IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 1053/DEL/2023
Assessment Year: 2011-12

Hero Motocorp Ltd. (as successor of Hero Investment P. Ltd.), Plot no. 2, The Grand Plaza, Nelson Mandela Road, Vasant Kunj, Phase-II, New Delhi-110070. **PAN- AAACH 0812 J**	Vs	**DCIT, Circle-11(1), New Delhi.**
APPELLANT		**RESPONDENT**
Assessee represented by	Shri Ajay Vohra, Sr. Adv.; Shri Deepesh jain, CA; & Shri Shaurya Jain CA	
Department represented by	Shri T. James Singson, CIT(DR)	
Date of hearing	20.05.2024	
Date of pronouncement	24.07.2024	

O R D E R

PER ANUBHAV SHARMA, JM:

The assessee has come in appeal against the order dated 28.03.2023 passed by the Commissioner of Income Tax (Appeals)-29, New Delhi (hereinafter referred as "learned First Appellate Authority" or in short "FAA"), in Appeal no. CIT(A), Delhi-4/10399/2018-19 for the assessment year 2011-12, arising out of the

order dated 29.12.2018, u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred as the "Act"), passed by the Dy. Commissioner of Income-tax, Circle 11(1), New Delhi (hereinafter referred in short as "Ld. AO").

2. The facts in brief are Hero Honda Motors Ltd. ('HHML'), is a public listed company, which was incorporated as a joint venture (JV) between Hero Group and Honda, Japan, with the Hero Group and Honda (here in after also referred as 'parties') holding 26% equity each, pursuant to shareholder agreement dated 26.12.1983 ('JV Agreement'). The parties, agreed to participate in manufacture, assembly, import, sale and service of motorcycles and parts thereof in India with technical assistance of Honda. The JV Agreement dated 26.12.1983, had certain restrictions related to the management and existence of the JV company on the parties qua (a) right to transfer/ sell/ assign shares held in the JV company, without any prior consent of the other (b) arrangement of funds to meet requirements of JV company ; (c) right to terminate the JV in certain cases. Further, restrictions vide Article 11 of JV agreement were placed on the JV Company and the Indian Partners in the said JV agreement by which the Indian Partners were prohibited to directly/ indirectly engage in the manufacture, sale or distribution of any motorcycles and other two-wheelers. Subsequently, vide Memorandum of Understanding (MOU) entered into on 12th July 1999 [referred also as '1999 MOU') the Indian partners permitted Honda to establish its subsidiary in India, namely, Honda Motorcycle and Scooter India Pvt. Ltd ('HMSI')] and independently manufacture scooters immediately and to manufacture motorcycles after 5 years from the date of agreement in India.

2.1 The case of assessee is that in late 2010, on mutual discussions between the parties, it was decided that the JV would be terminated, and Honda would exit the

JV by selling its entire stake to the Hero Group, to enable both Hero Group and Honda to independently focus on two-wheeler business in India. The said termination/ exit was publicly announced in December 2010 by way of Joint Press Release by both the JV partners. The break-up of shareholding between Hero Group and Honda (immediately prior to March 2011, i.e., before exit of Honda from JV) was - (1) 26% held by Honda; (ii) 26% held by Hero Group [including 17.33% held by appellant and 8.67% by Bahadur Chand Investment Pvt. Ltd. (BCIPL)] and (iii) 48% held by public.

2.2 A share transfer agreement dated 22.01.2011, was entered between Honda Motors co. Ltd., Hero Investment Pvt. Ltd. and Bhadur Chand Investment Private Ltd. by which the existing JV agreement dated 26.12.1983, as amended from time to time, and 1999 MOU between the JV partners stood terminated. Further, the existing technical know-how agreement entered between Honda and the HHML/JV Company was also terminated and fresh agreement(s), viz. License A products agreement and License B products agreements were entered to provide know-how with limited rights to the JV Company, by way of handholding for its survival after exit of Honda from the JV. As a consequence of the termination of the joint venture, HHML was:

(i) barred from using 'Honda' as part of its company name post 30.07.2011;

(ii) barred from using the trademark "Hero Honda" on motorcycles manufactured by HHML (except License A products) w.e.f. January 1, 2011 and for License A products after 30.06.2014;

(iii) permitted to use technology owned by Honda in respect of manufacture of License A products in perpetuity, but restriction on sale thereof by using trade-mark "Honda" post expiry of transition period, i.e., 30.06.2014;

(iv) allowed to use Honda technology for manufacture and sale of license B products, but restriction on use of trade-mark "Honda" against payment of royalty /model fee, upto 30.6.2017;

(v) allowed to develop and sell new models of motorcycles and scooters;

(vi) allowed to freely export motorcycles (other than License B products) to any country across the globe with restriction on use of brand "Honda" in case of export to new overseas distributors.

2.3 The 26% stake held by Honda in HHML (JV) was agreed to be taken over by Hero Group through erstwhile Hero Investment Pvt. Ltd. (HIPL/ assessee /appellant). Accordingly, the appellant (representing Hero Group), in an off-market deal on 22.03.2011 acquired 5.19 crore equity shares, representing 26% stake in HHML, from Honda at a mutually negotiated price of Rs.739 per share, for a total consideration of Rs. 3,841.83 crores being paid to Honda, on which due tax was deducted and deposited as per the provisions of section 195 of the Act.

2.4 The case of assessee is that to acquire the aforesaid shares, apart from utilizing the accumulated reserves and surplus available with the appellant, interest bearing borrowed funds were sourced through issue of secured Non-Convertible Debentures (NCDs) to the tune of Rs.2900 crores, which were secured against the shares of HHML. Further pursuant to the acquisition of aforesaid shares from Honda, the appellant also arranged funds to the extent of Rs.2,580.43 crores by fresh issue of equity shares having face value of Rs.100/- per share at premium of Rs.41,83,486 per share aggregating to Rs.2,580.43 crores to BC India Pvt. Investors II and Lathe Investment Pvt. Ltd. ('foreign investors') during the immediately succeeding year, which were substantially utilized to prepay the aforesaid NCDs.

3. The appellant filed its return of income under section 139(1) of the Act on 28.09.2011 declaring income of Rs.4,36,35,186, which was selected for scrutiny vide notice dated 7.9.2012 issued under section 143(2) of the Act by the jurisdictional assessing officer at Ludhiana. In the meantime, before the completion of assessment, HIPL/ assessee got amalgamated with HHML w.e.f. 01.01.2013 [now known as Hero Moto Corp Ltd. (HMCL)], pursuant to the scheme of amalgamation. Assessment was completed under section 143(3) of the Act by Assistant Commissioner of Income-tax, Circle-V, Ludhiana vide order dated 29.01.2014 at income of Rs.6,11,79,857 after making the adjustments on account of - (i) treating profit on sale of investment and interest income as business income-Rs.7,50,07,419; and (ii) disallowance under section 14A- Rs.1,01,82,707. The said assessed total income was subsequently rectified to Rs.6,02,96,513 vide order dated 08.04.2015 passed under section 154/ 143(3) of the Act. The aforesaid assessment order was challenged in further appeal before the CIT(A)-Ludhiana, which was disposed off vide order dated 30.10.2018, in favor of the appellant.

3.1 Subsequently, a survey under section 133A of the Act was conducted by the revenue authorities at the Delhi premises of the HMCL on 23/24.03.2018, whereby copy of certain agreements/ documents were collected and statement of various persons/ employees were recorded in relation to the aforesaid transaction of purchase of shares of HHML by HIPL/ assessee from Honda. Further, various other details / documents were requisitioned by the assessing officer.

3.2 This was followed by a reassessment proceedings under section 147 of the Act, initiated vide notice dated 31.03.2018 issued under section 148 of the Act. The appellant filed legal objections dated 26.04.2018 which were dismissed vide order dated 09.08.2018. Thereafter, reassessment proceedings were concluded vide

reassessment order dated 29.12.2018 at total income of Rs.3650,88,16,576, after making addition of Rs.3644,85,20,063 under section 28(iv) of the Act, alleging the same to be "benefit" accrued to the appellant on acquisition of 26% stake in HHML from Honda, at discount. On first appeal, the CIT(A), vide impugned order dated 28.03.2023, agreed to the contentions of the assessing officer in toto and dismissed the appeal of the appellant for which the assessee is in appeal here in Tribunal.

4. On hearing both the side, it is pertinent to observe that the grounds as raised by appellant/ assessee, bring forth the precise controversy, on facts and law, between the parties and for convenient discussion same can be concised in the form of following two issues:-

Issue No. 1:

Whether the reassessment order dated 29.12.2018 lacked valid 'reason to believe that income of the appellant had escaped assessment' in terms of absence of tangible material and beyond the scope of first proviso to section 147 of the Act, inasmuch as there was no failure on part of the appellant to fully and truly disclose all material facts relating to the impugned transaction?

Issue No. 2:

Whether for the purpose of section 28(iv) of the Act, any 'benefit', accrued to assessee, by way of discount arising out of purchase of shares of Hero Honda Motors Ltd. (HHML) from Honda Motor Company Ltd., Japan ('Honda'), at negotiated

price of Rs.739 vis-à-vis alleged stock exchange price of Rs. 1441 per share?

5. As regard to these issues, the Ld. Sr. Counsel Sh. Ajay Vohra has made detailed arguments and also filed a written submission, which we have taken into consideration and shall be dealt at appropriate places ahead.

5.1 On the other hand, relying heavily on findings of AO, Sh. T. James Singson, Ld. DR has submitted that only after the survey carried out at the business premises of M / s Hero MotoCorp Ltd. (as successor of Hero Investment Pvt. Ltd.). the issue was noticed and accordingly, the AO has made addition u/s 28(iv) of the Act as the same has not been disclosed by the assessee in its income in the concerned year. It is submitted that the AO has explained the reasons of reopening in details in his assessment order from page no. 2 to 20. Further the AO has disposed the objections raised by the assessee with respect to challenging the reopening of the said case. The same has been explained by the AO in details from page no. 27 to 42. The same has been dismissed by the Ld. CIT(A) in a speaking order and detailed discussion of the same is mentioned in the para no. 7 of Ld. CIT (A) order for which reliance was placed on page no. 60 to 67 of the impugned order.

5.2 Ld. DR submitted that, the AO on page no. 45 of the order mentioned that the assessee had filed a writ petition before the Hon'ble High Court challenging the reopening of the case for AY 2011-12. However, the Hon'ble Court did not agree to the pleadings of the assessee that the re-assessment proceedings were bad in law. The Hon'ble High Court of Delhi instructed the petitioner to withdraw the writ petition filed by the assessee for challenging the reopening of the case for AY

2011-12 as same is not bad in law. The detailed discussion with respect to the writ petition filed by the assessee was cited as mentioned at para no. 4 of AO's order at page no. 45-46. We will like to hold here itself that as there was no order on merits, these contentions, are inconsequential.

