VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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Inside this edition

Supreme Court Rulings

Where revenue had filed an FIR alleging that concerned officials of bank had breached restraining order issued u/s 132(3), since bank had acted with common intention and was not intentionally engaged in commission of any alleged offences, provisions of sections 34, 37 and 120B of IPC would not be applicable; ingredients of sections 420 and 462 were also not attracted

High Court Rulings

No recovery should be made from appellant during pendency of appeals where more than five lakhs appeals were pending across country to be heard by Commissioner (Appeals) in faceless regime and revenue instead of resolving pendency as per directions of High Court ignored said directions

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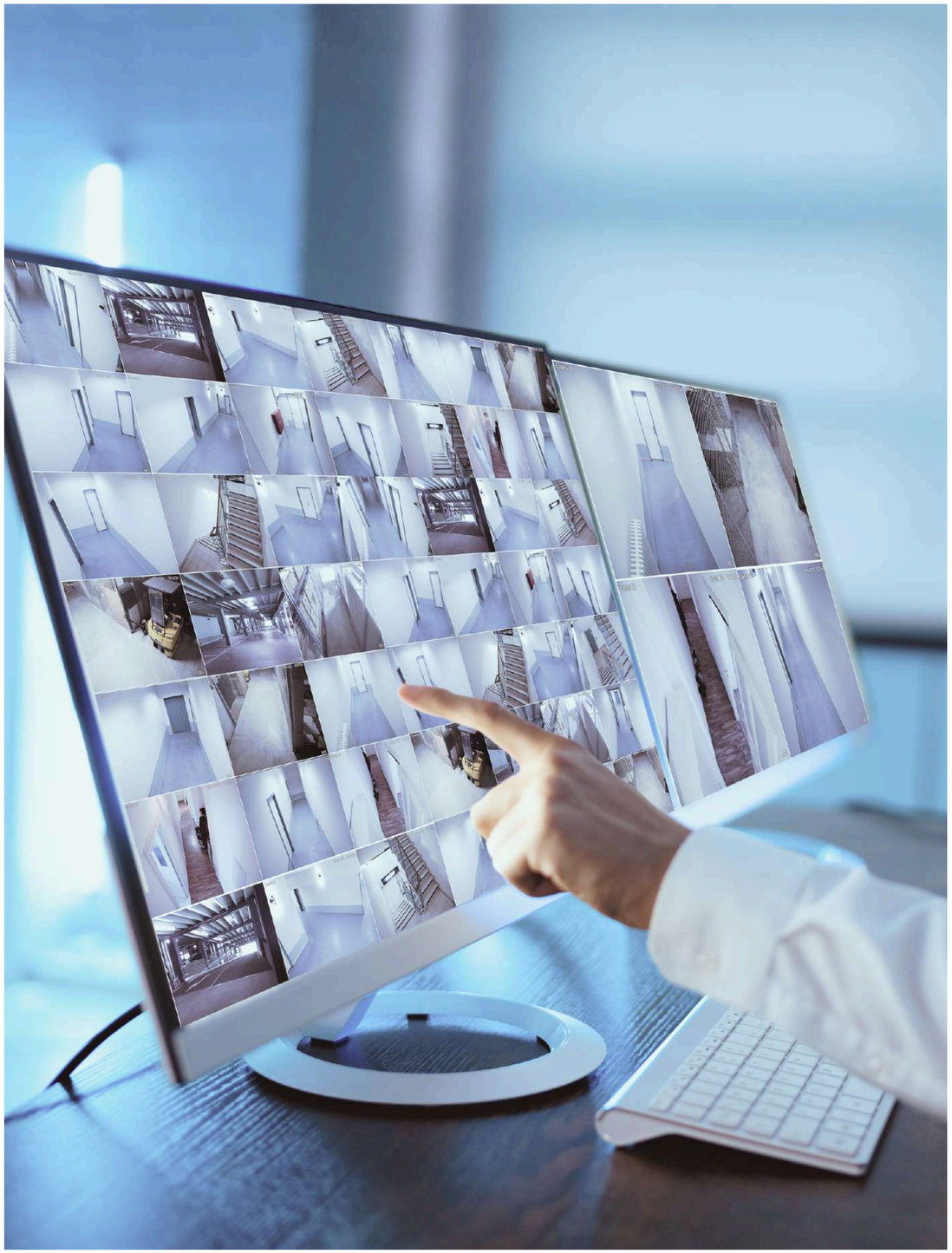
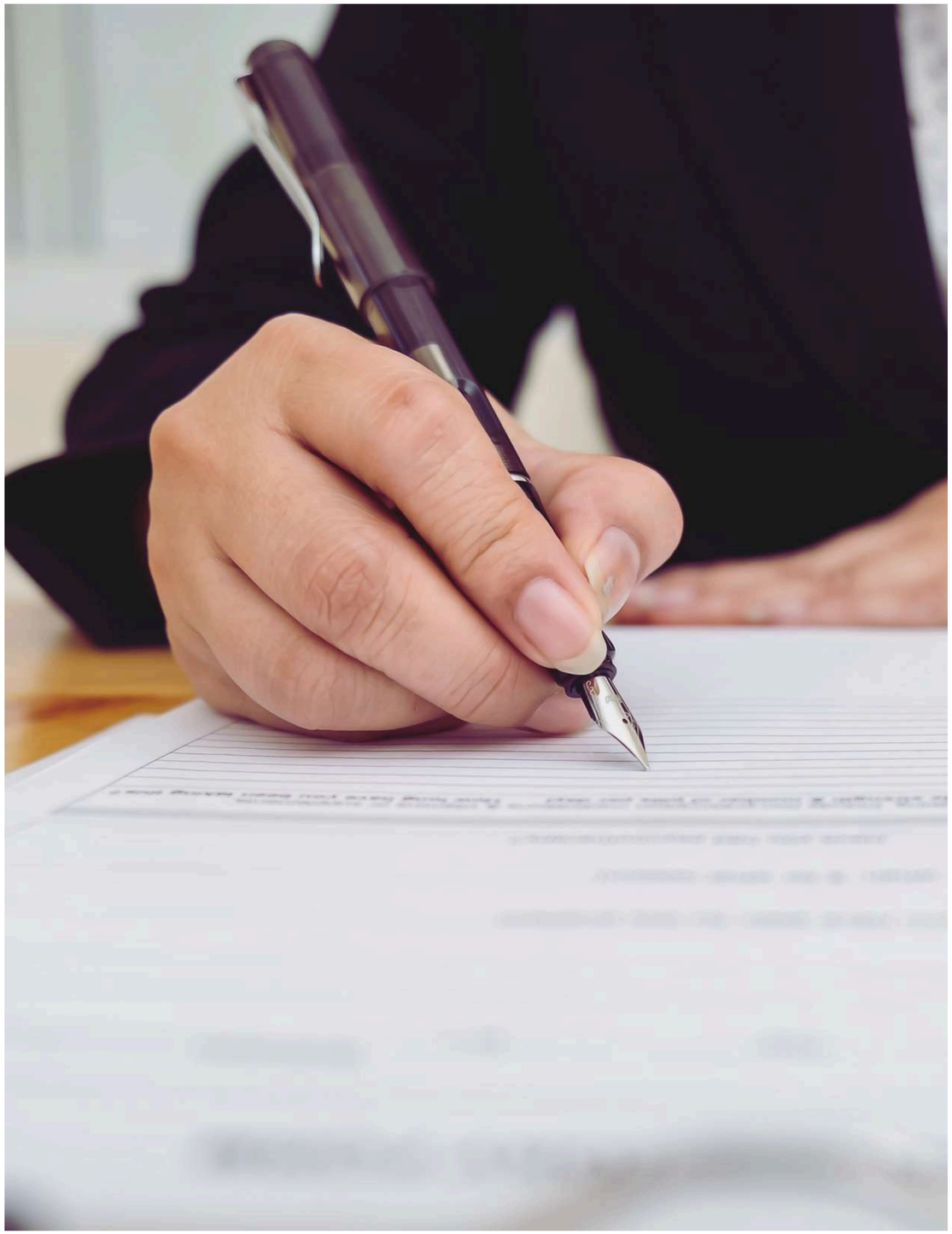
Facts

