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W.P.No.9154 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	22.08.2023
Pronounced On	17.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.9154 of 2023
and
W.M.P.Nos.9289 and 9291 of 2023

BHK Trading LLP,
Having its office at
115, Kothari Building, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.
Tamil Nadu
Represented by its Authorised Signatory,
Mr.Arjun B Kothari.

... Petitioner

vs.

- 1.The Assistant Commissioner of Income Tax,
Non Corporate Circle 3(1) Chennai,
Room No.623 A, Wanaparthi
Block – VI Floor, No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai,
Tamil Nadu – 600 034.
- 2.The Principal Commissioner of Income Tax -4,
Aayakar Bhawan,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai,



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Tamil Nadu – 600 034.

3.The Assessment Unit,
Income Tax Department,
Government of India,
Ministry of Finance,
North Block, New Delhi – 110 001.

4.The Union of India,
Through the Secretary,
Ministry of Finance, Government of India,
North Block,
New Delhi – 110 001.

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, seeking to issue a Writ of Certiorari or any other appropriate Writ Order or Direction, to call for the records of the show cause notice dated 19.05.2022 bearing number ITBA/COM/F/17/2022-23/1043079036(1) issued by the respondent No.1; the order dated 30.06.2022 passed under Section 148A(d) of the Act bearing number ITBA/COM/F/17/2022-23/1043685876(1) by the respondent No.1; the Reopening Notice dated 30.06.2022 bearing number ITBA/AST/M/148_1/2022-23/1043690517(1) issued by the respondent No.1; the notices dated 30.12.2022 issued under Section 143(2) and 142(1) bearing numbers ITBA/AST/F/143(2)_5/2022-23/1048357158(1) and ITBA/AST/F/142(1)/2022-23/1048357179(1) respectively by the respondent No.3 and the Show Cause Notices dated 20.02.2023 and 08.03.2023 for the Assessment Year 2016-2017 bearing



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numbers ITBA/AST/F/147(SCN)/2022-23/1049934527(1) and
ITBA/AST/F/147(SCN)/2022-23/1050510139(1) respectively issued
by the respondent No.3 in reference to the present petition and quash
the same with immediate effect.

For Petitioner : Mr.Sanjay Sanghvi

For Respondents : Mr.V.Mahalingam
Senior Standing Counsel

ORDER

The petitioner has challenged the Impugned Notice dated 19.05.2022 issued under Section 148A(b) of the Income Tax Act, 1961 and an order dated 30.06.2022 under Section 148A(d) of the Income Tax Act, 1961, pursuant to order of the Hon'ble Supreme Court in the case of *Union of India Vs. Ashish Agarwal* reported in *[2022] SCC online SC 543* rendered on 04.05.2022.

2. The case of the petitioner is that the impugned proceedings are bad in law inasmuch as it is inspired from the change of opinion.

3. A regular Assessment was completed and an Assessment Order



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came to be passed under Section 143(3) of the Income Tax Act, 1961 on 27.11.2018 for the Assessment year 2016-2017. The aforesaid Assessment Order was preceded a notice under Section 142(1) of the Income Tax Act, 1961 on the same issue which is the subject matter of the Impugned Notice and the Impugned Order under Section 148A(b)(d) of the Income Tax Act, 1961.

4. The petitioner had filed a detailed reply in response to Notice dated 19.11.2018 issued under Section 142(1) of the Income Tax Act, 1961 on 26.11.2018. Thereafter, the aforesaid Assessment Order dated 27.11.2018 came to be passed under Section 143(3) of the Income Tax Act 1961 for the Assessment Year 2016-2017. It is therefore submitted that invocation of Section 148A of the Income Tax Act 1961 to reopen the completed Assessment for the Assessment year 2016-2017 was without any merits.

5. The learned counsel for the petitioner submits that the petitioner had offered the income, as “income from trading” and claimed exemption on capital gains under Section 47(xiiib) of the



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Income Tax Act, 1961. It is submitted that the petitioner did not have any business income, although, the petitioner was incorporated in the year 2006, as company for carrying business of buying, selling, marketing, supplying, importing, exporting, trading, storing, distributing, transporting or otherwise dealing in all kinds of petroleum, petroleum products and by products, petrochemicals, fuel, oil, crude oil including other related products and to act as selling agents, commission agents, sales organizers, distributors, stockists, del-credre agents, C & F agents, wholesale dealers and retailers for aforesaid products. It is submitted that the petitioner was later registered as a withhold liability Partnership Firm on 07.08.2015.