5.3 The Ld. DR relied the finding of CIT(A) on page no. 68 to 79, and submitted that during the discussion, the CIT(A) has questioned the share transfer agreement dated 22.1.2011 being in violation of the shareholder's agreement of 1983 regarding termination of JV in terms of transfer of share by terminating party at the market price. The terms and condition of the framework agreement 1983 provided purchase and sale of share at fair market price. Reliance is placed byLd. DR on findings of CIT(A) at page no. 63 and para no. 7.6, that during the course of post survey enquires, the appellant was called upon to furnish various documents related to the negotiation between the transacting parties namely HIPL, HHML and M/s Honda Japan. It is noted by the AO that the appellant was able to provide only a few documents and had not provided crucial documents relating to negotiation and determination of payments for concession allowed by the parties including the reason for allowing appellant a 50% discount on purchase of share of M/s HHML during the year under consideration.

6. Now in regard to issue no. 1, it is settled proposition of law that under the scheme of the Act, the assessing officer can initiate proceedings under section 147 of the Act only if he has "reason to believe" that any income has escaped assessment. Such belief has to be arrived at by the assessing officer on the basis of tangible/ reliable information, which has come in the possession of the assessing officer after the initial assessment. The reasons recorded must, therefore, show application of mind by the assessing officer. If the reasons recorded are vague or

ambiguous or based on suspicion, conjectures and surmises, the proceedings initiated under section 147 of the Act are liable to be held as invalid and bad in law. Ld. Sr. Counsel has relied various judicial pronouncement and we will like to refer particularly to the judgment of Hon'ble Supreme Court in the case **Sheo Nath Singh vs. ACIT 82 ITR 148,** wherein while construing the scope of expression "reason to believe", it has been observed as under:

> *"There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court."*

7. Further the words "reason to believe" cannot be equated with 'reason to suspect', as held by Hon'ble Delhi High Court in the case of ***Krown Agro Foods (P) Ltd vs. ACIT: 375 ITR 460,*** as follows:

> *"The reason to believe recorded by the Assessing officer is not based on any material that had come to the knowledge of the Assessing Officer. There is a mere suspicion in the mind of the Assessing Officer and the notice under section 147/148 has been issued for the purpose of verification and for clearing the cloud of suspicion. The reasons to believe recorded do not show as to on what basis the Assessing Officer has formed a reasonable belief that the amount in question had escaped assessment.*
>
> *It is apparent the Assessing Officer suspects that the income has escaped assessment. However, mere suspicion is not enough. The reasons to believe must be such, which upon a plain reading, should demonstrate that such a reasonable belief could be formed on some basis/ foundation and had in fact been formed by the Assessing*

Officer that income has escaped assessment. No such reasonable belief can be inferred from the purported reasons to believe recorded. [Para 13]

The words "reason to believe" indicate that the belief must be that of a reasonable person based on reasonable grounds emerging from direct or circumstantial evidence and not on mere suspicion, gossip or rumor. The "reason to believe" recorded did not refer to any material that came to the knowledge of the Assessing Officer whereby it could be inferred that he could have formed a reasonable belief that amount in question had escaped assessment.

..... In view of the above, the reassessment proceedings initiated pursuant to the notice issued under section 148 are hereby quashed. [Para 15]"

8. Now coming to the facts of present case, the broad allegations made by the assessing officer in the reasons recorded, which forms the basis of impugned proceedings are:

i. It has been alleged by AO that benefit by way of discount in purchase of shares had been extended by Honda to the assessee. AO was of view that shares were purchased at a 50% discounted price of Rs.739 per share arrived as per clause 3.1 of the Share Purchase Agreement, whereas the shares of HHML were traded at a price of Rs.1439 per share (approximately) on stock exchange in that period. The foundation to this allegation was reliance on clause 14 of the original JV Agreement entered between Hero Group (which contained assessee as one of the party) and Honda on 26.12.1983. As per AO, this agreement provided that acquisition of shares by one party from the other party shall only be done at FMV of such share(s), whereas shares had been purchased at discount vide share transfer agreement dated 22.1.2011,

whereby consideration for payment of share was agreed to be 50% of lower of the following:

- Average of weekly high and low of closing price of shares as quoted on NSE during six months preceding the date nine (9) business days prior to the transfer date; or
- Average of weekly high and low of closing price of shares as quoted on NSE during the two weeks preceding the date nine (9) business days prior to the transfer date.

ii. Then AO, was of opinion that as per the Memorandum of Understanding dated 16.12.2010 between Honda and the Hero Group (through assessee), the assessee had an option to purchase the shares in two tranches upto 30.9.2011, but the assessee chose to buy all the shares in March 2011. It has been alleged that the assessee chose to expedite the transaction with a view to quickly freeze the benefit arising from purchase of shares at discount and jack up price of its shares thereafter and garner premium from fresh issue of shares to foreign investor, in the process incurring interest cost of Rs.81.34 crores on interest bearing borrowed funds/ NCD. In this regard, the AO also took note of the fact that the assessee had already moved application before FIPB for issue of shares to foreign investors on 03.01.2011 against which approval was received on 7.4.2011 and funds were received against allotment of such fresh shares before April 2011, i.e., before the aforementioned terminal date of September 2011, there was no need for the assessee to rush into the transaction of purchase of shares of HHML from Honda.

iii. To invoke section 28(iv) of the Act, the AO alleged ‘benefit’ by way of discount on purchase of shares was to be in lieu of grant of concession by the assessee / Hero Group to Honda permitting the latter to independently carry on business in the field of manufacturing two wheelers in India. For the aforesaid conclusion, support was drawn by AO from clause 17.10 of the Share Purchase Agreement- "No objection for future business".

iv. AO, records in the "reason to believe" that this was new information coming to the knowledge of Revenue, and the facts whereof were not fully and truly disclosed by the assessee.

v. The assessing officer has further tried to justify the reopening on the premise that following issues raised during the course of survey/ post survey enquiries remain to be answered by the assessee- (i) authorization to Board of Directors in AGM permitting issue of shares to foreign investors at premium was not provided; and (ii) entire 26% stake was sold by Honda to HIPL/ assessee and not to BCIPL who was also another major shareholder in HHML.

9. As we examine the reasons recorded by the assessing officer available at page 653 to 673 of paper book, we find that what the AO, harps upon, as 'reasons to believe', was not on the basis of any tangible material, from which certain fact would emanate with consequences to follow without any process of drawing some presumption. But here in the case it was AO’s own perception about how the whole transaction has actuated and crystallized formed basis of reasons for reopening. On his own belief out of perception of the transaction, the AO considered the negotiated price paid for purchase of shares, as discounted on the

basis of notional concessions allegedly made available by the appellant to Honda. Same can be called nothing but based on surmises and conjectures.

9.1 Further, to examine factually if at all there was any discount on purchase of shares, as inferred by the AO, we find that the most important document is the share transfer agreement dated 22.01.2011 available at page no. 304 to 335 of paper book. The first thing to keep in mind is that price of Rs.739 per share was an off-market arrangement. So it is not a case of prices fixed in open market by way of call between available buyers or sellers. So to compare it with shares of HHML quoted on the stock exchange, is not objective. The transaction price of Rs.739 per share was at negotiated price of the shares, acquired in the bulk deal. The deal here cannot be examined to be one of mere sale of stocks but has in its background a series of events, which are themselves on the basis of certain agreements and MOU.

9.2 If we examine these agreements and MOU, Clause 8 and 9 of the JV Agreement, available at page no. 305 to 335 of paper book, we find that same restricted the right of both the parties, which are unrelated, to unilaterally liquidate their interest in the JV. Both were required to obtain prior written consent of the other partner before selling their respective stakes. This made the holding of both the parties not a marketable security. That certainly made it inevitable that investment of both partners of JV could have only fetched, negotiated price that was mutually agreeable by both the parties for exit of one of them from JV. Thus, benchmarking at market rate is not justified.

9.3 In this context the Ld. Sr. Counsel was also correct to rely the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers)

Regulations, 1997 [Takeover Code'] which by Regulation 21 (1) required that for transaction other than amongst promoters, the incoming third party was obliged to make public announcement of existing 20% stake and thus fairly contended that acquisition of high stake (26%+20%=46%) in HHML was not lucrative to third-party investor as still the third party would be an equal partner with the Hero Group, holding only 26%.

9.4 Then the price of Rs. 1439 (approx.) quoted at the stock exchange, as taken by AO, was for Hero Honda Motors Ltd., a JV, with substantial brand value, having developed its reputation/ brand over a period of more than 25 years, however, the new Company HMCL, would have to prove its mettle all over. So how fair it would have been for a investor is stock exchange to buy a share of HHML at Rs. 1439. The market perception, about capability of new company, due to exit of Honda, would have certainly been open to different sentiments. Taking notice of fact that during the subsistence of the JV Agreement, HHML was benefitted by the technical know-how for manufacture of two wheelers from Honda, the exit of Honda, from JV, was likely to raise lot of apprehension on HHML's ability to sustain further in the competitive market. This was to be further complicated with the competition that Honda would put to HHML, post exit, as Honda was to independently enter in the two-wheeler market in India. These factors could have resulted in any sort of speculation in the price of the shares of the new entity HMCL. So, it was all the more necessary that these parties had option to decide the price of stock transfer, independently of stock market, pricing of scrip. We thus find substance in the contention of Ld. Sr. Counsel that the price quoted on stock exchange was of HHML whereas the shares proposed to be purchased by the appellant was of the company that was to come into existence after exit of Honda, i.e. "Hero sans Honda Motors". The comparison made by the

AO, of the share price of HHML while Honda continued as a financial and technological partner, on one hand, and HHML post the exit of Honda, on the other, is most inappropriate as contended by Ld. Sr. Counsel it is like comparing apples and oranges.

9.5 We also take note of certain, peculiar aspects of practice in two wheeler industry where the overseas partners transfer their interest at substantial discount. Ld. SR, Counsel had cited some similar instances and we consider it appropriate to reproduce the same tabulated hereunder:

S.No.	Name of JV	Discount % (quoted price-negotiated price/quoted price]
1.	Kinetic-Honda	50% [(90-45)*100/90]
2.	TVS-Suzuki	81% [(81-15)*100/81]
3.	LML-Piaggio	72.2% [(50.60-14.06)*100/50.60]

9.6 At the same time Revenue cannot dispute the fact that the price of Rs.739 per share received by Honda stood accepted in the hands of Honda, in a ruling of Authority for Advance Ruling reported as Honda Motor Co. Ltd., In Re: A.A.R. NO 1200 OF 2011/ [2018] 301 CTR 159 wherein Honda had filed application before AAR seeking advance ruling on the determination of the correct rate of tax, viz., 20% or 10% as per proviso to section 112 of the Act to be applied on the long term capital gains arising from the impugned transaction of sale of shares to the assessee, computed with reference to consideration of Rs.739 per share. The AAR in the aforesaid ruling, held that tax @ 10% as per the proviso to section 112 of the Act was applicable on the amount of capital gains computed as aforesaid. Though the question before AAR was only with regard to rate of tax applicable, the larger issue was certainly if the stock was valued appropriately. Thus to our mind the

quoted price of shares Rs.1439 of the JV company was not comparable with the price paid to Honda for acquisition of shares.