In the present proceedings, a search and seizure operation was conducted in the case of several income-tax appellants including Shri Sunil Khemka (HUF), Smt. Sunita Khemka and Smt. Shivani Khemka at the third floor of Khataruka Niwas, South Gandhi Maidan, Patna on the basis of warrants of authorization issued u/s 132(1). During the course of the search, it was found that Smt. Sunita Khemka held a bank locker bearing No.462 in the appellant-bank at its Exhibition Road Branch, Patna on the basis of which, on 05-10-21, an order u/s 132(3) was served upon the Branch Manager of the appellant-bank by the concerned Authorized Officer, thereby directing the said branch of the appellant-bank to stop the operation of any bank lockers, bank accounts and fixed deposits standing in all the three names, among several other individuals and entities, with immediate effect. It was further clarified that contravention of the order would render the Branch Manager liable u/s 275A and the same would result in penal action. In compliance of the aforesaid order, the appellant-bank stopped the operation of the bank accounts, bank lockers and fixed deposits of the individuals/entities mentioned in the order. Further, on 07-10-21, the



appellant-bank blocked the bank accounts of the income-tax assesses named in the order and also sealed the bank locker bearing No. 462 belonging to Smt. Sunita Khemka. Subsequently, on 01-11-21, Respondent issued an order to the Branch Manager of the appellant bank at its aforementioned branch thereby directing the appellant-bank to revoke the restraint put on the bank accounts of Smt. Sunita Khemka and three other persons, in view of the restraining order passed u/s 132(3). Accordingly, the said persons, were to be allowed to operate their bank accounts. The said order was received by the concerned Branch Manager on 08-11-21 at 4:00 p.m. However, on 02-11-21 at 11:24 a.m., an email was sent to the Branch Manager which contained the same order. Thereafter, on 09-11-21, the concerned branch of the appellant-bank allowed to operate her bank locker bearing No. 462 and proper entries recording the operation of the said locker were made in the bank's records. Subsequently, on 20-11-21, Respondent conducted a search and seizure operation at the aforementioned bank locker in the concerned branch of the appellant-bank wherein it was found that Smt. Khemka had operated her bank locker with the assistance of the concerned officers of the appellant-bank. This was validated by the entry made in the bank's records and the CCTV footage of the bank. Resultantly, the concerned officials of the aforementioned branch of the appellant-bank were found to have breached the restraining order. Accordingly, Respondent issued summons u/s 131(1A) Abha Sinha-Branch Manager, Abhishek Kumar-Branch Operation Manager and Deepak Kumar-Teller Authoriser being the concerned officials of the appellant-bank at its

aforementioned branch. The aforementioned officials attended the office and their statements were recorded wherein Abha Sinha and Abhishek Kumar stated that there had been an inadvertent error on the part of the bank officials and they had misinterpreted the order dated 01-11-21. Since the said order pertained to the bank accounts of the concerned individuals including Smt. Sunita Khemka, the bank officials had misread the order to understand /assume that the revocation of the restraint extended to the bank lockers as well. Having misunderstood the order, the bank officials under a bona fide assumption that bank locker had been released as well, allowed Smt. Sunita Khemka to operate the same. The statement of Smt. Sunita Khemka was also recorded wherein she stated that her accountant Surendra Prasad, after speaking with Deepak Kumar, had informed her that the restraint on the aforementioned bank locker had been revoked and she could operate the said locker which was specifically denied by Deepak Kumar in his statement. Dissatisfied, the Respondent submitted a written complaint to the SHO, Gandhi Maidan Police Station seeking to register an FIR against Smt. Sunita Khemka and the concerned bank officials on the ground that the order had been violated owing to the unlawful operation of the aforementioned locker. On the basis of the said complaint, an FIR being Case No. 549 of 2021 was registered against Smt. Sunita Khemka and the staff of the appellant-bank at its aforementioned branch for the offences punishable under Sections 34, 37, 120B, 201, 207, 217, 406, 409, 420 and 462 of the IPC at the Gandhi Maidan Police Station, Patna.



Aggrieved by the registration of the FIR, the appellant-bank preferred a Criminal Writ Jurisdiction Case thereby invoking the inherent power of the High Court under Section 482 of the Code of Criminal Procedure,1973 for the quashing of the FIR. The High Court vide the impugned order dismissed the writ petition finding it to be devoid of merit. Being aggrieved thereby, the present appeal.