6. It is further submitted that the even as per the Board Circular No.6/2016 dated 29.02.2016, it has been clarified as follows:

(a)Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

(b)In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as



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Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;

(c) In all other cases, the nature of transaction (i.e. Whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

7. That apart, the learned counsel for the petitioner would further submits that similar income during the succeeding Assessment years viz., 2017-2018 and 2018-2019 have also been assessed in the same manner, vide Assessment Order dated 04.01.2021 for 2018-2019 and vide Assessment Order dated 30.11.2019 for the Assessment Year 2017-2018.

8. It is therefore submitted that the invocation of amended provisions of Section 148A for re-opening of the Assessment completed under Section 143(3) on 27.11.2018 for the Assessment year 2016-2017 was without jurisdiction.



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9. That apart, it is submitted that in response to the Notice issued on 19.05.2022, the petitioner had also filed a detailed reply which has not been considered.

10. It is therefore submitted that the specific allegations in the notice dated 19.05.2022 was on account of transfer of preference shares held by Ms.Nina B Kothari to M/s. BHK Foundation (Discretionary Trust). It was not camouflaged to avail to exemption under Section 47(xiiiib) of the Income Tax Act, 1961. It is further submitted that the petitioner had not circumvented any of the provisions of the Income Tax Act, 1961.

11. It is therefore submitted that the notice alleges violation of Section 47(xiiiib) of the Income Tax Act, 1961 with reference to proviso (e) and (ea) were not satisfied and therefore the transaction was not chargeable to 'capital gains' under Section 45 of the Income Tax Act. It is therefore submitted that while passing the impugned order



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under Section 148A(d) of the Income Tax Act, 1961 a reference has been made to Section 47(xiv) of the Income Tax Act, 1961 which was not at all applicable to the facts of the case.

12. The learned counsel for the petitioner has placed reliance on the following decisions which held as under:-

(1)*CIT Vs. Kelvinator of India Ltd* reported in [2010] 320 ITR 561 (SC);

(2)*ITO Vs. Techspan India Pvt Ltd* reported in [2018] 302 CTR 74 (SC);

(3)*DCIT Vs. Financial Software and Systems (P) Ltd* reported in [2022] 447 ITR 370 (SC);

(4)*ACIT Vs. Kalpataru Land (P.) Ltd* reported in [2022] 447 ITR 364 (SC);

(5)*Kalpataru Land (P.) Ltd Vs. ACIT* reported in [2022] 136 taxmann.com 434 (Bom HC);

(6)*PCIT Vs. State Bank of India* reported in [2022] 447 ITR 368 (SC);

(7)*State Bank of India Vs. ACIT* reported in [2019] 418 ITR 485 (Bom HC);

(8)*Mobis India Ltd Vs. DCIT* reported in [2023] 450 ITR 60 (Mad HC);

(9)*PCIT Vs. M.R.Narayanan* reported in [2021]



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436 ITR 520 (Mad HC);

(10)*CIT Vs. Baer Shoes (India) Pvt Ltd* reported in [2011] 331 ITR 435 (Mad HC);

(11)*Cognizant Technology Solutions India (P.) Ltd Vs. Assistant Commissioner of Income Tax* reported in [2021] 439 ITR 571 (Mad HC);

(12)*CIT Vs. Elgi Thread (India) Ltd* reported in [2018] 96 taxmann.com 254 (Mad HC);

(13)*Ananta Landmark (P.) Ltd Vs. DCIT* reported in [2021] 131 taxmann.com 52 (Bom HC);

(14)*PCIT Vs. Everlon Synthetics (P.) Ltd* reported in [2020] 113 taxmann.com 442 (Bom HC);

(15)*Bharti Infratel Ltd Vs. DCIT* reported in [2019] 101 taxmann.com 285 (Del HC);

(16)*Stewart Science College Vs. ITO* rendered in W.P.(C).No.17176 of 2022;

(17)*Larsen & Toubro Limited Vs. State of Jharkhand* rendered in Civil Appeal No.5390 of 2007-(SC);

(18)*Divya Capital One Private Limited Vs. ACIT* rendered in W.P.(C).No.7406/2022 (Del HC);

(19)*CIT Vs. Aquatic Remedies (P.) Ltd* reported in [2020] 269 taxmann 195 (SC);

(20)*CIT Vs. Aquatic Remedies (P.) Ltd* reported in



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[2018] 406 ITR 545 (Bom HC);