9.7 We are of view that the AO, and so also ld. DR, has got swayed by misinterpretation of Clause 14 of JV Agreement**.** The same provided for inter se sale- purchase of shares between the JV Partners at fair market value. This clause 14.6 of the JV agreement, was to be effective only in the event that the agreement was terminated by virtue of certain specified contingencies as contemplated in clauses 14.2, 14.3 or 14.5(a) or (b) or (c). It was in those circumstances that the terminating party was vested rights to require the other party to purchase their stake/ shares at the then current fair market price. However, to our understanding, as there was termination of agreement by a mutual decision and not due to triggering of any of the aforesaid default clauses, the clause 14.6 was not applicable. We appreciate the contention of Ld. Sr. Counsel that Section 62 of the Indian Contract Act, 1872, enables the parties to a contract to mutually modify the terms of the original contract, so substitution of original recital, of method of valuation of shares, at time of exit, from fair market value to mutually negotiable price, cannot be relied by the AO, as an estoppel, against the contracting parties.

10. Ld. DR has heavily relied the fact that after acquiring shares of HHML from Honda, when the assessee issued fresh shares to foreign investor BC India Investor and Lathe Investment Pvt. Ltd., the value of share was quite high. In this context it comes up that the appellant issued and allotted fresh shares to these foreign investors, after obtaining necessary FIPB approval. Ld. Sr. Counsel has submitted that in accordance with the applicable FDI Rules, the shares were to be allotted at a price not less than the price arrived in accordance with the valuation rules prescribed by RBI, i.e., as per Discounted Cash Flow Method ("DCF Method"). As

per the DCF Method, the value of shares of the appellant / HIPL was arrived at around Rs.40 lakh per share, for the purpose of fresh allotment of shares to foreign investors. We find no justification in reasoning of AO to draw adverse inference on that basis as the DCF Method was applied being the acceptable method as per RBI/FDI Rules. The valuation subsequent to exit of Honda, has all together, different dynamics in terms of the expected realization on account of dividend from investment in shares of HHML in future.

11. There is an allegation, by the AO and which too has been pressed hard by the ld. DR, that the transaction was completed, hurriedly in March by raising interest bearing funds / NCDs, even when the appellant could have waited for fresh capital to be raised from the foreign investors and complete the transaction before September 2011, with a view to freeze the benefit arising from discount on purchase of shares and jack-up the price of company thereafter.

11.1 Ld. Sr. Counsel has submitted that this allegation is purely based on hypothesis. It was submitted that the appellant/ Indian Partners had already completed negotiations with Honda in December 2010 itself and Memorandum of Understanding to that effect was also entered amongst the parties on 16.12.2010 which was legally binding on all the parties, where under the appellant agreed to acquire shares from Honda at a mutually agreed price. Since the decision to purchase the shares of HHML from Honda along with price mechanism thereof already stood concluded, it mattered little whether the issue of shares was offered to foreign investors before or after the acquisition of shares of HHML. Ld. Sr, Counsel has drawn our attention to the FIPB application dated 03.01.2011, available at pages 417 to 424 of paper book, which was filed before the actual

acquisition of shares of HHML from Honda. It was submitted that the facts relating to the MoU dated 16.12.2010 and the aforesaid proposed acquisition were fully disclosed and the permission for foreign inward remittance was sought keeping in mind the valuation of the appellant company post such acquisition. Thus on unsubstantiated allegation the transaction is questioned.

11.2 Ld. Sr. Counsel submitted that even otherwise, the decision to consummate the transaction at the earliest was commercially prudent for the appellant as the purchase price was to be computed on the basis of average of weekly high or low of the quoted price of preceding nine business days prior to date of transfer. Being so, since the acquisition price was dependent on the volatile quoted price of shares prior to transfer date, the appellant in order to avoid any future volatility in price, decided to close the transaction as early as possible. It was submitted that since all the announcements relating to the deal and exit of Honda from the JV were made public, the appellant, in its commercial wisdom, decided to close the deal at the earliest possible to avoid any adverse speculations and uncertainties amongst its associates such as vendors, dealers, customers and employees on account of any delay in acquisition of shares from Honda. The appellant wanted to consummate the transaction at the earliest possible time to focus on building/ growing the business of HHML in the changed competitive scenario/environment.

11.3 In this context we are of considered view that commercial wisdom of any business transaction, on the basis of sequence of event or timing cannot be doubted by Revenue, by merely alleging, a motive, unless there is sufficient evidence to show, the sequence of event or timing, were curated, for a particular end, resulting into loss of Revenue, which is not alleged, what to say of proof of the same. In the case in hand, assessee has sufficiently demonstrated, that the sequence of event and

the timing of same, has been for making out best deal. Even otherwise when two parties had decided to part their ways, out of the JV, the expeditious and prompt, exit was a prudent way. To draw adverse inference, and that too, at time of recording the reasons for re-opening, was not justified.

12. Now the critical, question is if at all there was any concession to Honda, for which there was alleged discount. The AO has observed that the JV agreement of 1983 had put several restrictions on business operations of Honda and with the growing Indian automobile market, Honda wanted to independently focus on its two-wheeler business carried on through its subsidiary in India, being so, for relaxation of such alleged restrictions imposed on Honda, consideration was paid to the assessee company in the form of discount in purchase price of shares from Honda. The assessing officer relied on clause 17.10 of the Share Transfer Agreement dated 22.01.2011, as with regard to 'No objection for future business' .

12.1 In this regard, it would be pertinent to highlight the terms of the JV Agreement. Under the initial JV Agreement dated 26.12.1983, the restrictions were placed on Honda qua (a) right to transfer/sell/ assign shares held in the JV company, without any prior consent of the Indian Partners (Article 8 of the JV Agreement, available on pages 257 to 258 of paper book); (b) arrangement of funds to meet requirements of JV company (Article 9 available on pages 59 to 261 of paper book); (c) right to terminate in certain cases (Article 14 available on pages 265 to 271 of paper book).

12.2 Ld. Sr. Counsel has submitted that all the said restrictions which related to the management and existence of the JV Company, were equally placed on the Indian partner as well. No restrictions on carrying on independent business

operations by Honda in India was placed in the aforesaid initial JV Agreement. Ld. Sr. Counsel has cited certain clauses of the JV agreement, where restrictions are placed on the JV Company and the Indian Partners. We consider it appropriate to reproduce the same here under:

> *"1. Article 5.1 of the agreement restricted the JV company to directly/ indirectly sell/ export the products or parts to any country where Honda was present.*
>
> *2. Article 5.2 provided that the company could only export the Products, viz, motorcycles that too only through Honda, to countries other than countries where Honda or its subsidiaries/ affiliates had any licensing arrangement.*
>
> *3. Article 5.5 to 5.7, which provide various conditions relating to warranty/ quality of the product was placed on the JV company.*
>
> *4. Article 6 provided various restrictions on use of trademark as placed on the JV company and Indian partners.*
>
> *5. Article 11 regarding Non-Competition and Non-Disclosure of Information. Indian Partners were prohibited to engage in manufacture, sale or distribution of motorcycles and other two-wheelers directly/ indirectly. Vide supplementary agreement dated 1st September 1984 and 20 May 1995 (available at pages 279 to 290 of paperbook), the aforesaid Article 11 was amended to also restrict Honda from engaging in manufacture and sale of motorcycles in India otherwise than through JV Company, without obtaining consent from the Indian partner."*

12.3 As we glance through the relevant Articles of JV agreement it comes up that standard restrictions, as are usually part of any JV agreement, were imposed on both the parties to protect any inter-se competition amongst the parties during

subsistence of JV. Rather this reasoning of AO is not sustainable for the fact that the Indian partners had already permitted Honda to establish its subsidiary in India [i.c., Honda Motorcycle and Scooter India Pvt. Ltd (HMSI)], vide Memorandum of Understanding entered into on 12th July 1999 and independently manufacture scooters immediately and to manufacture motorcycles after 5 years from the date of agreement in India, without any consideration. Ld. Sr. Counsel has brought to our notice that the market share of HMSI in the two-wheeler space in India was already at 13% at the time of Share Transfer Agreement dated 22.01.2011. Further, Honda, during the subsistence of the JV agreement had also entered into JV with Firodia Group engaged in manufacturing of two-wheelers, popularly known as Kinetic Honda, which, too, substantiates that there were no restrictions on Honda in independently carrying on business of manufacturing of two-wheelers. In fact on termination of the JV and transfer of 26% stake by Honda to the assessee vide Share Transfer Agreement dated 22.01.2011, all the then existing restrictions were lifted on both the parties, as opposed to Honda only.

12.4 Then concessions, if provided to any party, should be quantified to some reasonable extent. AO has not made any homework on that account to establish what was the quantified value of alleged concession so as to prove discounting of shares accordingly. Parties to any agreement, are supposed to protect their vital interests and in a bargain, one party is always bound to end up with some advantage, but the same cannot be, called a willful concession, so as to be part of the consideration, itself, under the agreement. The AO has in fact fallen in error in putting assessee under an onus to prove that no concession was given. Thus the failure of appellant to not furnish any documents/ communications/

correspondences in respect of negotiations with Honda relating to the deal, cannot be basis to draw inferences of concession being granted to Honda.

12.5 On the contrary, the benefit came to share of assessee as after termination of JV, the Hero group was permitted to use technology owned by Honda in respect of manufacture of Licence 'A' products in perpetuity.

13. We can also conveniently discuss here the allegations of AO as made during assessment with regard to non-submission of authorization to Board of Directors in AGM for issue of shares at premium to foreign investors. It is submitted by Ld. Sr. Counsel that the said allegation is factually incorrect as during the course of survey proceedings, minutes of meeting were submitted before the assessing officer. Reliance was placed on pages 530 to 574 of paper book. Same could not be controverted by the Ld. DR. The perusal of the minutes of meetings of the shareholders dated 7.4.2011, show that the Board of Directors was duly authorized to do all acts/deeds for the purposes of issue of shares to the foreign investors. In any case, the question is not about legality of transfer, so this aspect is actually superfluous.

14. Then to question the transaction price on the averment that the entire 26% stake was sold by Honda to HIPL/ appellant and not to BCIPL, another major shareholder in HHML, is again not sustainable as it is not prudent and justified , too, to ask any tax payer to prove a negative, in a contract. Obviously, 26% stake was purchased by the Hero Group from Honda, through the appellant company as a strategic restructuring of group for which the Revenue, cannot raise a question.

15. Thus we concluded that theory of "discounted price" of share transfer, out of concession advanced to Honda, as assumed by the assessing officer, had no substance. The above discussion reinforces our view that the AO while recording the ‘reasons to believe’ has harped upon his own perception about the transaction of purchase of shares by the Hero group. As such, these inferences and perception of AO were independent of any tangible material from which it would be patent, to any prudent person, that there was a discounting of the share prices due to some concessions given by the Hero Group to Honda. The aforesaid examination of the facts and circumstances firmly establish that except for AO’s own belief of the manner in which the parties to this share sale transaction ‘may’ have acted upon, to ‘benefit’ the assessee was miserably insufficient to even indicate escapement of income. The same can be called ‘mere suspicion’ as there was no basis of this belief of escapement of income. The plea for recording reasons must be that of a reasonable person based on reasonable grounds emerging from direct or circumstantial evidence which, as we have discussed above, was completely absent.