Ruling

SC held that the appellant-bank is a juristic person and as such, a question of mens rea does not arise. However, even reading the FIR and the complaint at their face value, there is nothing to show that the appellant-bank or its staff members had dishonestly induced someone deceived to deliver any property to any person, and that the mens rea existed at the time of such inducement. As such, the ingredients to attract the offence under Section420 IPC would not be available. Further, for bringing out the case under criminal breach of trust, it will have to be pointed out that a person, with whom entrustment of a property is made, has dishonestly misappropriated it, or converted it to his own use, or dishonestly used it, or disposed of that property.

In the present case, there is not even an allegation of entrustment of the property which the appellant-bank has misappropriated or converted for its own use to the detriment of the respondent No.5. As such, the provisions of Section 406 and 409 IPC would also not be applicable.Since there was no entrustment of any property with the appellant-bank, the ingredients of Section 462 IPC are also not applicable.

Likewise, since the offences under Section 206, 217 and 201 of the IPC requires mens rea, the ingredients of the said Sections also would not be available against the appellant-bank. The FIR also does not show that the appellant bank and its officers acted with any common intention or intentionally cooperated in the commission of any alleged offences. As such, the provisions of section 34, 37 and 120B of the IPC would also not be applicable. Reliance has been placed by this Court in the case of Bhajan Lal and others wherein it has been held that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice." In the result, the appeal was allowed.

Source : SC in the case of HDFC Bank Ltd. vs State of Bihar vide [2024] 167 taxmann.com 600 (SC) on October 22, 2024

No recovery should be made from appellant during pendency of appeals where more than five lakhs appeals were pending across country to be heard by Commissioner (Appeals) in faceless regime and revenue instead of resolving pendency as per directions of High Court ignored said directions

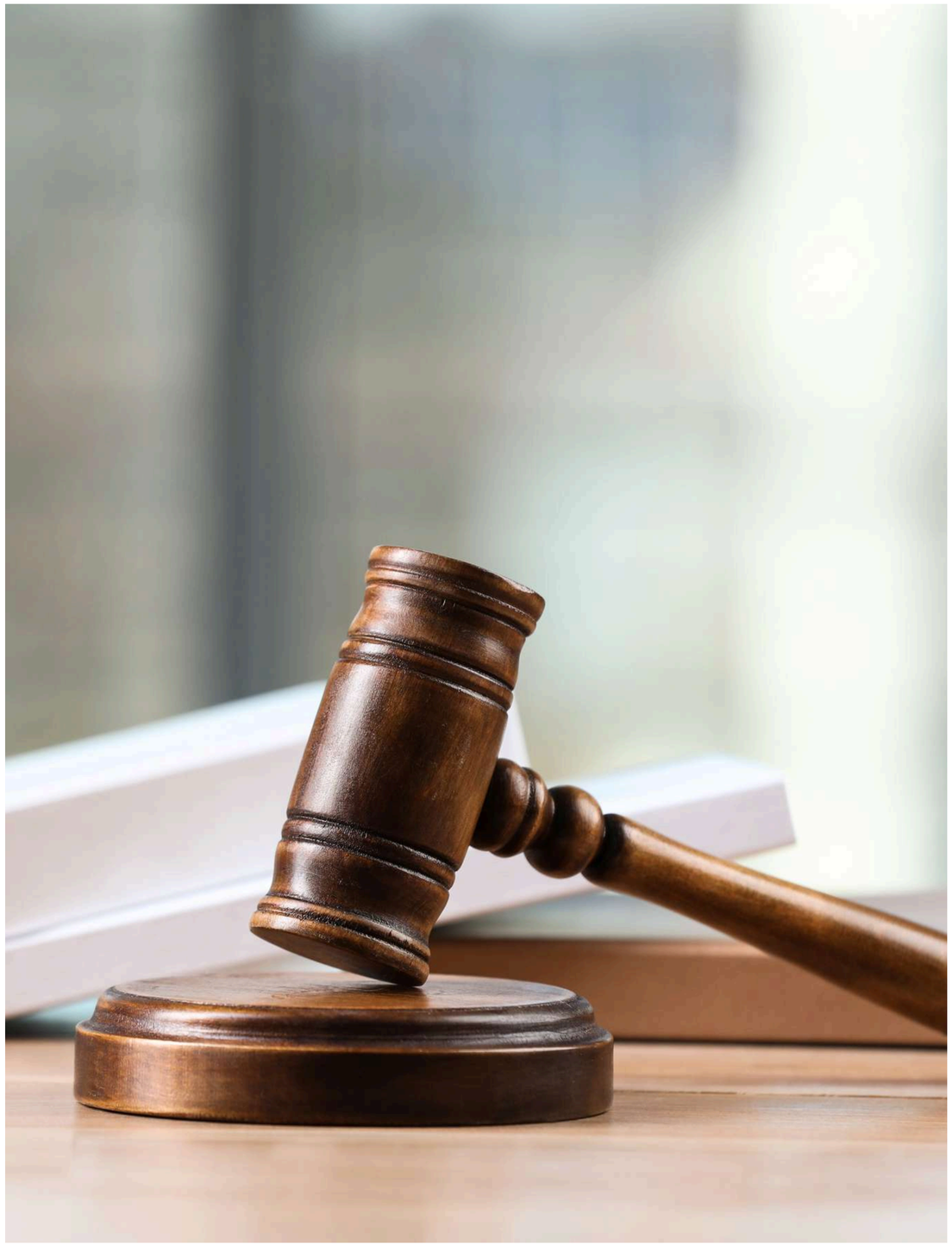
Facts

The appeal filed by the petitioner before the CIT(Appeals) is pending for more than four years and the same is not being heard. It was further submitted that though the petitioner is protected by this Court by permitting the petitioner to operate the bank account as per order dated 26.03.2020, till this date, no further progress has been made with regard to hearing of the appeal by the CIT(Appeals).

The ld. Senior Advocate Mr. Hemani further submitted that there are more than five lakhs appeals pending across the country to be heard by the CIT(Appeals) in the faceless regime.

