
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> | | |
> |---|---|
> | *(i) Keyur Shah* | *14,89,000* |
> | *(ii) Ashwin T Shah* | *3,12,000* |
> | *(iii) Dipan Pharma Chem* | *4,36,000* |
> | *(iv) Mulchandbhai & Sons* | *1,00,000* |
> | | *23,37.000* |
>
> *Out of these four parties, loan taken from M/s. Dipan Pharma Chem Ltd and M/s. Mulchandbhai & Sons were squared up while in other cases partly paid back. It is certified that in none of the case loan were accepted or repaid in cash by the tax auditor. It is therefore, only in the case of Shri Ashwin T Shah and Shri Keyur Shah, the loan can be treated as unexplained in the absence of address and PAN of both the parties. The total outstanding loan as on 31.3.2009 from these two parties are of Rs.3,12,000 and Rs.29,000 respectively. The other liability is of City bank loan with balance as on 31.3.2009 is of Rs.4,78,097. The loan from 'City Bank' cannot be treated as unexplained. It is therefore out of the total disallowance of Rs.8,55,310 , only addition to the extent of Rs.3,41,000 (3,12,000 + 29,000) is upheld and*

confirmed. The A.O. is directed to delete the balance addition of Rs.5,14,310 (8,55,310 - 3,41,000). The appellant gets part relief."

7.1 The learned CIT(A) thus sustained the addition of Rs.8,55,310/- made by the Assessing Officer on account of unexplained unsecured loans to the extent of Rs.3,41,000/- which were received by the assessee from Shri Ashwin Shah and Shri Keyur Shah. As found by the learned CIT(A), even the address and PAN of these loan creditors were not furnished by the assessee. The primary onus that lay on the assessee thus was not discharged by him as rightly held by the learned CIT(A). At the time of hearing before us, there is nothing brought on record to establish the identity and capacity of the concerned loan creditors and the genuineness of the relevant loan transactions. We, therefore, find no justifiable reason to interfere with the impugned order of the learned CIT(A) on this issue and upholding the same, we dismiss Ground No.3 of the assessee's appeal.

8. As regards the issue involved in Ground No.4, it is observed that the addition of Rs.31,639/- made by the Assessing Officer on account of unexplained investment made by the assessee in gold ornaments was confirmed by the learned CIT(A) for the following reasons given in his impugned order:-

"Ground No.5 is against the addition of Rs.31,639 as unexplained investment. The A.O. contended that as per Ann. A to the Tax audit report in respect of block of asset for claim of depreciation, it is mentioned that appellant added 'gold ornaments' of Rs.31,693 though no depreciation claimed. Further, despite being asked, the appellant has not submitted and proof of purchase with source hence the same is treated as unexplained investment. The tax audit report in the case of appellant at fixed asset i.e. Schedule 4 to the audited balance sheet mentioned about the purchase of ornament. The logic of not showing the same at Investment' of Schedule 5 is not understandable. Further, the Tax auditor at Annexure 'D' i.e. Notes forming part of Form No.3CD at Cl.3 mentioned that 'whenever original bills/vouchers are not available for our verification, we have verified the same on the basis of vouchers/bills duly signed by the proprietor. "The appellant in

its letter dated 8.11.2011 at point No.3 mentioned that The assessee is not maintained personal account or personal balance sheet during above asstt.year." It is therefore, there is no detail as well as explanation of source of such purchase. Therefore the addition so made by A.O. is upheld and confirmed. The ground is dismissed."

8.1 After considering the rival submissions and perusing the relevant material available on record, it is observed that the investment made by the assessee in gold ornaments amounting to Rs.31,639/- was duly recorded in the books of account of the assessee regularly maintained inasmuch as the same was duly reflected in the block of assets as noted by the authorities below. In our opinion, it therefore cannot be said that the source of the said investment, which was duly recorded in the books of account, had remained unexplained. Moreover, no deduction even on account of depreciation was claimed by the assessee in respect of the investment made in gold ornaments and this being so, we are of the view that no addition can be made on account of gold ornaments even if the details and documents such as bills/vouchers are not produced by the assessee in support of the purchase of gold ornaments. We, therefore, delete the addition made by the Assessing Officer and confirmed by the learned CIT(A) on this issue and allow Ground No.4 of the assessee's appeal.

9. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 12th October, 2022 at Ahmedabad.

Sd/- Sd/-

(MADHUMITA ROY) **(P.M. JAGTAP)**
JUDICIAL MEMBER **VICE-PRESIDENT**

Ahmedabad, Dated 12/10/2022

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

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

आदेशानुसार/ BY ORDER,

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सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण
ITAT, Ahmedabad