16. Now based on the facts culled out above, we consider it convenient to examine the issue no. 1 further in context to allegation of non-disclosure of full and true material facts during assessment completed u/s 143(2) of the Act. What is relevant is that Section 147 of the Act authorizes an assessing officer to assess or reassess income chargeable to tax if he has reason to believe that the income for any assessment year has escaped assessment. The proviso to the aforesaid section, places fetters on the powers of the assessing officer to initiate reassessment proceedings beyond the period of 4 years from the end of the relevant assessment year, where the assessment has been completed under section 143(3) of the Act

unless income has escaped assessment by reason of the failure of the assessee to disclose fully and truly all material facts necessary for assessment.

17. The settled proposition of law being that where there was no failure on the part of the assessee to truly disclose all material facts and it was only a question of drawing an inference from these facts, reopening of assessment beyond the four years period is invalid. Reliance in this regard can be placed on following judgments, as cited by Ld. Sr. Counsel.

1. CIT v. Foramer France: 264 ITR 566 (SC)
2. Purolator India Ltd: 343 ITR 155 (Del.)
3. CIT v. Motor & General Finance: 184 Taxman 465 (Del.)
4. Titanor Components Ltd. v. ACIT: 343 ITR 183 (Bom.)
5. D.T. & T.D.C. Ltd. vs. ACIT: 232 CTR 260 (Del.)
6. Haryana Acrylic Manufacturing Company: 308 ITR 38 (Del.)
7. German Remedies Ltd. v. DCIT: 287 ITR 494 (Bom.)
8. Hindustan Lever Ltd. v. ACIT: 268 ITR 339 (Bom.)
9. Grindwell Norton v. ACIT: 267 ITR 673(Bom.)
10. Orient Beverages Ltd. v. ITO: 208 ITR 509 (Cal.)
11. Peico Electronics & Electricals Ltd. v. DCIT: 210 ITR 991 (Cal.)
12. Kaira District Cooperative Milk Producers Union Ltd: 216 ITR 371 (Guj.)
13. Garden Silk Mills Ltd. v. DCIT: 222 ITR 27 (Guj.) CIT vs. Veer Overseas Ltd.: ITA No. 510 of 2009 (P&H.)

18. In the present case, admittedly the notice under section 148 was issued on 31.03.2018, i.e., after the expiry of period of four years from the end of the relevant assessment year. Thus the question to be examined is if there was any failure on part of appellant to disclose fully and truly all material facts. The Ld. Sr. Counsel has stressed on the fact that the transaction of purchase of shares of HHML by the appellant was disclosed at various stages commencing from (i) the time of public announcement of deal in December 2010, (ii) entering of the Shares Transfer Agreement, (iii) payment being made to Honda after deduction of tax at

source under section 195 of the Act. (iv) filing of return of income along with accompanying annexures, and (v) during assessment proceedings under section 143(3) of the Act. As per ld. Sr. Counsel, the full and true disclosure was made by the appellant and specific reliance was placed on following facts and evidences on record.

1. In the assessment proceedings the AO had access to accounts/audit reports. The copy of same is on record at pages 30 to 52 of paper book. Ld. Sr. Counsel has submitted that investments aggregating to Rs.3907,88,18,578 (as on 31.3.2011) had been disclosed on the face of the balance sheet, which had increased from Rs.1,65,20,08,667 as on the last date of the immediately preceding year (31.03.2010).

2. Then in Schedule D (Investments), the fact of acquisition of shares of Hero Honda Motors Limited is duly disclosed. In fact, even market value of such quoted shares is also reflected. @40 to 41 of paperbook.

3. In Note No. B (13) (II) of Schedule 1- 'Significant Accounting Policies and Notes to Accounts' under the head 'Disclosures of transactions between the company and related parties and the status of outstanding balances as on 31.03.2011', investment of Rs.3846,71,62,378 has duly been highlighted.

4. In the cash flow statement for the year ending 31.03.2011, the category of 'Cash flow from Investment Activities' also captures the purchase of investments by the appellant during the relevant year.

5. As stated by the assessing officer in the reasons recorded, the appellant had partly financed the said acquisition by issue of Short Term Non-Convertible Debentures (NCDs). The details of such NCDs were also disclosed in the balance sheet.

6. Schedule C Loan liability captures the details of NCDs which are stated to be secured against equity shares of Hero Honda Motors Limited. Notes to accounts at around No. B(11) also states the details of issue of such NCDs during the relevant year.

6. Clause (xvii) to Annexure to auditor's report discloses that appellant has raised funds by issuing NCDs of Rs.2900 Crores which was utilized for long term investment in equity shares of Hero Honda Motors Ltd.

7. Schedule H 'Administrative and other expenses' also reflects debenture issue expenses and interest paid on NCDs.

8. The books of accounts of the appellant were also examined by the tax auditors, who at clause No.13 of the tax audit report clearly reported that no item has been found during the course of the audit which may fall within the scope of section 28 of the Act.

19. As regards detailed disclosure in the annual accounts made by the appellant, reliance was placed, by Ld. Sr. Counsel, on the judgment in the case of ***Sun Investment (P) Ltd. vs. ACIT 344 ITR 1 (Del)***, wherein it was expressly noted that disclosure made in the 'notes to account submitted during the course of assessment proceedings under section 143(3) of the Act amounts to full and true disclosure of material facts. To similar effect the following decisions were relied:

Sak Industries Private Ltd v. DCIT: 363 ITR 378 (online) (Del.)

CIT v. Sain Processing and Weaving Mills (P) Ltd.: 325 ITR 565 (Del.)

Bharti Infratel Limited v. DCIT: WP(C) No. 2036/2016 (Del)

20. Ld. Sr. Counsel has also relied certain facts which, as per him, were in public domain, to contend that the AO, ought to be presumed to be aware of the

same. He reffered to a Joint Press Release dated 16.12.2010, issued by the Hero Group and Honda to disclose the exit of Honda from the JV Company (HHML) by way of Hero group acquiring 26% stake Held by Honda in the JV Company.

20.1 Then reference was made to a July 2011, announcement of the CBDT, that Hero Group has paid Rs.811 crores as capital gains tax while buying 26% stake from Honda. It was categorically mentioned by the CBDT that the entire tax was deducted and paid at the highest rate by the Hero Group who did not seek any tax concession.

20.2 Ld. Sr. Counsel has submitted that the factum of FIPB approval for foreign direct investment was also in public domain as is evident from the article/ newspaper report dated 14.7.2011 published in "The Economic Times' which is featured alongwith aforesaid announcement of payment of TDS by CBDT. A copy of same is filed on pages 65 of paper book.

20.3 The factum of entering into Memorandum of Understanding dated 16.12.2010 and Share Transfer Agreement dated 22.01.2011 were also disclosed in the annual reports of HMCL (erstwhile HHML) for financial years 2010-11 and 2011-12, which, as per Ld. Sr. Counsel were available in the public domain and duly examined by the assessing officer.

20.4 Ld. Sr. Counsel has then referred to certain disclosures to various Government and statutory authorities like SEBI/RBI/Stock Exchanges, as illustrated hereunder:

1. Permission sought by Honda from RBI.

2. Letters by appellant to investee company (HHML) in compliance with SEBI Regulations for proposed takeover of shares from Honda
3. Letters by appellant to BSE and NSE in compliance of SEBI Regulations
4. Reports to SEBI and enquires conducted by SEBI

20.5 Ld. Sr. Counsel has submitted that most importantly, the aforesaid transaction of acquisition of shares by erstwhile HIPL (appellant) from Honda was duly disclosed, monitored and examined by the various tax authorities. He refered to the fact that on 9th March 2011, the Income-tax Officer, Ward 1(2) International Taxation, New Delhi issued notice under section 133(6) of the Act to appellant (available at page 156 of paperbook) to furnish various details/information, including, inter alia: Details of payment of sale consideration and tax deduction thereon; Valuation of such shares acquired by the appellant; Explanation regarding materialization of the transaction on 50% of the market value. It was submitted that the aforesaid queries were duly replied by the assessee vide reply dated 11.03.2011 wherein the appellant categorically stated that (a) sale of shares by Honda to the appellant would attract capital gains tax in the hands of Honda and accordingly, in terms of section 195 of the Act; (b) FEMA regulations would be complied with; (iii) no valuation report valuing the shares acquired from Honda was prepared; and (iv) It was stated that the deal price was the result of negotiation and discussion between the two qualified promoters being Honda and the Hero Group.

20.6 Ld. Sr. Counsel has pointed out that another notice dated 15.03.2011 was issued by Assistant Director of Income-tax (Investigation) Unit - V (3) to the appellant seeking information/documents / explanation regarding purchase of 26% of Hero Honda Motors Ltd. at price of Rs.739 per share by the appellant. The aforesaid notice was duly replied to by the appellant vide letter dated 24.03.2011

wherein the explanation/ information given earlier vide letter dated 11.03.2011 was reiterated.

20.7 Then notice dated 15.03.2011 was also issued by Assistant Director of Income-tax (Investigation) Unit-V(3) to HMCL (erstwhile HHML) raising queries regarding the impugned transaction which was duly replied by them vide reply dated 17.03.2011. Ld. Sr. Counsel has submitted that the Investigation Wing of the Department having pan India jurisdiction was fully aware of the transaction of acquisition of shares by the appellant from Honda and had accepted the same to have no further tax implication, after thorough examination and due application of mind, inasmuch as no adverse inference was drawn by the Investigation Wing.

20.8 Ld. Sr. Counsel has submitted that on 18.03.2011, the appellant duly filed Form 15CA before the Income tax Department clearly specifying that (a) consideration of Rs. 3841.83 crores was being paid by the appellant to Honda; (b) such consideration was towards sale proceeds of aforesaid shares; (c) tax of Rs.811 crores was deducted by the appellant @20% as per the applicable provisions of the Act.

20.9 Further it was submitted that post-acquisition of 26% stake in HHML from Honda by erstwhile HIPL, a letter dated 06.04.2011 was written by the appellant to the Additional Director of Income-tax (Hqtr.), International Taxation, duly informing about deduction of tax aggregating to Rs.811.20 crores under section 195 of the Act out of payments to be made to Honda. In July 2011 the CBDT announced that Hero Group had paid Rs.811 crores as capital gains tax while buying 26% stake from Honda. It was categorically mentioned by the CBDT that

the entire tax was deducted and paid at the highest rate by the Hero Group who did not seek any tax concession.

20.10 Ld. Sr. Counsel submitted that that all the details/ documents relating to the aforesaid transaction of acquisition of shares by the appellant was already available with the Tax Department inasmuch as Honda had filed an application, seeking determination of tax rate on the capital gains accrued to Honda before the Authority for Advance Ruling, copy of which was available to the Department.