Ruling

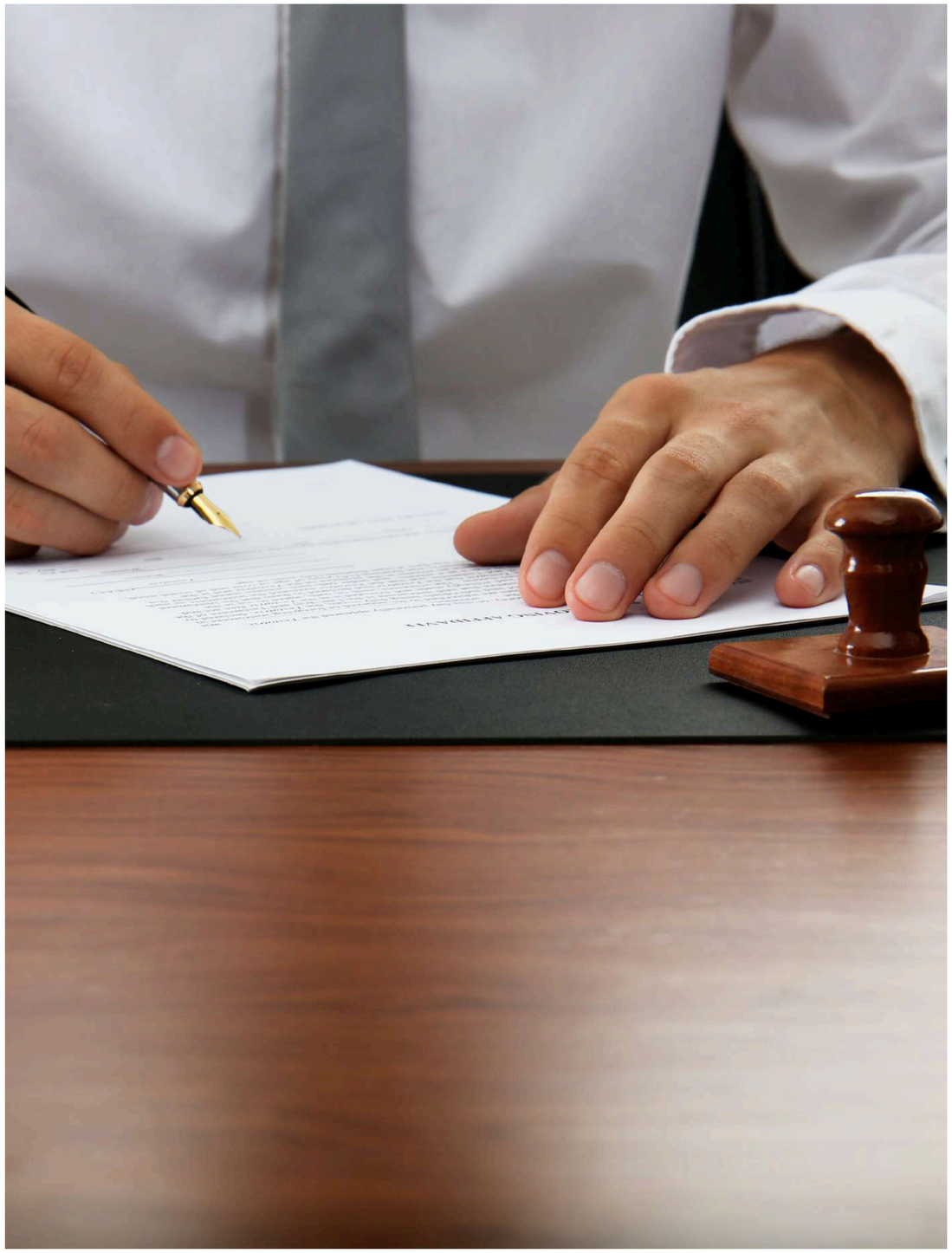
Pursuant to the aforesaid both the orders, the respondents have tendered the affidavits-in-reply. On perusal of the affidavits-in-reply filed on both the occasions, it appears that respondents instead of addressing the issue of pendency of the Appeals pending before the CIT(Appeals) has tried to justify the proceedings undertaken by the CIT(Appeals) for the disposal. HC held that we are at pain to note that in spite of giving specific directions in paragraph No.9 of the order dated 01-10-24, the respondents have ignored



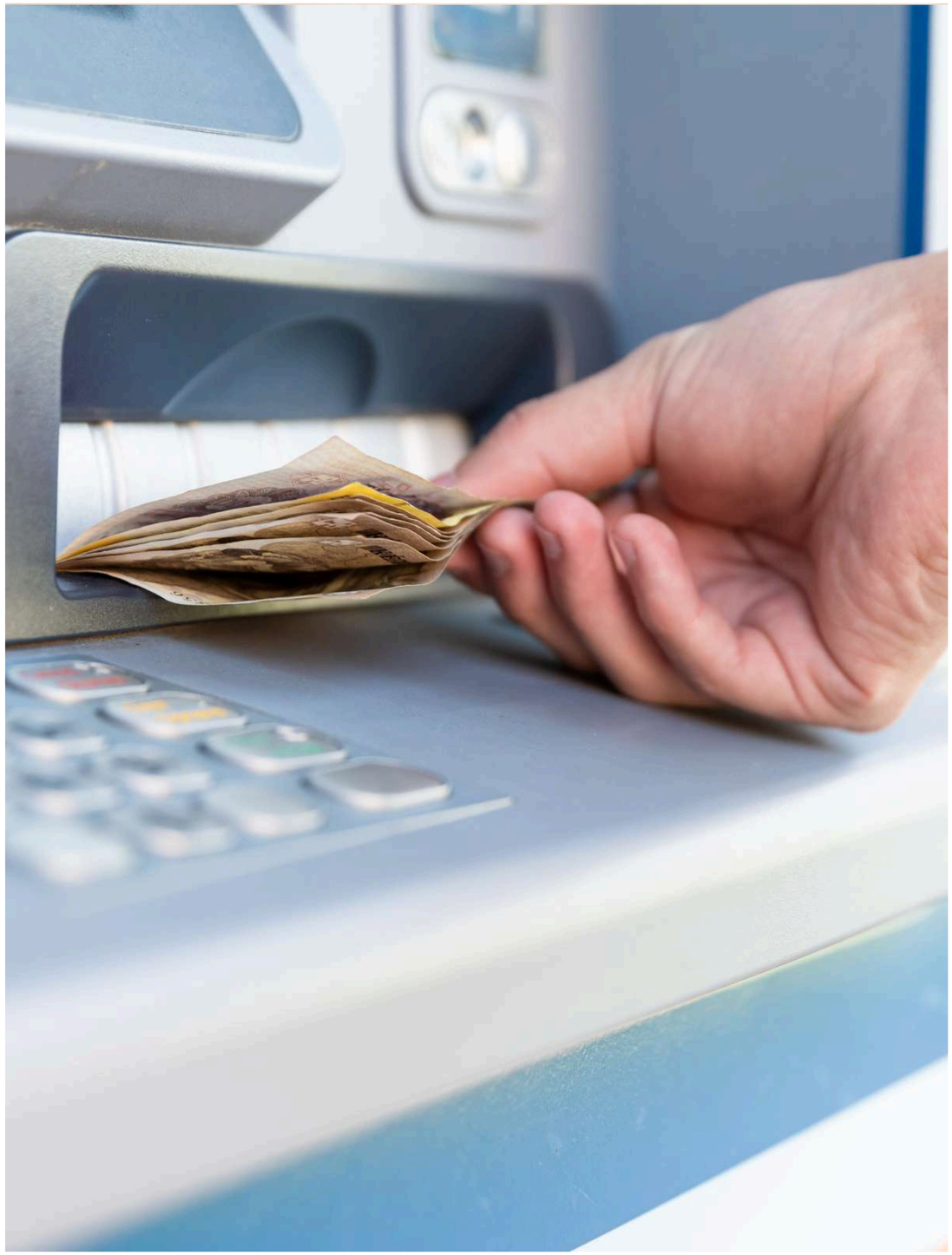
the same and repeated what is stated in the earlier affidavit with an addition only reference to annual Central Action Plan 2024-25 and Vivad se Vishwash Scheme, 2024 for issue of pendency of more than 5,80,000 Appeals before the CIT (Appeals). Be that as it may, if the respondents are not interested in resolution of the issue of pendency of the Appeals the manner in which it ought to have been resolved by classifying the Appeals as per the issues concerning the recurring issues, covered issues, etc., we are of the opinion that no recovery should be made from the appellants during the pendency of the Appeals.