(21)*Miranda Tools (P.) Ltd Vs. ITO* reported in
[2020] 272 taxman 154 (Bom HC);

(22)*Sylvesa Infotech (P.) Ltd Vs. ACIT* reported in
[2023] 146 taxmann.com 94 (Orissa High Court);

(23)*UOI and others Vs. Ashish Agarwal* rendered
in [Civil Appeal No.3005/2022] (SC);

(24)*Kamlesh Keswani Vs. ACIT* reported in [2023]
451 ITR 153;

(25)*State of Uttar Pradesh and others Vs.
Aryaverth Chawal Udyog and others* reported in [2015]
17 SCC 324;

(26)*Ratan Industries (Pvt.) Ltd Vs. ACIT and
another* reported in [2006] 148 STC 111 and

(27)*Ball Aerosol Packaging India (P.) Ltd Vs.
ACIT* reported in [2023] 146 taxmann.com 193 (Guj HC).

13. Specifically, a reference was made to the decision of the Division Bench of this Court in the case of *Deputy/Assistant Commissioner of Income-tax Vs. Financial Software and Systems Pvt Ltd* reported in [2022] 145 taxmann.com 37 (SC) and *Financial Software and Systems (P) Ltd Vs. Deputy/Assistant Commissioner of*



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Income Tax reported in *[2022] 145 taxmann.com 36 (Mad)* rendered in the context of re-opening of the Assessment.

14. It is submitted that the aforesaid decision of the Division Bench of this Court was upheld by the Hon'ble Supreme Court in its Order dated 22.07.2022 in the case of ***Deputy/Assistant Commissioner of Income Tax vs Financial Software and Systems (P) Ltd*** reported in *[2022] 145 taxmann.com 37 (SC)*.

15. The learned Counsel for the petitioner would submit that a recent decision of this Court rendered in ***Mobis India Ltd Vs. DCIT [2023] 450 ITR 60 (Mad HC)***, has reiterated the position taken by the Hon'ble Supreme Court. A reference is made to Para 21 from the said decision which reads as under:-

“21.Apparently, it is in view of the above reason that the Hon'ble Supreme Court way back in 1979, in Indian and Eastern News Paper Society, put the issue beyond any pale of doubt by holding that the opinion on law rendered by an audit party cannot be the basis for exercising the power of reassessment. Evaluation of law and its bearing on the assessment must be directly and solely done by the assessing officer. The



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audit party can furnish information which leads the assessing officer to realise the need for reassessment. In other words, the information/material provided by the audit or any external agency must give birth to the realization on the part of the assessing officer of the need to exercise its power of reassessment. However, the information cannot be the realisation. If the distinction between the two is lost sight, there is a grave danger of powers of reassessment being usurped by external agency and abdication of its quasi judicial function/power by the assessing officer, both of which are impermissible and would prove fatal to the validity of any proceedings which suffers from the above vice.”

16. Defending the impugned proceedings, the learned Senior Standing Counsel for the respondent would submit that the impugned proceedings was inspired from the audit objections, pursuant to which the impugned notice and orders have been passed.

17. It is submitted that a huge transaction of money and the entire transaction was camouflaged to evade tax. It is further submitted that during the Assessment year 2015-2016, there was an amalgamation with effect from 01.04.2014.



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18. It is therefore submitted that three companies namely Spellbound Trading P Ltd, Ragini Synthetics Trading Pvt Ltd and Riti Holdings Trading Pvt Ltd were merged with the BHK Trading Pvt Ltd, pursuant to Order dated 18.03.2014 of the High Court. The appointed date was 01.04.2014. It is therefore submitted that consequent to the merger of these three companies with BHK Trading Pvt Ltd, the assets of these company as on 31.03.2015 was Rs.4,94,50,71,538/- as against Rs.7,85,26,272/- as on 31.03.2014 i.e., one day before the “Appointment Date” under the Scheme of Amalgamation.

19. It is further submitted that revenue of the company as on 31.03.2015 was Rs.15,26,34,643/- as against Rs.23,60,000/- as on 31.03.2014. It is therefore submitted that there was a huge investment of Rs.51,22,23,588/- in the shares of the listed companies and the shares in the unlisted company amounting to Rs.10,64,97,947/- from the investments in Mutual funds is Rs.2,15,58,56,047/-, investment in urban infrastructure OPP Fund is Rs.7,13,01,600/- investments in fixed maturity plan in Rs.3,15,00,000/-. There is an investment in bonds and



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debentures to the tune of Rs.3,03,64,57,137/-.