21. Ld. Sr. Counsel has then submitted that the issue was examined by the assessing officer during course of assessment proceedings as during the course of original assessment proceedings, the appellant vide reply dated 16.01.2014 [available at pages 171-175 of paperbook], duly placed on record copy of Share Transfer Agreement dated 22.01.2011 entered between the appellant and Honda towards acquisition of impugned shares of HHML from Honda. Being so, all the facts and the contours, including the price and the factum of alleged discount was known to the assessing officer and were duly examined. Reference was specifically made to Point No.8 read with Annexure A of the reply. It was submitted that vide Point No. 1 of the said reply, it was pointed out that NCDs were issued by the appellant for the purposes of making investments in the shares of HHML and interest cost on such NCDs was incurred. Then vide Point No.9 read with Annexure II of the reply, the appellant submitted detailed reconciliation of investments made by the appellant including quantity and value of opening investments, investments purchased and sold during the year and closing investments. It was submitted that the said detail clearly shows number/ quantity of shares of HHML purchased by the appellant during the year along with the value at which shares were purchased. In that view of the matter Ld. Sr. Counsel submitted

that the relevant details were duly furnished before the assessing officer during the course of original assessment proceedings and the same were duly examined by the assessing officer.

21.1 Then reference was made to reply dated 03.07.2013 (at Point No.10) [available at pages 176-181@179 of paper book] to point out to the AO, that the NCDs issued during the year were secured by way of pledge against the shares of HHML. Ld. Sr. Counsel has submitted that in the assessment order dated 29.01.2014 passed under section 143(3) of the Act, the assessing officer mentions that AO had thoroughly examined the books of account of the appellant as at Para no.4 at page no. 2 of order under section 143(3) of the Act and attention was drawn to following: -

> *"The assessee company has shown its total income as per return of income filed as under:*
>
> | | *Rs.* |
> |---|---|
> | *Dividend Income* | *1123077807* |
> | *Interest income* | *62324731* |
> | *Capital gain income* | *37825154* |
> | | *1223227692* |
>
> *During the year assessee has earned capital gain on redemption switchover of investment into mutual funds and PMS (Portfolio Management Services). Schedule C of the Balance Sheet reveals that the total investment as on 31.03.2010 and 31.03.2011 are Rs. 1,65,20,08,667/- and Rs. 39,07,88,18,578/-respectively."*

21.2 First para at page no. 5 of original assessment order under section 143(3) of the Act reads as under: -

> *"The assessee has earned income from various sources which are as follows: -*

Sr. No.	*Category of income*	*Amount*	*% of total income*
1.	*Dividend*	*1, 12, 30 ,77,807*	*91.80%*
2.	*Interest*	*6,23,24,731*	*5.09%*
3.	*Sale/Purchase of shares*	*3,78,25,154*	*3.09%*
	Total	*1,22,32,27,692*	*100%*

Apart from the dividend income the assessee has also earned capital gains from sale and purchase of shares to the tune of Rs. 154 /- The investment pattern of the assessee-company clearly shows that the investments of the company during the year is 100% in shares to the tune of Rs. 39,07,88,18,578/-. Moreover investment in shares have also been made in many companies other than group companies."

22. Ld. Sr. Counsel has emphasized that in the original assessment order passed under section 143(3), the assessing officer specifically made disallowance under section 14A on the ground that the assessee had incurred expenses in relation to investments, resulting in exempt dividend income. It was contended that while making the aforesaid disallowance, the impugned investment in shares of HHML was duly considered by the assessing officer. He pointed out that in fact, substantial amount of disallowance of expenses under section 14A of the Act, was attributed to the aforesaid investment in shares of HHML. Thus, it was submitted, the investment in shares of HHML was in the full knowledge of assessing officer, which was accepted after due application of mind, on the basis of various disclosures made by the appellant at various stages.

23. It was also submitted that other documents particularly the JV agreement dated 26.12.1983 and other relevant agreements which have been relied upon by the assessing officer in the reasons to believe are part of the records of the Department in various years and no new information/ document/ material, as stated in reasons recorded, came to the knowledge of the assessing officer, leave alone from the survey carried out at the premises of HMCL.

24. Ld. Sr. Counsel submitted that the obligation on the assessee qua full and true disclosure of material facts is with respect to 'primary facts' only and does not extend to suggesting inferences of fact and law that can be drawn from such disclosure. Reference was made to decision of Hon'ble Supreme Court in **Calcutta Discount Co. Ltd. v. ITO: 41 ITR 191 (SC)**. as reiterated in **New Delhi Television Ltd. v. DCIT: 424 ITR 607 (SC).** Reliance was also placed on **ACIT vs. Oracle Financial Services Software Ltd.: [2023] 452 ITR 280 (SC).**

25. As regards the argument of ld. DR about failure to not disclose "concessions" being allowed by the appellant to Honda, Ld. Sr. Counsel submitted that the reasons recorded have drawn inference of such alleged concessions being made available by the appellant to Honda as part of business restructuring without there being any evidence in support thereof, such allegation is thus not only contrary but de hors the facts of the transaction. In view of the same, since no concession was allowed on termination of JV agreement and consequential sale of shares of HHML, no failure could be attributed on part of the appellant to disclose the factum of such non-existent concessions.

25.1 It was emphasized that the allegation that the shares were purchased at a discount in lieu of "concessions" being allowed by the appellant to Honda, is a matter of inference drawn by the assessing officer and beyond scope of proviso to section 147 of the Act as following were in knowledge of AO:-

(i) the price at which shares were purchased (Rs.739 per share) was duly disclosed in the accounts and accompanying documents;

(ii) the basis on which the price was calculated was evident from Share Transfer Agreement filed during the course of original assessment;

(iii) the fact that such shares were purchased at discount to the stock market quotation was evident from the aforesaid basis/formula;

(iv) the stock market quotation as on the date of transaction was available in the public domain;

(v) the alleged concession made available to Honda (in lieu of discount in price as alleged by the assessing officer) is a non-existent fact, for which no evidence has been brought on record by the assessing officer.

26. Having considered the aforesaid contentions and material relied, by Ld. Sr. Counsel, we observe that when objections against re-opening, dated 06.06.2018, were filed before the AO as available at page 675 of the paper book, the assessee had taken specific pleas, as taken before us also, as to how the reopening is not based on a tangible material and purchase of shares of HIPL from Honda, was duly disclosed to and monitored or otherwise examined by the different tax authorities.

26.1 The AO dismissed these objections by order dated 09.08.2018 which is available at page 739-767 of the paper book and as we go through the same, we find that with regard to the legality of reopening at page 753 onwards, the AO has made the discussion. The AO admits of the fact that the assessee had disclosed increase in investment of shares of HHML in Schedule-D of audited balance sheet. The AO also admitted that Accounting Policy and Notes to Account which are disclosed in Schedule-I of audited account has revealed that the assessee had entered into related transactions including the disputed investment. It was also admitted while disposing of these objections that the annexures to the audited reports reveal that the assessee has disclosed raising of fund to Rs.2900 crores for long-term investment in shares of M/s Hero Honda Motors Ltd. At the same time, the AO observes that there were details disclosed in the audited annual accounts

that the assessee had purchased some shares of HHML. However, AO alleged that all relevant details like shareholder agreement, terms and conditions of termination of joint venture were not filed. The AO observed that the information was very sketchy and that the assessee had not specifically disclosed about the purchase of shares at discounted price. Further, in para 1.4 at page 60 of the paper book, the AO has observed as follows:-

> *"1.4 A careful perusal of assessment proceedings in case of M/s HIPL which is now amalgamated has revealed that during the course of assessment proceedings the AO has examined and formed opinion on following issues as evident from order u/s 143(3) dated 29.01.2014:*
>
> *• The AO noticed that during the year under consideration, the assessee had traded in shares of its group company and other unrelated entity along with mutual funds. Since, the assessee was engaged in trading of investment in form of shares and mutual funds, the AO characterized the nature of income earned from shares/ mutual funds as business income as against capital gain disclosed by the assessee.*
>
> *• The AO also noticed that the assessee had earned tax free dividend income, accordingly, after examining the facts of this case, the expenditure relatable to exempt income were disallowed u/s 14A."*

26.2 In the light of the aforesaid, when we consider the contentions of the ld. Sr. Counsel, we are of the considered view that the agreement of share purchase dated 22.01.2011 was very much brought into the knowledge of the AO at the time of assessment itself. In this regard, we find that while question of examining issue under section 14A of the Act, the AO had called for information regarding cost incurred in relation to NCD, which was submitted by the assessee by letter dated 16.01.2014 as follows:-

"16.01.2014

Sir,

The Asst. Commissioner of Income Tax,
Circle - V,
Ludhiana
Reg: M/s Hero Investments Pvt. Ltd.

Asstt.Year: 2011-12

With reference to our further discussion, it is submitted as under:

1. The assesses company has claimed an amount of Rs.2.51 Crores, as a deduction u/s 57 expended wholly and exclusively for earning interest income taxed under the head ''Income from Other Sources".

The above amount relates to interest cost incurred in relation to NCD's issued during the year. The company had issued the above NCD's for the purpose of making investments in the shares of M/s. Hero Honda Motors Ltd, a group company. Since there was a gap of few days between issuing NCD's & making the investment, the idle funds had been parked in an FDR with Kotak Mahindra Bank on which interest income amounting to Rs.2.51 crores was earned. Since the FDR was made out of borrowed funds the interest paid in relation to these funds was claimed as deduction u/s 57 limited to the amount of income. The interest paid thereafter had not been claimed.

Copy of statement of Kotak Mahindra showing the making & en-cashing of FDR is enclosed.

2. As explained above, the TDS of the company has been deducted on the gross interest earned on FDR with Kotak Mahindra Bank at a flat rate of 10 % without considering any expenditure as per the provisions of relevant TDS Section. The Expenses claimed from such income has no relevance with TDS deduction accordingly after Claiming expenditure incurred to earn above income the assessed has claimed a refund.

3. Not applicable, As no expenditure has been claimed in the computation of income for disallowance u/s 14 A.

4. The assessee has debited legal & professional charges incurred in the normal course of its business. However this amount has not been claimed in the computation of taxable income.

5. The assessee has written off an amount of Rs. 26.49 Lacs on account of capital written off in Munjal Gases Since this amount was not recoverable, no deduction in relation to this amount has been claimed by the assessee.

6. Since no expenditure in relation to membership fee has been claimed in the computation, no disallowance is called for.

7. The assessee has an ICD of Rs. 5 crore recoverable from Majestic Auto Limited on which interest @12% has been charged and offered to tax under the head "Income from Other Sources".

8. The assessee company has invested in shares, stock, debentures etc. in group companies and other market instrument including fixed deposits.

All the above have always been shown as investments and have been valued as per Accounting Standard - 13 applicable to investments. The company has not made any investment with the motive of earning profit from day to day sale/purchase of these investments. This issue has already been reviewed by the Hon'ble High Court in assessee's case for A.Y. 2007-08.

The NCD was issued with the purpose of purchasing the shares of M/s. Hero Honda Motors Ltd, as per share transfer agreement dated 22.01.2011. Copy of agreement is enclosed as "A".

The interest earned on ICD's and FDR's has been shown as Income from Other Sources since many years and offered to tax @30% being the same applicable to business income.