Therefore, in all these petitions, there shall be no recovery of any outstanding dues from the petitioners whose Appeals are pending during pendency of these petitions. The appeal was accordingly decided in favour of the appellant.

Source : High Court, Gujarat in the case of Om Vision Infraspace (P.) Ltd. vs ITO vide [2024] 167 taxmann.com 709 (Gujarat) on October 15, 2024



Where appellant made frequent deposits and cash withdrawals in his bank account, looking at pattern of deposits and withdrawals, appellant should not be denied benefit of peak credit and thus, only peak shortage could be considered as unexplained income



Facts

The case of appellant-individual was taken up by AO for proceeding u/s 147 by issuing notice u/s 148 for the reason of cash deposits made in bank a/c during the FY 2010-11. Thereafter, the AO also issued notices u/s 142(1). All notices issued by AO remained uncompiled with. Ultimately, the AO called bank-statement of appellant directly from concerned bank u/s 133(6). On the basis of entries found in bank-statement, the AO made addition of INR 2,47,881 on account of salary income and of INR 11,61,000 on account of unexplained deposits in bank a/c and thereby completed assessment u/s 147/144 determining total income at INR 14,08,880. Aggrieved, the appellant carried matter in first-appeal whereupon the CIT(A) granted a part-relief of INR 22,748 in the matter of addition of INR 2,47,881 made by AO on account of salary income and thereby upheld remaining addition of INR 2,25,133. Further, the CIT(A) upheld fully the addition of INR 11,61,000 made by AO on account of unexplained deposits in bank. Now, the appellant is in appeal before ITAT and has raised following grounds:

- The Ld. CIT(A) erred in confirming the addition of INR 2,25,133 on account of salary out of total addition of 2,47,881 made to the income of the appellant.
- The Ld. CIT(A) erred in upholding the action of the AO in making an

addition of INR 11,61,603 to the income of appellant on account of unexplained cash deposits.

Ruling

ITAT held that we have considered submissions of both sides and perused the documents to which our attention has been drawn. Admittedly, the AO has made impugned addition of INR 11,61,000 by just aggregating various credit/deposits made by appellant throughout the FY. On perusal of bank statement, we find that the appellant has made frequent deposits in bank a a/c and it is not a case of one-time sudden deposit. Further, the appellant has also made frequent cash withdrawals from the very same bank a/c. Therefore, looking at the pattern of deposits and withdrawals, the appellant should not be denied the benefit of peak credit. That means, only peak-shortage can be considered as unexplained income. This is in consonance with the view taken by various judicial forums. Bearing in mind this, we have carefully examined the three alterative cash-flow statements filed by appellant in Paper-Book and find the 3rd cash flow statement starting from opening balance of INR 2,00,000 as on 01-04-10 is more appropriate as the appellant was having immediate source to show net cash of INR 2,00,000 available with him from withdrawals/deposits made from very same bank immediately before 01-04-10. According to this statement, ITAT find that there is a peak shortage of INR 1,05,000 on 01-06-10 which can only be treated as unexplained. Consequently, the addition amade by AO is restricted to the extent of INR 1,05,000 and the rest of the addition is