20. That apart, it is further submitted that the said companies were dealing with shares, mutual funds, other investments and advancing of loans to various companies in huge amounts and the business activities are done in a systematic way as detailed below:-

“The revenue earned as on 31.03.2015 is
Dividend income on mutual funds Rs.6,77,81,469/-
Dividend income on shares of Rs.3,38,23,310/-
net gain on sale of shares Rs.2,51,28,415/-
net gain on sale of mutual funds Rs.97,71,721/-
net gain on sale of other investments Rs.22,41,286/-
interest on tax free bonds Rs.44,47,429/-
distribution income – urban infra Rs.39,28,437/-
other interest income Rs.55,35,892/-
Miscellaneous Income Rs.3,683/-
Total income- Rs.15,26,34,643/-”

21. It is further submitted that in the above facts show gross receipts of the petitioner's company as on 31.03.2015 was much more than Rs.60,00,000/- mentioned in Section 47(xiiib)(ea) of the Income



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Tax Act. The income was assessable under the head income from business and the total sales, turnover or gross receipts in the business of the said company was less than Rs.60,00,000/- for the accounting year relevant to the Assessment year 2015-2016 and hence the conversion of the petitioner's into LLP did not entitle it the benefits of Section 47(xiiib) of the Income Tax Act for the Assessment year 2016-2017.

22. It is therefore submitted that the Assessment year involved is Assessment year 2016-2017. The four year period from the end of the Assessment Year is 31.03.2021. This outer limit was extended to 30.06.2021 by TOLA (the reopening in this case is on 30.06.2021). In view of this, the petitioner's contention that all the details were filed before the Assessing Officer during the original assessment proceedings and hence reopening cannot be made in view the first proviso to the pre amended Section 147 of the Income Tax Act and hence the reopening was bad in law is not acceptable.

23. It is therefore submitted that the petitioner had earlier questioned the notice dated 30.06.2021 issued under Section 148 of the



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Income Tax Act in W.P.No.5039 of 2022. It is further submitted that W.P.No.5039 of 2022 is pending before this Court.

24. By way of rejoinder, the learned counsel for the petitioner submits that the aforesaid petition has become infructuous in the light of the subsequent development and in view of the pendency of the Writ Petition. Same stands recorded.

25. Arguing further, the learned Senior Standing Counsel for the respondents would submit that the provisions of Section 147 of the Income Tax Act as, 1961 as it stood prior to the period in dispute and during the period in dispute are different. It is therefore submitted that if there are circumstances re-opening of the Assessment on account of income escaping Assessment, a Notice under Section 148A(b) can be issued for the purpose of re-assessment under Section 147 of the Income Tax Act, 1961.

26. It is therefore submitted that if there is an income escaping assessment, the Assessing Officer may subject to the provision of 148



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of the Act, issue a notice to a person who has failed to furnish a return of income, report or statement of financial transaction. This Section was introduced by the Finance Act, 2021, and is applicable from 01.04.2021.

27. By way of rejoinder, the learned counsel for the petitioner would submit that an audit memo dated 19.06.2019 was issued and therefore re-opening of the Assessment if at all based on the above information would be only in terms of the above audit objections which was impermissible as per the decisions of the Hon'ble Supreme Court.

28. The learned counsel for the petitioner would further submit that Assessment under Section 153 of the Income Tax Act has to be as per the time limit and therefore the notice that was issued has culminated in the passing of the Impugned Order in a hurried manner.

29. On the other hand, the learned Senior Standing Counsel for the respondents would draw attention to Section 153(6)(i). It is therefore submitted that the decision of the Hon'ble Supreme Court in



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the case of *Union of India Vs. Ashish Agarwal* reported in [2022] *SCC online SC 543* rendered on 04.05.2022 the Assessment had completed within a period of twelve months from the month in which the orders are received or passed by this Court.

30. I have considered the arguments advanced by counsel for the petitioner and the learned counsel for the respondent. There is no dispute that the notice that were issued were under the old regime.

31. However, the Hon'ble Supreme Court in *Union of India and others versus Ashish Agarwal* rendered its decision on 04.05.2022 as a result of which all notices issued under the old regime after 01.04.2021 were to be treated as a notice issued under section 148A of the Income Tax Act, 1961.

32. Thus, the Notice Issued under Section 148 of the Income Tax Act, 1961 to the petitioner on 30.06.2021 was to be decided in accordance with the newly inserted section 148A of the Income Tax



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Act, 1961. Thus, the Assessment was to be completed in accordance with the aforesaid provision.