9. Reconciliation between opening investment & closing investment is enclosed at Annexure-II.

10. The B/F capital loss is in relation to AY 2005-06 & 2009-10. Annexure giving break up is enclosed as per Annexure-III. The C/F losses has been done and shown in all computations from year to year as also evident from the current year's computation already on record.

11. Statement containing income generated from holding of investments and its treatment in the computation of income tax is enclosed at Annexure-IV.

12. Details of Tax Credit u/s 115JAA of as hereunder:-

AY	*MAT Credit Available*	*MAT Credit Utilised in Asstt. Year 2011-12*	*MAT Credit C/F*
2007-08	*67,08,332*	*67,08,332*	
TOTAL	*67,08,332*	*67,08,332*	

The aforesaid MAT credit has been adjusted from the Net Tax Liability of the assessee for the year under consideration in accordance with provisions of section 115JAA."

26.3 Thus we find that the share agreement dated 22.01.2011 and reconciliation of investments capturing quantity and value of opening investment, investment purchased and sold during the year were provided to the AO during assessment and infact AO made a incorrect observation while disposing the objections to the reopening that agreement dated 22.01.2011 was not provided.

26.4 There is also substance in the contention of ld. Sr. Counsel that when AO was examining disallowances for purpose of Section 14A of the Act, certainly AO had material before him to also examine the prices of acquisition of investments and any hidden cost or advantages.

26.5 We further find that the Assistant Director of Income-tax (Investigations) had raised queries on the basis of 'reliable sources' about 26% stake acquired by the assessee @ Rs.739/- per share and this was replied by the assessee by letter dated 24.03.2011 informing that this matter is already under inquiry by International Taxation Division of the Income-tax Department by issuance of a notice u/s 133(6) of the Act and, therefore, request was made that to avoid

multiplicity of proceedings, the proceedings be dropped by Assistant Director of Income-tax (Inv.), Unit-5(3), New Delhi.

26.6 Further, it is established that on pages 499-502, the assessee had provided a copy of the decision of AAR in the case of Honda Motor Company Ltd., wherein one of the parties to the disputed agreement had sought a ruling on the following question:-

> *"(i) Whether, on the stated facts and circumstances of the case and in law, the tax payable by the Applicant on the long term capital gains arising on the sale of equity shares of the Hero Honda Motors Limited [now known as Hero MotoCorp Limited] (hereinafter referred to as 'HHML'), being listed securities, will be 10% (plus surcharge and cess) of the amount of capital gains as per the proviso to section 112(1) of the Act?"*

26.7 After examining all the aspects of the transaction, AAR had held as follows:-

> *"8.1 Question No. (i): Yes, the tax payable by the Applicant on the long term capital gains arising on the sale of equity shares of Hero Honda Motors Limited being listed securities, will be 10% (plus surcharge and cess) of the amount of capital gains as per the proviso to section 112(1) of the Act."*

26.8 We are of considered view that the instances of disclosures to various government and statutory authorities and tax authorities cited before us sufficiently establish that the assessee was not acting in any surreptitious manner in regard to the share purchase transaction. Rather, as it appears to be a case where an Indian enterprise was not selling its stake to a foreign enterprise, but, purchasing the stake of a foreign enterprise of the stature of Honda. Which certainly must be looked upon as a sign of growing and strengthening of India as a emerging economy, for which, Hero group must have been eager to take credit and thus the information was not kept close to heart but shared at large. So much so that based on 'media reports' only a notice dated 09/03/2011 was issued to the assessee by Director of

Income Tax (International Taxation)-1, New Delhi, to examine the purchase of 26% stake in Hero Honda Motors Ltd. by Hero Investment Pvt. Ltd. from Honda Moto Company Ltd., Japan, and information u/s 133(6) of the Act, was called on the following questionnaire:-

> *"Please refer to the recent **media reports** regarding sale of 26% stake in Hero Honda Motor Limited by Honda Motor Company, Japan to Hero Investment Pvt Limited. It has been reported that Hero Investment is purchasing 26% shares for a price of Rs.739.97 per share while the current market price as per stock exchange is around Rs. 1551 per share. You would be aware that payment/ credit of sale consideration of shares of Indian company to a non resident attracts withholding provisions under Section 195 of the Income Tax Act,1961.*
>
> *In connection with the above deal, you are requested to furnish the following information:-*
>
> *1. Details of payment of sale consideration and the schedule for complying with the withholding provisions on payment to Honda Motor Corporation limited, Japan.*
>
> *2. Copy of application filed before FIPB along with all annexures.*
>
> *3. Copy of due diligence Report of Hero Honda Motor Limited. A categorical statement if no due diligence was conducted in respect of the above deal.*

4. Copy of valuation report of Hero Honda Motor Limited. A categorical statement if no valuation report was prepared in respect of above mentioned transfer of stake.

5. Copy of application made before SEBI and its approval if any.

6. Copy of your final accounts for F.Y.09-10.

7. Your comments/explanation as to why the transaction value of share of Hero Honda Motor Limited in the above deal is approximately 50% of the market value.

This information is sought u/s 133(6) of the Income Tax Act, 1961 after obtaining prior approval of the Director of Income Tax (International Taxation)-1, New Delhi, which may be furnished by 17.03.2011."

26.9 Thus when such a fact finds prominence in news to which even senior authority like Director of Income Tax (International Taxation)-1, New Delhi, takes cognizance, an assessing officer, of such a company cannot claim to have been not aware of details of transaction, otherwise then, when informed by the Pr. CIT. In this context only as we consider the transaction as reported to various statutory authorities and the tax authorities in different proceedings we are of considered opinion that same could not have be out of the cognizance and knowledge of the AO so as to say that only on the information being received from PCIT-4, Delhi vide a letter dated 12.06.2017 the transaction of acquisition of shares came into the cognizance of the AO.

26.10 Though generally speaking information in public domain cannot be considered to be one to be always in the knowledge of the AO so as to take cognizance of all of it during the assessment proceedings, but, when a transaction

of the nature under consideration is reported by the assessee to prominent authorities of the Department like Investigation Wing, International Tax Division and CBDT or AAR, then, the AO should be validly presumed to be aware of these information in public domain because the AO is not only an adjudicators, but also an investigator and in quite many assessments they exclusively rely upon the information available in public domain for completing the assessments or reopening. So to say that before the aforesaid letter of PrCIT the AO was completely unaware of the disputed transaction, would be giving too much leverage to ignorance of AO, which should not be, on principles of rules of prudence.

27 Thus, the AO had opportunity to examine all the terms and conditions of share transfer. It is not justified on part of AO to say that though all these relevant information were there in the financials or provided by assessee, but it was not disclosed that purchase was on discount. As such assessee never claimed to have made purchase on discount so as to have mentioned it in return of income.

27.1. As we conclude that there was no failure on the part of the assessee to furnish full and true material facts at the time of assessment and the content and information in the return of income, annual report, books of accounts, specific queries raised, and replies filed etc., as discussed in detail above, were quite supposedly examined by AO while completing the assessment u/s 143(3) of the Act, thus making the same set of information as basis of recording of reasons u/s 148 of the Act, is merely change of opinion. Thus my merely mentioning in the reasons recorded that certain fresh information was received from the office of Pr. CIT regarding alleged benefit received by the appellant in transaction of purchase of shares of HHML from Honda, which was not disclosed by the appellant during

the original assessment proceedings, the AO cannot come out of the rigour of law, which mandates that re-opening can only be on the basis of fresh tangible material. Reliance can be placed on the decision of Hon'ble Supreme Court in the case of **Kelvinator of India 320 ITR 561 (SC),** wherein the Hon'ble Apex Court held that there can be no review of an assessment in the guise of reopening and that a bare review without any tangible material would amount to abuse of power. To similar effect are the following decisions, as relied by the ld, Sr, Counsel:

PCIT v. Tata Power Delhi Distribution Limited: ITA No.689 of 2016 (Del.)
PCIT vs. Tupperware India Pvt. Ltd.: 284 CTR 68 (Del.)
CIT vs. Batra Bhatta Co 321 ITR 526 (Del) - SLP has been dismissed by the Supreme Court and is reported in 320 ITR (St.) 24.
CIT vs. Orient Craft Ltd: 354 ITR 536 (Del.)
Sarthak Securities Co. Pvt. Ltd. vs. ITO: 329 ITR 110 (Del.)
Indivest Pte Ltd., Singapore vs. ADIT: 250 CTR 15 (Bom)
Nitin P. Shah vs. DCIT 146 Taxman 536 (Guj.).
CIT vs. Manohar Lal Gupta 213 CTR 93 (Raj.)

28. Now as with regard to grounds of appeal nos.4 to 8, which are also to great extent covered in the second issue, as framed above, to find out if addition under section 28(iv) is sustainable, it can be seen that in the reassessment order, addition of Rs.3644,85,20,063 under section 28(iv) of the Act has been made alleging the same to be "benefit" accrued to the appellant on acquisition of 26% stake in HHML from Honda at alleged discount of 50%. It has been alleged that the discount offered by Honda to appellant on acquisition of shares in HHML was in lieu of/payment for concession granted by appellant to Honda in the form of right/ license to manufacture motorcycles in India which was allegedly not available to Honda earlier. The said alleged benefit has been added to income of the appellant under section 28(iv) of the Act.

29. Further, we will like to go into the merits of issue and at outset observe that in the determination of issue no. 1, in favour of assessee, we have concluded that there was no case of discount or concession, as alleged by the AO. So on those two count, there cannot be any alleged, benefit attributed to the assessee. Still for completeness, we intend to further examine the sustainability of reasons given by AO, to make addition u/s 28(iv) of the Act. In the impugned order, the assessing officer has alleged that one-time lump-sum license fee of Rs.2151.80 crores paid by HHML to Honda pursuant to the share purchase transaction by HIPL from Honda was in lieu of discount availed by HIPL for acquiring 26% controlling stake from Honda.

29.1 Then it was submitted that Honda had exited the JV by selling its stake in the JV/ HHML to HIPL, which had led to consequential termination of existing license agreement, denying HHML access to technology owned by Honda to survive/ continue its operations. In absence of access to technology, the operations of HHML could have, it is stated, come to a halt. Thus, the aforesaid licensee agreement was entered between HHML and Honda to acquire right to use technology in respect of certain models, to continue business operations in India for its survival. In that background, HHML had paid one time license fee of Rs.2151.80 crores to Honda pursuant to New License Agreement dated 22.01.2011 between Honda and HMCL wherein the former had granted to the latter, the right and license to manufacture, assemble, sell and distribute certain products/parts and export license for certain products and their service parts using the intellectual property rights provided by Honda. In terms of the license agreement for License A Products, HHML received the following rights:

1. Rights to use the technology, design and drawings for manufacture of 18 specific models of motor cycles till perpetuity

2. Right to make modifications to the technology, design and drawings
3. Unrestricted right to export such products in the overseas markets.