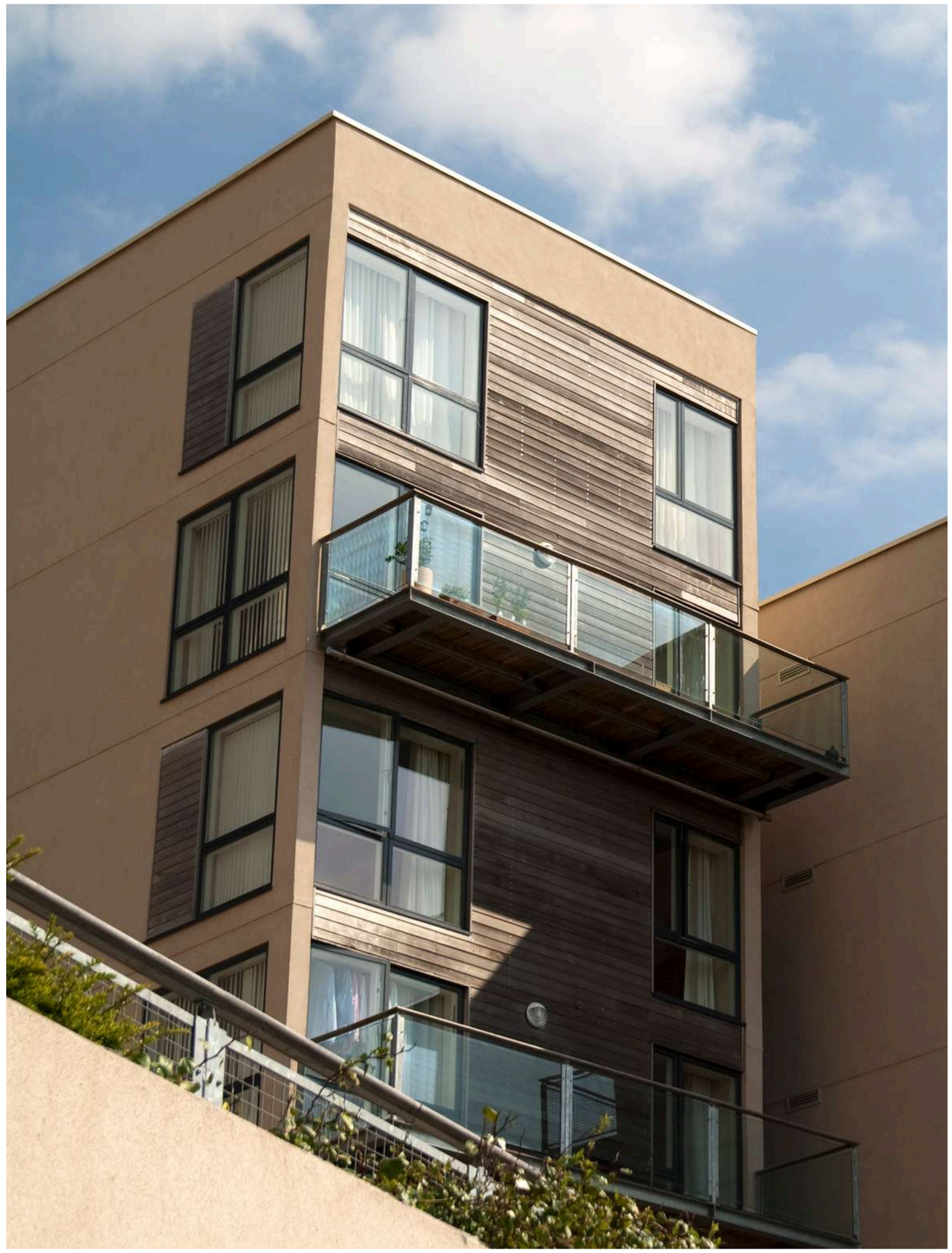
deleted. The appellant gets partial relief accordingly.

Source : ITAT, Indore in the case of Kamal Chand Sisodiya vs ITO vide [2024] 167 taxmann.com 671 (Indore - Trib.) on October 11, 2024

Revised plan clearly established that said two flats though independently purchased by appellant were to be used as a single unit, exemption under section 54F could not be denied to appellant so long as house was used by appellant as one single unit

Ruling

The appellant being an individual had filed his return of income declaring total income at INR 1,01,52,950 after claiming deduction under Chapter VIA at INR 1,60,000. The case was selected for scrutiny to verify deduction/exemption from capital gains, investment in immovable property and foreign asset. Statutory notices under section 143(2) and 142(1) wherein it was submitted by the appellant that he was a shareholder in Binary Life Technology Pvt Ltd by virtue of subscribing to its share capital on its incorporation on 11-01-10. Vide letter dated 28/08/2018 before the Ld.AO, appellant submitted that he was holding 5000 shares of INR 10 each at a total cost of acquisition of INR 50,000. Subsequently, the company was converted into a Limited Liability Partnership. Upon conversion, the amount of capital and accumulated profit was credited into the capital account of appellant in the LLP, amounting to INR 23,46,81,043. The appellant submitted that, the gain was invested in residential property subsequently, which was entirely tax free. It is submitted that appellant had furnished all



relevant details/documents in support of the claim including the conversion certificate of the company into LLP, accounts of Binary Life Technology Pvt Ltd and the details of investment made by the appellant in the residential property. The Ld. AO observed that, the appellant claimed deduction u/s 54F and purchased two flats, one being 1402 & the other being 1401 in Terra West C, Rustomjee Elements, New D.N. Nagar, Andheri (W), Mumbai. The Ld.AO was of the opinion that the appellant violated the provisions of section 54F by purchasing two flats as against one as required under section 54F and thus recomputed the claim of appellant by disallowing the long-term capital gain invested in both the flats. Aggrieved by the order of the Ld. AO, appellant preferred appeal before the Ld. CIT(A) who, after considering the documents filed by the appellant allowed the claim in respect of one of the houses on pro-rata basis and directed the Ld.AO to re-compute the deduction u/s 54F. Aggrieved by the order of the Ld. CIT(A), both appellant as well as the revenue are in appeal before this Tribunal.

Ruling

At this juncture ITAT referred to the Special Bench decision of this Tribunal in case of ITO v. Ms. Shushila M. Jhaveri reported in [2007] 107 ITD 327/14 SOT 394 (Mumbai), wherein exemption u/s 54 was held to be allowable only in case of purchase of a single house wherein the word "a" means "any" which, in turn, means "many" or "more than one". According to various dictionary meanings, it also includes "one" or "one out of many". The word any" may have several meanings according to the circumstances. It may mean "all", "each", "some" or "one or more out of several" but it is not confined to a plural sense. It may also be used to denote "one". So, both the words "a" and "any" are ambiguous and, therefore, the meaning of these words has to be seen with reference to the context in which these words are used." Further, it was held that "The word "any" has been used by the Legislature in sections 54B, 54D, 54E, 54EA and 54EB while as the word "a" has been used in sections 54 and 54F. This clearly shows that the Legislature intended different meanings to be given to these two words. A close reading of these sections shows that the Legislature intended to allow exemption in respect of investment in more than one asset by using the word "any". Hon'ble Special Bench in the above referred decision focused their discussion on the word "a" and held that exemption u/s 54/54F would be available in respect of one house only. But where two houses joint together constitutes a single unit for residence, then exemption would be available to such joint residential house. Hon'ble Special Bench, also noted that, where two units are distantly situated, then it could not constitute to be "a residential house" and, therefore, exemption will be available only to one residential house at the option of the appellant. ITAT therefore, do not find any reason to dismiss the claim of the appellant based on surmises and conjectures of the authorities below and therefore directed the Ld. AO to grant complete as claimed by the appellant.

Source : ITAT Mumbai in the case of Nakul Aggarwal vs ACIt vide [2024] 167 taxmann.com 540 (Mumbai - Trib.) on October 14, 2024

Since succession of firm into company had taken into effect from 27-03-17 and all assets and liabilities of firm relating to business of firm immediately before succession i.e. on 26-03-17 became assets and liabilities of appellant company and there was no evidence available to show that partners had received consideration at time of succession, there was no violation of conditions laid down in section 47(xiii), proviso (a) or (c) and appellant was entitled for exemption u/s 47(xiii)

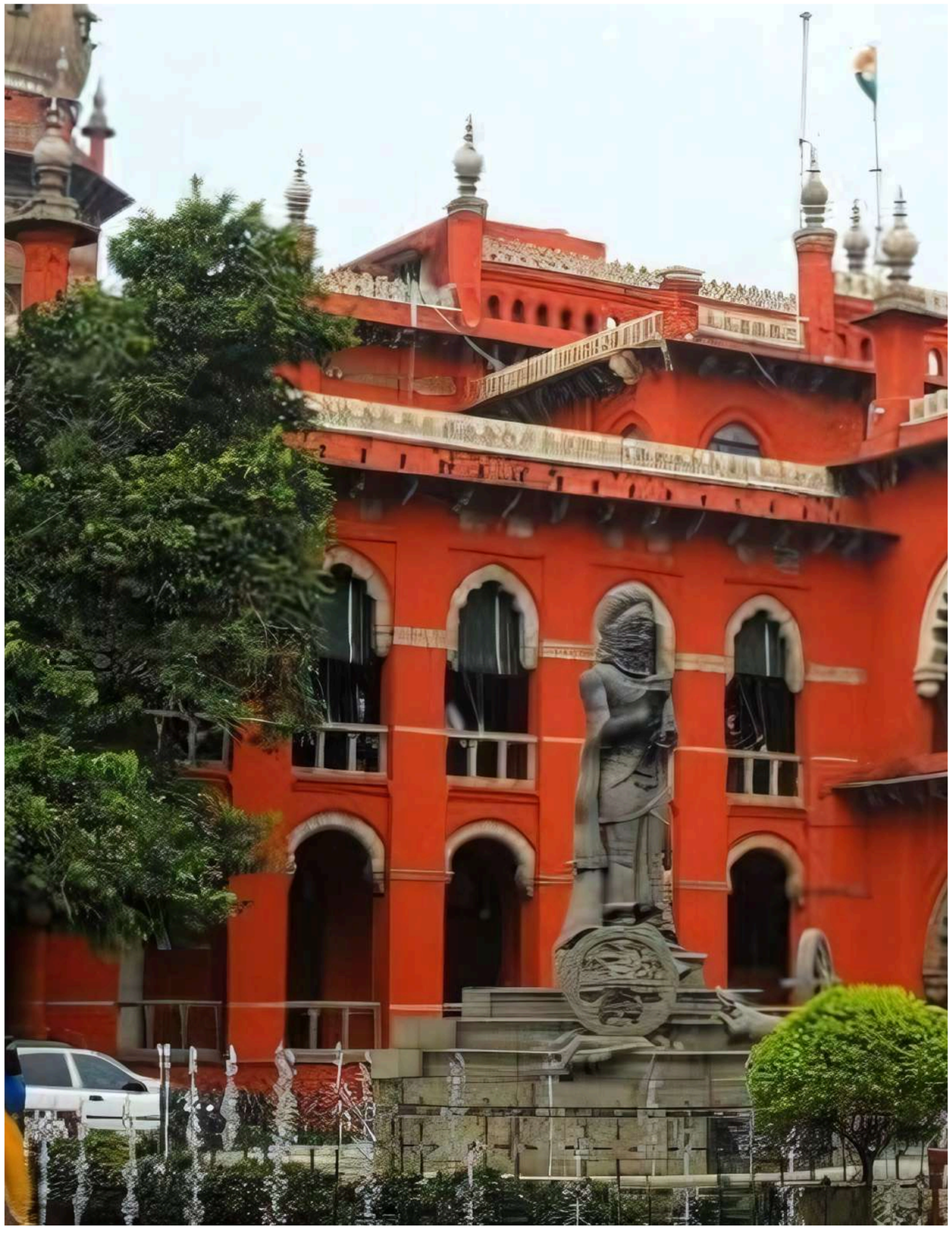
Facts

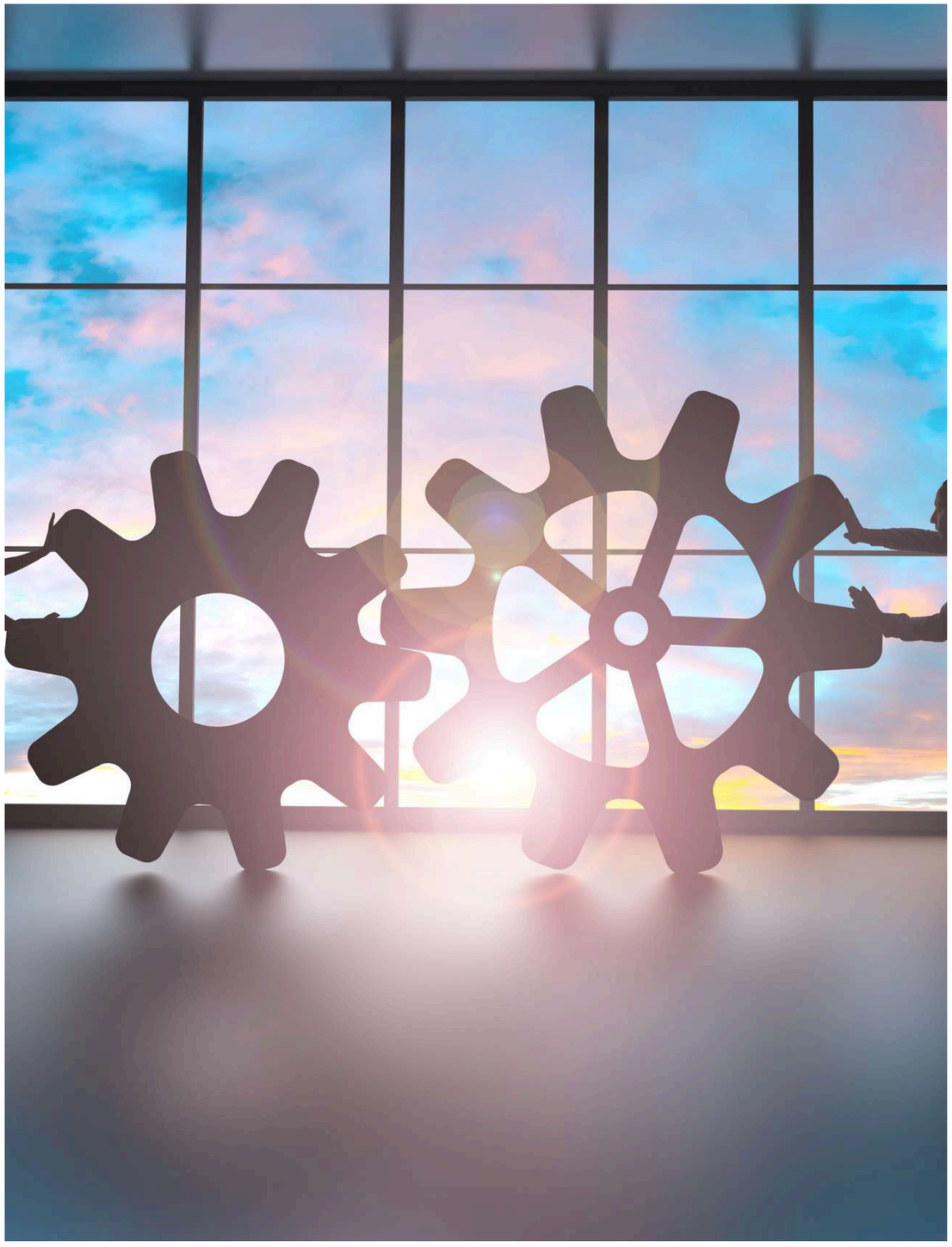
A search was carried u/s 132 during which, some records were found and seized by the department. Thereafter, notice u/s 153A was issued for which the assessee filed its return of income on 29-11-21 declaring a loss of INR 2,83,86,495 which was already reported in the original return. Thereafter, notices u/s 143(2) & 142(1) were issued along with detailed questionnaire. The assessee filed their explanations and also produced the documents called for by the AO. The AO by his order had determined the total income of the assessee at INR 189,11,81,757 as against the loss reported by the assessee by making the addition of capital gains on the conversion of partnership firm M/s. Perpetual Investments into the assessee company. The assessee challenged the above said order of assessment before the ld. CIT(A) on the ground that there was no seizure of any incriminating materials at the time of search and the assessment made u/s143(3) is bad in law since no notice u/s 143(2) was issued by the AO. The assessee also contended that the addition made under the head "Long Term Capital Gain" on conversion of the partnership firm into a company is also not in

in accordance with section 47(xiii). The ld. CIT(A) had dismissed the appeal and confirmed the addition made under the head capital gains and in respect of the ground No.6, which relates to the levy of interest u/s 234B & 234C of the Act, the ld. CIT(A) had remitted the issue to the file of AO for recomputing the interest while giving effect to the order. The assessee aggrieved with the order of the ld. CIT(A) had filed the present appeal before this Tribunal.

Ruling

ITAT had placed reliance on **Hon'ble Madras High Court dated 01-12-15 in T.C (A) No.2619 of 2006 in the case of M/S CADD Centre v. ACIT** and held that we do not find any merit in the above finding of the AO. We have verified the balance sheet as on 26-03-17 which was also extracted by the AO in his order and the statement showing the reserves and surplus for coming to the conclusion that the assessee had violated clause (a) & (c) of the Section 47(xiii). The language of section 47(xiii) is very simple and it has not restricted anything done prior to the succession i.e. before 26-03-17 and therefore, the transactions pointed out by the AO was done by the firm well before succession and not immediately before succession. In order to attract the proviso, the AO should establish the fact that the partners had received consideration or benefit other than the allotment of shares in the company. In the case on hand, there is no such evidence to show that the partners had received any consideration from the company apart from the shares. On the wrong interpretation of the provision the AO cannot assume





that the assessee had violated the provisions and therefore, long term capital gains would arise for the transfer of the firm into company.Furter, ITAT also stated that we have also gone through the various documents filed by the assessee and found that the sale of the capital asset, i.e. shares of ACT, by the firm was made long time back and thereafter, because of their constitution of the firm, the surplus amounts stood in the capital account of the partners were withdrawn much before the succession and therefore we are of the view that the same could not be treated as consideration received by the partners for the transfer of the firm into a company. The firm in its normal course of business had affected the sale of shares and by no stretch of imagination it could be treated as consideration received by the partners for effecting the transfer and hence the same is also not a violation committed by the assessee in order to get the benefit prescribed u/s 47(xiii). We do not find any merit in the above finding of the AO since Section 47(xiii) proviso (c) of the Actspecifies that the partners should not receive any consideration or benefit directly or indirectly other than byway of the allotment of shares in the company when there is a transfer of capital assets by a firm to a company as a result of succession of the firm by a company in the business carried on by the firm. The provision also does not authorize the AO to treat the withdrawal of capital from the erstwhile partnership firm before the succession took place as consideration received for effecting the succession. Further, there is no evidence available with the AO to show that the partners had received consideration at the time of succession and the AO also not brought out any

specific instances of receiving any consideration at the time of effecting the succession. As seen from the various records, and the balance sheet, it is clear that before the transfer of the firm into a company, the partners have withdrawn their surplus share capitals and therefore, there is no evidence or any materials available with the AO to show that the partners have received consideration for the purpose of transferring the assets and liabilities of the firm to the assessee company. The partners have withdrawn their surplus capital amount after the reorganization of the firm and not immediately before the succession and therefore, it cannot be treated as consideration received for the transfer of the assets and liabilities of the firm to the company. Therefore, we are not agreeing with the reasons adduced by the AO in order to attract proviso (c) to section 47(xiii) of the Act. In the present case, there are no violation of the conditions laid down in section 47(xiii) proviso (a) or (c)of the Act and therefore, the order of the AO treating the value of the assets and liabilities of the firm, as capital gain obtained by way of transfer of capital asset liable to be taxed under the head long term capital gains u/s 45(4) is not sustainable. In the result, appeal filed by the assessee is allowed.

Source : ITAT Bangalore, in the case of Atria Wind (Kadambur) (P.) Ltd. vs DCIT vide [2024] 168 taxmann.com 8 (Bangalore - Trib.) on October 15, 2024

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