33. Prior to issuance of Notice Issued under Section 148 of the Income Tax Act, 1961 to the petitioner on 30.06.2021, the Department had audited the accounts of the petitioner for the assessment year 2016-17 after the Assessment was completed under Section 143(3) of the Income Tax Act, 1961.

34. The audit memo addressed to the Asst Commissioner of Income Tax dated 19.6.2019 indicates that the petitioner a Limited Liability Partnership Firm was earlier Private Limited Company. The 2 partners of the petitioner Firm were its directors. The company was converted into petitioner firm only on 07.08.2015. As on 31.03.2015, one of the partner namely Ms Nina B. Kothari held 25,07,688 preference shares of Rs. 10/- each in the said company prior to its conversion into a Limited Liability Partnership Firm.

35. After, 31.03.2015, but before the conversion of the company into a Limited Liability Partnership Firm on 07.08.2015, the aforesaid



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preference shares were transferred to the other partner namely BHK Foundation (Discretionary Trust). Ms Nina B. Kothari thus merely held one equity share in the said company, prior to conversion on 07.08.2015.

36. The Trust, thus had 1,99,999 equity shares of Rs 10 each and 25,07,688 preference shares of Rs.10 each in the company. This aspect was not brought to the notice of the Income Tax Department prior to scrutiny assessment that came to be completed/passed on 27.11.2018.

37. *Prime facie*, it appears that income had escaped assessment. The exemption that was claimed under section 47 (xiv) of the Income Tax Act, 1961 is available subject to the rider specified therein. The sales turnover or gross receipts from the business in the 3 preceding year prior to the previous year in which the conversion took place should not have been more than Rs.60,00,000/-.

38. The profit and loss account of the company for the



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assessment years 2013-14, 2014-15 and 2015-16 as per the memo indicates the following position:-

Assessment year	Gross receipts
2013-14	23,60,000/-
2014-15	15,26,34,643/-
2015-16	3,72,37,151/-

39. The petitioner firm has not disclosed all the above information to the assessing officer prior to the assessment order that was passed on 27.11.2018 under Section 143 (3) of the Income Tax Act, 1961. Therefore, the respondents were prima facie justified in re-opening the assessment under Section 148 of the Income Tax Act, 1961 for the Assessment year 2016-17.

40. The limitation stood which was to expire stood protected in view of the orders passed by the Hon'ble Supreme Court and in view of the Ordinance and the Act in the wake of out break of Covid-19 Pandemic. However, in the light of the decision of the Hon'ble



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Supreme Court in Union of India versus Ashish Agarwal, notices issued after 01.04.2021, were to be treated as notice issued under section 148A of the Income Tax Act, 1961.

41. Therefore, the challenge to the proceedings initiated in the light of the decision of the Hon'ble Supreme Court cannot be countenanced. Whether the petitioner is indeed entitled to succeed eventually in the re-assessment proceedings or not is to be decided by the 1st respondent. Intervention of this Court against the proceedings initiated cannot be countenanced as prime facie there are indications that income had escaped assessment.

42. That apart, the petitioner has also participated in the proceedings and has filed this writ petition only on 16.3.20 23. Therefore, the challenge to the impugned proceedings and show cause notices cannot be countenanced at this stage. Consequently, this writ petition is liable to be dismissed.



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43. The 1st respondent is directed to complete the proceedings as expeditiously as possible preferably within a period of 6 months from the date of receipt of this order. It is made clear that while passing order, the 1st respondent shall pass orders on merits without getting influenced by any observations contained herein.

44. Writ Petition stands dismissed. No costs. Consequently connected miscellaneous petitions are closed.

17.11.2023

Index:Yes/No
Internet:Yes/No
Speaking/Non-speaking Order
Neutral Citation : Yes/No
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To

- 1.The Assistant Commissioner of Income Tax,
Non Corporate Circle 3(1) Chennai,
Room No.623 A, Wanaparthy
Block – VI Floor,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai,
Tamil Nadu – 600 034.
- 2.The Principal Commissioner of Income Tax -4,
Aayakar Bhawan,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai,
Tamil Nadu – 600 034.
- 3.The Assessment Unit,
Income Tax Department,
Government of India,
Ministry of Finance,
North Block, New Delhi – 110 001.
- 4.The Union of India,
Through the Secretary,
Ministry of Finance, Government of India,
North Block,



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New Delhi – 110 001.

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