29.2 Thus Ld. Sr. Counsel has submitted that licensee fee did not have any correlation to acquisition cost of shares of HHML purchased by the HIPL from Honda, but was in lieu of aforesaid rights. In this context only Ld. Counsel has then contended that HIPL and HHML are separate legal entities, and no payment could have been made by HHML in lieu of alleged discount, if any, availed by HIPL on acquisition of shares from Honda, particularly when HIPL was not part of the New License Agreement, nor any separate/ independent agreement exists between HIPL and HHML for HHML to have made such payment on behalf of HIPL. It was also submitted that no evidence has been brought on record by the assessing officer to even remotely suggest that license fee was paid by HHML to Honda in lieu of alleged discount offered by Honda to HIPL on acquisition of 26% stake in HHML held by Honda. Moreover, no arrangement between HIPL and HHML to the said effect has been brought on record by the assessing officer. Ld. Sr. Counsel contended that it is settled law that the apparent is real unless the contrary is proved and the burden to prove the contrary is on the person, who alleges so and reference was made to the Hon'ble Supreme Court juddgement in ***CIT vs. Daulat Ram Rawatmull [1973] ITR 349 (SC)].***

30. We find substance in the arguments as it was incumbent upon the assessing officer to lead evidence to conclusively establish that (a) shares of HHML were sold by Honda to HIPL at a discount; (b) such (alleged) arrangement of selling Shares at a discount was in lieu of HHML paying one time license fee to Honda, and (c) there existed a tacit understanding / arrangement between HIPL and HHML whereby HHML agreed to pay Honda one time license fee in order that Honda sold shares of HHML at a discount to HIPL. Pertinent to note is that the

issue whether the aforesaid license fee paid by HHML was at arm's length was specifically examined by the transfer pricing officer of HHML for assessment year 2011-12. The TPO after detailed examination, expressly accepted such payment at arm's length vide order dated 29.01.2015 passed under section 92CA of the Act.

30.1 Then HHML was an entity listed on recognized stock exchanges in India and governed by norms/ regulations of Securities and Exchange Board of India (SEBI). No competent authority has raised any doubts on the payment of license fee by HHML to Honda nor alleged that the same was paid by HHML (on behalf of HIPL) in lieu of discount allowed by Honda to HIPL qua acquisition of shares of HHML by JIPL from Honda. All statutory compliances relating to the payment of license fee were made by HHML before RBI, which have not been doubted.

30.2 Further, the payment of aforesaid licensee fee was capitalized by HHML, and depreciation thereon was claimed w.e.f. assessment year 2012-13, which undisputedly stands allowed in the completed assessments in the case of HHML till date. Being so, the fact that the payment of license fee was for the business purposes of HHML stands accepted by the Revenue Department.

30.3 Then it can be observed that as per the new agreement, HHML. has paid a sum of JPY 45 Billion over a period of 42 months ending 30th June, 2014 in lieu of right to manufacture, assemble, sell, distribute, modify certain model of motorcycles & parts and in lieu of granting the right to export products to certain specified territories. The payment was made as per the agreed instalment schedule between the parties as tabulated hereunder:-

Installment	Amount (Billion Yen)	Date of payment
1st	14.50	28.03.2012
2nd	12.80	28.03.2013
3rd	12.30	27.03.2014
4th	5.40	27.06.2014
Total	45.00	

30.4 In view of the aforesaid, the allegation of assessing officer that HMCL has hurriedly made payment of Rs.2151.80 crores as License fee in financial year 2010-11 itself, when it was required to pay sum in instalments upto 30.06.2014, is thus factually incorrect. The aforesaid instalments were paid after due deduction of tax at source at the time of remittance of instalments, which has not been disputed by the Revenue.

30.5 Apart from the above, it is noted that in the reassessment order, it has, on one hand, been observed/ alleged that monetary benefit/ discount of Rs.3644 crores has been availed by HIPL which was in lieu of concessions granted by HIPL to Honda in the form of right to manufacture motor cycles in India, while, on the other hand, it has been alleged that said discount offered by Honda to HIPL on acquisition of its stake in HHML was compensated by HHML by payment of Rs.2151.80 crores of license fee to Honda. Being so, the stand of the Department qua the aforesaid alleged discount is contradictory and self-defeating.

31. In view of the aforesaid facts, we are of considered view that without establishing a nexus or linking price paid by the appellant to Honda for acquisition

of shares held by Honda in HHML and the license fee paid by HHML, a distinct legal entity to Honda for use of technology, on mere assumptions, conjectures and surmises, the conclusion of alleged 'benefit' for the purpose of Section 28(iv) of the Act is drawn.

31.2. This assertion of AO is well countered by the fact that in fact due to exit the Hero group had acquired right to use technology of Honda for manufacture of Licence 'A' product for perpetuity. So actually Hero group was a gainer.

32. Even otherwise it is doubtful that provision of Section 28 of the Act, including sub-clause (iv) could be applied by the AO. Ld. AR has contended that Section 28 of the Act, is applicable only to tax income arising on account of business transaction. Since no income/ benefit in form of alleged discount on purchase of shares had flown to the appellant, no addition was liable to be made in the hands of the appellant.

33. Further Ld. Sr. Counsel has submitted that the alleged benefit, in any case, could not be taxed as business income under section 28 of the Act as shares of HHML are not held as business asset but 'investment'/capital asset. Ld. Sr. Counsel has stressed on the fact that appellant was not engaged in the business of dealing in shares/ mutual funds. It was submitted that in so far as shares of HHML are concerned, the shares were, in any case, not held for the purposes of trading; but were acquired for holding controlling stake in HHML to be held as investment/ capital asset and therefore the alleged benefit by way of discount, though not so as per Ld. Sr. Counsel, if any, was on capital account and outside the scope of business income under section 28 of the Act. In this context he submitted that the

nature of income arising from shares depends upon the nature of asset, viz., whether the shares were held as "capital asset" or as "stock-in-trade". The nature of asset, whether 'stock in trade' or 'capital asset depends upon the intention with which investment is made. If the intention behind holding an asset is to deal in it, the same qualifies as 'stock in trade' and if the asset is held with an intent not to deal therein but to reap benefit through holding the same, by way of controlling interest, in the form of capital appreciation, deriving rental/royalty/dividend income, etc., it will qualify as 'capital asset'. Reference, in this regard, was drawn from the following decisions and CBDT circulars:

Raja Bahadur Kamakhya Narain Singh: 77 ITR 253 (SC)

Sutlej Cotton Mills Supply Agency Ltd: 100 ITR 706 (SC)

Karam Chand Thapar& Bros. (P) Limited V. CIT: 82 ITR 899 (SC)

PCIT v. Ramniwas Ramjivan Kasat: 248 taxman 484 (Guj.)

PCIT v. Hardik Bharat Patel: ITA No. 390 of 2016 (Bom.)

CIT vs Century Plyboard (1) Ltd.: ITA No. 83/2010 (Cal.)

Circular No. 4 of 2007, dated 15.6.2007- CBDT.

Circular No.6/2016 dated 29.02.2016

34. Ld. Sr. Counsel has also pointed out that in the present case, original shareholding held by the appellant in HHML, and the subject shares acquired from Honda are held as capital asset and not as stock in trade, as can be gauged from the fact that under the original JV Agreement with Honda had acquired shares, in HHML in 1983, which were held over a period of approximately 25 years as capital asset/investment, without any dilution / trade therein. Then in the audited

financial statement of the appellant prepared since inception, the appellant has shown shares and securities as "Investments". Sales and purchase of shares are not credited/ debited to the profit and loss account. Further shares have always been valued at cost and not on NRV, based on Accounting Standard- 13 relating to 'Investments'. The income as shown by the appellant in its profit & loss account for the relevant year, under Schedule-G, is in the nature of investment income from long term investments. The appellant held shares in HHM as a 'promotor' holding substantial interest. The appellant, in order to acquire / strengthen its management rights in HHML, acquired shares from Honda and, therefore, these shares were acquired for the purposes of controlling/management interest in the company and not for trading therein.

35. Then Ld. Sr. Counsel has placed reliance, on the following decisions, wherein shares acquired with a view to have controlling interest in the companies were held to be 'capital asset' and profit arising from sale thereof was held as resulting in income taxable under the head 'capital gains':

Accra Investments (P) Ltd. v. ITO: 359 ITR 116 (Bom.)
CIT v. Nadatur Holdings and Investment (P) Ltd.: 210 Taxman 597 (Kar.)
Gomti Credits (P) Limited vs. DCIT: 100 TTJ 1132 (Del.)
Pace Industries Ltd.: ITA 1106 / Del / 2004 (Del Trib.)
Everplus Securities and Finance Ltd. vs DCIT: 101 ITD 151 (Del.)
Slocum Investment (P) Ltd. vs. DCIT: 106 ITD 1 (Del.)

36. Specific reliance, in this regard, was placed on the decision of the Hon’ble Gujarat High Court in the case of **Elscope P. Ltd vs. CIT: 313 ITR 293 (Guj)**, wherein the Hon'ble Court while dealing with the issue of taxability of profit arising to the assessee company on reduction of liabilities observed that for purposes of taxability under section 28(iv) of the Act, there must be nexus or

connection between the business of the assessee and the benefit/perquisite sought to be taxed. To similar effect the decision in the case of **CIT v. Bhavnagar Bone, & Fertilizer Co. Ltd.: 166 ITR 316 (Guj.)**, was relied.

36.1 Emphatic reliance is placed, by Ld. Sr. Counsel on the decision of the jurisdictional Delhi High Court in the case of **Unitech Holdings Ltd. v. DCIT: 240 Taxman 70/290 CTR 201**, which he claims was rendered on the facts similar to the present case. He has submitted that in that case, the assessing officer initiated reassessment proceedings on the ground that assessee's holding company had transferred shares in three joint venture companies to the assessee at cost price reflected in the books of holding company, which was significantly lower than the book value of those shares calculated on the basis of the net worth of the said companies. The assessing officer was of view that difference in the book value of the shares and the cost incurred by the appellant to purchase those shares was income of the assessee under section 28(iv) of the Act, which had escaped assessment. Against the initiation of reassessment proceedings, the assessee filed writ petition before the Hon'ble Court. The Hon'ble Court while quashing the reassessment proceedings also held that acquisition of shares which were held as investments at cost price which was lower than the book value computed as per net worth of the companies, did not give rise to any business income taxable under section 28(iv) of the Act.

36.2 Attention was also invited to the decision of the Mumbai Bench of the Tribunal in the case of **Rupee Finance & Management (P.) Ltd. v. ACIT: 120 ITD 539.** Ld. Sr. Counsel has submitted that in that case, the assessee, an investment company, acquired shares for a group company to retain/ reorganize the

controlling interest in the investee at a price much lower than the market price (with a lock-in period of 3 years). The assessing officer sought to tax, inter-alia, difference between the market price and cost price as benefit under section 28(iv) of the Act in the hands of purchaser assessee. CIT(A) affirmed the order of the assessing officer. On further appeal, the Tribunal held that purchase of shares as investments below the market price could not be brought to tax under section 28(iv) of the Act as the benefit had not arisen to the assessee as part of any business transaction with the seller of such shares.

36.3 It was pointed out by Ld. Sr. Counsel that in the assessment order, the assessing officer has relied upon the order of Punjab and Haryana High Court in the appellant's own case for AY 2006-07 in ITA No. 226 of 2012 wherein profit arising from sale and purchase of investments in unit of Tata Service Industries Fund (Dividend Plan) within short span of time was held to be business income. In this regard, it is submitted that the aforesaid decision is peculiar to facts of that case and has no precedent value qua long term investments held by the appellant in HHML, which are subject matter of dispute, wherein dominant intention behind holding entire equity share/stake in HHML as capital asset/investment. That apart, it is submitted that the aforesaid decision has been challenged by the appellant before the Hon'ble Apex Court in SLP No. 21902/2014 which has been admitted and appeal (Civil Appeal No.669/2015) is pending for disposal. Thus it was submitted that no adverse inference can be drawn from the aforesaid decision of the Punjab and Haryana High Court.

36.4 Ld. Sr. Counsel has submitted that the assessing officer has, in the aforesaid order, had held that CBDT Circular No. 6 of 2016 is not applicable on the facts of the present case as the same is intended for general application and is not

applicable where intention of the taxpayer is very clear. Ld. Sr. Counsel submitted that said Circular has directed the assessing authorities not to question/ doubt the intention of the taxpayer where shares are held as capital assets for more than twelve months. In the present case, undisputedly shares of HHML were held by the appellant since inception (more than 25 years) as investment and thus it would not be open for the Department to doubt the nature of such holding, in terms of the binding Circular. It is further submitted that in appeal against the original assessment order passed under section 143(3) of the Act for the year under consideration in case of the appellant, the CIT(A) vide order dated 30.10.2018, after considering the aforesaid decision of the Hon'ble High Court in the appellant's own case and also aforesaid Circular No.6 of 2016, held that gains on transfer of mutual funds held for more than one year are assessable as capital gains and not business income.

37. Then the Ld. Sr. Counsel has submitted that monetary benefit is outside purview of section 28(iv) of the Act. In the impugned order, benefit arising to the appellant is alleged to be monetary in nature inasmuch as, according to the assessing officer, the appellant had in effect paid Rs.7484 cores for acquisition of shares and received Rs.3644 crores from Honda in lieu of concessions, such that net payment of Rs.3838 crores was made by the assessee to Honda for acquisition of additional 26% stake in HHML. Being so, benefit that arose to the assessee was, as per the Revenue, admittedly in money terms/ monetary shape.

38. Ld. Sr. Counsel has submitted that it is well settled that for invoking provisions of section 28(iv) of the Act, benefit received must be in some form other than in shape of money. Reliance in this regard in this regard is placed on the decision of

the Hon'ble Supreme Court in the case of **CIT v. Mahindra and Mahindra Ltd.: [2018] 302 CTR 213** wherein it was held that section 28(iv) of the Act is not applicable qua monetary benefits. Then the Mumbai Bench of the Tribunal decision in the case of **DCIT v. Pidilite Industries Ltd.: [2019] 107 taxmann.com 91 (Mum.)** is relied where it is held that Discount received by assessee on buyback of Foreign Currency Convertible Bonds (FCCB) could not be taxed under section 28(iv) as said receipt in hands of assessee was in form of cash/money and, further, such proceeds were utilised partly for ongoing capitalization programs and, thus, same was capital receipt.

39. Ld. Sr. Counsel also submitted, though without prejudice, that alleged benefit being only notional, cannot be taxed. The actual benefit, in the given situation, would arise only when the shares so purchased are sold in future, which would result in real income being subjected to tax at the time of sale. Considering that the entire differential between the sale consideration and purchase price would be subject to tax in the year of sale, the tax on alleged notional benefit in the year under consideration is impermissible in law. In this context, he relied the settled principle of law that only real income and not notional income can be taxed in the hands of an assessee and reference was made to judgment of Hon'ble Supreme Court in **Shoorji Vallabhdas& Co.: 46 ITR 144 (SC)** and **Godhra Electricity Co. Ltd. v. CIT: 225 ITR 746 (SC)].** Specific reliance, in this regard, is also placed on the decision of Hon'ble Andhra Pradesh High Court in the case of **CIT v. K.N.B. Investments (P.) Ltd.: 367 ITR 616**. It was pointed out that in that case, the assessee was allotted shares at concessional rate of Rs. 90 per share. The assessing officer took the view that the market value of the shares being about Rs. 455 per share, the differential amount of Rs. 365 per share deserved to be treated as

'benefit', as defined under section 28 of the Act. Dealing with the issue, the High Court observed that the price differential could not be said to be benefit arising to the assessee, so as to be taxed under section 28 of the Act.

39.1 The Hon'ble Delhi High Court decision in the case of **CIT v. Asian Hotels Ltd.: 323 ITR 490** was also relied where it is held that notional interest on interest-free deposit advanced by the assessee could not be added to income of assessee under section 28 of the Act on the basis that it may have been earned if placed in a fixed deposit.

40. In regard to these ground it is seen that section 28(iv) before substitution by Finance Act. 2023 provided that value of any benefit or perquisite, whether convertible into money or not, arising from business or exercise of a business or profession shall be chargeable to income-tax under head 'profits and gains of business or profession". Thus, to be taxable under this head the benefit or perquisite should arise from business or profession of the assessee.

41. In the present case, the issue arises that whether the impugned discount on the transaction can be treated as benefit or perquisite of the business. We observe that in general parlance discount would mean there is some instant benefit in terms of price paid by purchaser to the market price or price otherwise quoted by another seller. It means lower cost of acquiring anything when compared to market price. It is absolute benefit in the hands of purchaser. But, when discount as a ‘benefit’ to fall under deemed business income for the purpose of section 28(iv) of the Act, is concerned, it has a special meaning. Here the discount is not the absolute benefit but becomes relative to time when the income accrues. In that sense the discount as benefit u/s 28(iv) of the Act in case of shares will be the benefit, purchaser will be

entitled upon sale in the future. The discount on purchase would mutate into benefit u/s 28(iv) when the difference in actual price and discounted price is converted by higher net realization. The immediate recognition of discount, as a benefit u/s 28(iv) of the Act would mean deemed acceleration of the sale consideration or part thereof without actually effecting any sale and certainly not a real income. At most it can be a notional benefit or hypothetical income. The actual benefit, to assessee, if any, would arise only when the shares so purchased are sold in future. The settled law being that it is not a hypothetical accrual of income that has got to be taken into consideration but the real accrual of the income. Thus the reliance placed by Ld. Sr. Counsel on the judgment of Hon'ble Supreme Court in case of **Shoorji Vallabhdas & Co.: 46 ITR 144 (SC), and, in Godhra Electricity Co. Ltd. v. CIT: 225 ITR 746 (SC),** has to be sustained, to hold that AO, has adventured to tax, the hypothetical income, of alleged discounting of shares, as benefit u/s 28(iv) of the Act.

42. We then consider it beneficial for bolstering out aforesaid conclusion to rely on judgments cited by the Id. Sr. Counsel, with particular reference to similar instances of discount to be out of ambit of section 28(iv) of the Act. Hon'ble Delhi High Court in the case of **Unitech Holdings Ltd. v. DCIT: 240 Taxman 70/290 CTR 201** held as under:

> *"25. Applying the aforesaid principles, in the facts of the present case, it is difficult to accept that the sale of shares by Unitech Limited at its cost price which is lower than the book value of the shares would result in income (equivalent to the difference between the book value of the shares and the cost price at which they were sold) in the hands of the Assessee. The shares of the three companies in question are held as investments by the Assessee and duly reflected by the Assessee as such. No objection has been raised by the AO in this regard. In the circumstances, we find it difficult to comprehend as to how the acquisition of investments by the Assessee could*

lead to an inference that the Assessee had earned income under Section 28(iv) of the Act-value of any benefit or perquisite arising from business or profession-chargeable under the head profits and gains of business or profession."

43. Then we are of view that though section 28(iv) deals with the benefit or perquisite, whether convertible into money or not, arising from business or exercise of a business or profession, however, Hon'ble Supreme Court, while interpretating scope of section 28(iv), as it was before the amendment made in section 28(iv) by Finance Act, 2023, has held in the case of **CIT v. Mahindra and Mahindra Ltd. [2018] 302 CTR 213** that section 28(iv) of the Act is not applicable to monetary benefits. The relevant extracts of the judgment are reproduced as under:

"12. The first issue is the applicability of Section 28 (iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below:-

'28. Profits and gains of business or profession. The following income shall be chargeable to income-tax under the head "Profits and gains of business profession",-

**

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;

** **

13. On a plain reading of Section 28 (iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs. 57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view, in no circumstances, it can be said that the amount

of Rs 57,74,064/- can be taxed under the provisions of Section 28 (iv) of the IT Act."

44. Then considering the agreements and MOU executed between the Honda and Hero groups of companies, the acquisition of shares by Honda is only strategic investment to consolidate the holding in JV. Thus, we find substance in the submissions that provisions of section 28(iv) per se does not apply to the disputed transaction, as the assessee has held such shares in the capacity of promoter shareholder and not for the purpose of trading and has been consistently showing it as long term capital investment in the books of accounts and balance sheet. It is established that assessee has held the shares of HHML since inception for more than 25 years as long-term investments and not a single share has been sold by the assessee during those 25 years. The Circular No.6/2016 dated 29.02.2016, expressly lays down that where the taxpayer treats shares as investment in the books of accounts, then, profit on sale of listed shares held for more than twelve months should be taxed as long-term capital gains. Thus, any benefit, if there is any, may fall within capital field.

44.1 Then, when we consider the order dated 29.01.2014 of the CIT(A), Ludhiana in appeal against original assessment order dated 29.01.2014 available at pages 204-229 of the paper book. We find that the CIT(A) has rejected AO's conclusion of assessment u/s 143(3) of the Act, that assessee was earning business income from sale and purchase of shares, etc., and CIT(A) concluded that shares were held as investments giving rise to capital gains only. Infact by reopening vide notice u/s 148 of the Act, dated 31.03.2018, the AO has tried to undo the findings of CIT(A) order dated 29.1.2014 where in it was categorically held that income from sale and purchase of shares was to be treated as capital gains and not business income. Thus when there was no business income from the selling shares held as investments,

certainly provision of section 28(iv) of the Act could not have been invoked. Thus bringing the difference in the price of acquisition of shares with market price as benefit arising from business u/s 28(4) of the Act was in a way again holding that sale and purchase of shares gives rise to business income. In view of above discussions we are of firm view that AO had fallen in error to invoke provision of section 28(iv) of the Act.

45. As sequel to aforesaid discussion the issue no. 1 as framed by us above is decided in favour of appellant and issue no. 2 against the revenue and consequently the ground No. 1 to 1.4 and 4 to 8 are decided in favour of the assessee. Remaining grounds become academic and are left open. The appeal is allowed.

Order pronounced in open court on 24.07.2024.

Sd/-	**Sd/-**
(G.S. PANNU) **VICE PRESIDENT**	**(ANUBHAV SHARMA)** **JUDICIAL MEMBER**

MP
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI