IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'G' NEW DELHI

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER
[Through Video Conferencing]

ITA No.7826/Del./2018
Assessment Year: 2011-12

ACIT, Central Circle-06, New Delhi	**Vs.**	M/s. Oxygen Business Park Pvt. Ltd. (Formerly known as Achvis Softech Pvt. Ltd.), Plot No. -7, Sec- 144, Noida
		PAN :AAGCA4439E
(Appellant)		**(Respondent)**

Appellant by	Sh. Sanjeev Sapra, CA
Respondent by	Sh. H.K. Chaudhary, CIT(DR)

Date of hearing	03.06.2021
Date of pronouncement	28.06.2021

ORDER

PER O.P. KANT, AM:

This appeal by the Revenue is directed against order dated 27/09/2018 passed by the Learned Commissioner of Income Tax (Appeals)-24, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2011-12 raising following grounds:

1. *The order of Ld. CIT(A) is not correct in law and facts.*
2. *That on facts and circumstances of the case, the Ld. CIT(A) has erred in quashing the reassessment order passed by Assessing Officer u/s 153A r.w.s. 143(3) & deleting the addition of Rs.13,30,50,000/- made by the Assessing Officer by way of*

disallowance of deduction claimed u/s 80IAB of the Income Tax Act, 1961 on the ground that no incriminating material was unearthed during the search operation and therefore no addition can be made in assessment order passed u/s 153A r.w.s. 143(3) in this year.

3. *The appellant craves for leave to add, amend any/all the ground of appeal before or during the course of hearing of the appeal.*

2. Briefly stated facts of the case relevant to dispute before us are that the assessee, a company, was engaged in the development of Special Economic Zone (SEZ) for Information Technology (IT)/Information Technology enabled services (ITes) in Noida (Uttar Pradesh). For the year under consideration, the assessee filed return of income on 30/09/2011 declaring nil income. A search and seizure action under section 132 of the Income-tax Act, 1961 (in short 'the Act') was carried out at the premises of the assessee on 29/10/2013. A notice under section 153A of the Act was issued on 11/11/2014 for filing return of income consequent to search action. The assessee requested to treat the original return of income filed on 30/09/2011 as return filed in response to notice under section 153A of the Act. In the return of income, the assessee declared net profit of ₹ 155,13,39,200/-, which was claimed as deduction under section 80IAB of the Act. The Assessing Officer noticed that assessee sold SEZ buildings to two of its subsidiary companies, which were admitted as co-developer of SEZ. Tower A of SEZ building was transferred (subleased) to M/s Aachvis IT SEZ Infra Private Limited at value of ₹ 247 crore and Tower B of SEZ building was transferred (subleased) to M/s Standard IT Web Solutions Private Limited at value of ₹ 78 crore. According to the Assessing Officer, different rate adopted for transfer (or sublease) of two towers by

the assessee was not justified. The Assessing Officer reduced the excess profit and consequent deduction under section 80IAB observing as under:

> *"3.8 From the above discussion, it is clear that value of 5322 sqm of land transferred @ of Rs. 50,000/- sqm to Standard IT Web Solutions Pvt. Ltd. is excessive and should have been at 50% of the value rate adopted. Thus correct value of land works out to Rs. 13,30,50,000/- (5322 x 25,000) as against Rs. 26,61,00,000/- (5322 x 50,000) adopted by the valuer and the assessee. Excess value of land is not allowable as deduction as provided under the provisions of section 80IA (8) and 80IA (10) as discussed above. In view of above discussion, deduction claimed u/s 80IAB to the extent of Rs. 13,30,50,000/- is disallowed and added back to the income declared in the Return of Income. The undersigned is satisfied that the assessee has furnished inaccurate particulars of its income and is liable for penalty u/s 271(1 Me) of the Act Penalty proceedings u/s 271 (1)(c) are initiated separately."*

2.1 On further appeal, the assessee challenged legality of assessment by way of additional ground and also challenged the addition on merit. According to the assessee, the part disallowance of deduction under section 80IAB is not based on any incriminating material found during the course of the search and therefore in view of various decision of the Hon'ble High Court's, no addition could have been made under 153A proceedings. The Ld. CIT(A) sought comment from the Assessing Officer on the additional ground raised by the assessee challenging legality of addition. In the remand report, the Assessing Officer referred to appraisal report (a report sent by the Investigating Officer to the Assessing Officer on inquiries carried out by him and comment on the evidence collected during search and post search proceedings) and submitted that addition was based on core documents being documents and statement recorded both during and post search proceeding. The Ld. CIT(A)

in his detailed factual finding held that in the assessment order for making addition there was only reference of the statement of valuer Sh. B.P. Singh, which was recorded in post search proceedings and therefore addition was not based on any incriminating material found during the course of the search. The relevant discussion in the impugned order on the issue whether the disallowance of deduction under section 80 IAB is based on incriminating material or not, is reproduced as under:

> *"4.7 The AO has referred to the appraisal report and stated that the perusal of the appraisal report shows that the case is based on core documents being documents and statements recorded both during and post search proceedings. The appraisal report is a confidential document and cannot be confronted to the appellant. Therefore, mere reference to the appraisal report does not establish the case of the AO. It is undisputed that the incriminating material would be used for the assessment (otherwise, it cannot be said to be incriminating). In the report dated 12.09.2018, the AO has not stated which seized documents have actually been used for the assessment. As can be seen from the perusal of the assessment order, specilicaiiy the above reproduced portion of the assessment order (ref. para 3.2 of the assessment order) that the only specific reference is to the statement of Sh. B.P. Singh, the valuer. The date of the statement has not been mentioned. However, it has been clearly stated that the statement was recorded in the post search proceedings.*
>
> *4.8 The AO has also referred to the statements of the employee of M/s Aachvis Softech (P) Ltd and Three C Universal Group, that the appellant and the entities (namely, i) M/s Standard IT Web Solutions Pvt. Ltd., ii) M/s Aachvis IT SEZ Infra (P) Ltd and iii) Three C Facility Management Ltd} are related as co-developers in SEZ and are actively involved in the business related to SEZ. First of all, it is a general information that the appellant and the entities (namely i) M/s Standard IT Web Solutions Pvt. Ltd., ii) M/s Aachvis IT SEZ Infra (P) Ltd. and iii) Three C Facility Management Ltd.} are related as codevelopers in SEZ and are actively involved in the business related to SEZ. This, by no stretch of imagination, can be said to be 'incriminating'. This kind of information is, otherwise, freely available in the relevant business circle and cannot be said to be 'unearthed' due to search. Secondly, the names of the employees whose statements are being referred to have not been specified. Nor*

specific contents of the statements have been mentioned. Certainty, the assessment order does not refer to any such statements.

4.9 A perusal of above reproduced para 7 of the notice dated 14.10.2015, in para 4.5 above, shows that till issue of this notice dated 14.10.2015, the department was only aware of said transfer but not of any further details (that is why details mentioned therein were requisitioned).

4.10 From the perusal of the assessment order, it is noted that it cannot be the case of the department that the transaction of sale/transfer of SEZ to Aachvis IT SEZ Infra Pvt. Ltd. and Standard IT Web Solution Pvt. Ltd. was not recorded in books of accounts. In fact, the profit out of the said sale/transfer has been accounted in books of accounts and deduction u/s 80IAB has been claimed. It is mentioned in the assessment order that in response to notice u/s 153A, AR of the appellant requested to treat original return filed on 30.09.2011 as return filed in response to notice u/s 153A. Subsequently, the AO has reduced the deduction claimed u/s 80IAB because of the dispute on valuation of sold/transfer land. Therefore, there it cannot be under dispute that the fact of transfer/sale of SEZ to Aachvis IT SEZ Infra Pvt. Ltd. and Standard IT Web Solution Pvt. Ltd. was recorded in books of accounts and corresponding return was filed and intimation u/s 143(1) was received before the date of search. A perusal of balance sheet of M/s Aachivis Softtech Pvt. Ltd. for the year ending 31.03.2011 shows that as per sub-paras i), ii) and iii) of para 3 of Schedule 12 (Significant accounting policies and notes annexed to and forming part of Balance Sheet as at 31st March, 2011 and the Profit and Loss Account for the year ended on that date), it is mentioned that there was lease deed dt. 31.09.2007 with NOIDA Authority and later on sub-lease agreements were executed namely i) Co-Development agreement dt. 30.11.2009 read with supplementary Co-Development agreement dt. 30.10.2010 with M/s Aachivis IT SEZ Infra Pvt. Ltd. and ii) Co-Development agreement dt. 30.11.2010 with M/s Standard IT Web Solution Pvt. Ltd. A copy of relevant portions of the said Schedule 12 are reproduced below:

AACHVIS SOFTECH PRIVATE LIMITED

SCHEDULE '12'

Significant accounting policies and notes annexed to and forming part of Balance Sheet as at 31" March, 2011 and the Profit and Loss Account for the year ended on that date :

1. Background

The Company/was incorporated on 9th July, 2007 with the main object to acquire land and to construct and develop/operate/maintain the building for setting up

sector specific special economic zone for IT/ITES Sector. The Company has constructed and developed a SRZ building at Plot No. 7, Sector 144, Noida, Uttar Pradesh, part of which is under progress.

.....

3. Notes?

i) in terms of Lease Deed dated 2st September, 2007, the New Okhla Industrial Authority (NOIDA Authority), the Lesser, vide letter dated 13/11/2006 has allotted 1,00,498 sdq. Metres of land Plot No. 7, Sector 144, Noida Uttar Pradesh ("the said plot") for the purpose of developing, operating and maintain the sector specific Special Economic Zone for ITES/ITES sector and vide their approval letter dated 7th February 2008, the Company became entitled to hold such leasehold Land for a term of 90 years. Out of the total consideration for such leasehold land, the Company had made part payment was made before signing of the lease deed on 21st September, 2007 while, the balance consideration was payable in 16 half yearly installments (which commenced on 12th May, 2007) along with interest rate of 11 % p. a. on outstanding balance , NOIDA Authority has the first charge upon the demised promises for the amount of unpaid balance, charge, interest and other dues.

ii) The Company has executed a Co-Development agreement dated 30th November 2009 read with supplementary Co-Development agreement dated 30th October 2010 with M/s. Aachvis IT SEZ Infra Pvt. Ltd., ("Sub-lessee") for appointment of Sub-lessee as the co-developer to undertake to develop, operate and maintain the IT SEZ project along with the Company of the said IT SEZ on 52,038 sq. metres out of a total area of 1,00,498 sq. metres of the said plot, which was duly approved by the Board of Approval, Ministry of Commerce, Govt. of India ("BOA") , vide approval letters dated 19-04-2010 and 01-12-2010 and accordingly on 31st December, 2010, a Tripartite Sub-Lease Deed was executed between the Noida Authority, the Company and fee Sub-Lessee.

iil) The Company has further executed another Co-Development agreement dated 30th November 2010 with M/S. Standard IT Web Solutions Pvt. Ltd,, ("Sub-lessee") for appointment of Sub-lessee as the co-developer to undertake- to - develop, operate and mamtain.fee TT.SEZ project along with the Company of the said IT .SEZ on 5,322 sq. metres as separately earmarked out of a total area of 1,00,498 sq, metres of fee said Plot, which was duly approved by fee BOA, vide approval letter dated 19-04-2010 and accordingly on 31st December, 2010, a Tripartite Sub-Lease Deed was executed between the Noida Authority, the Company and the Sub-Lessee.

4.11 A perusal of audit report u/s 80IAB (Form No. 10CCB) in case of M/s Aachivis Softtech Pvt. Ltd. for AY 2011-12 (ref. column no. 28) shows that there were reporting of transactions between M/s Aachivis Softtech Pvt. Ltd. and i) M/s Aachvis IT SEZ Infra Pvt. Ltd. and ii) M/s Standard IT Web Solution Pvt. Ltd. A copy of relevant portions of the said Schedule 12 are reproduced below:

28 Transactions by the undertaking to a related concern of the assessee, or another undertaking of the assessee, or the co-owner of the undertaking, or another undertaking of the co-owner :

[Related concern is a person within the meaning of section 40A(2)(b)]

	Name of Related Concern	Transaction	
		Nature	(Amount in rupees)
i	Design and Development	Project design fees paid	5,18,85,120
ii	Aachvis IT SEZ Infra (P) Ltd.	Income from development of SEZ	2,47,02,62,590
iii	Standard IT Web Solutions (P) Ltd.	Income from development of SEZ	78,88,39,012

29 Profits and gains derived by the Undertaking/enterprise from the Eligible business — Rs. 155,13,39,200.

30 Deduction under section 80-I/80-IA/80-IB/80-IC (Strike out whichever is not applicable). — Section 80IAB: Rs. 155,13,39,200.

4.12 Therefore, the above mentioned reference in the notice dated 14.10.2015 that "Perusal of the documents found during and post search shows that you has transferred/sold a SEZ to Aachvis IT SEZ Infra Pvt. Ltd. and Standard IT Web Solution Pvt. Ltd." cannot be said to be indicating that any incriminating material was found during the search. It is clearly referring to the transaction which had already been recorded in books of accounts as well as finalised balance sheet. Hon'ble Delhi High Court while delivering judgment in the case of CIT Vs. RRJ Securities Ltd. [2015] 52 taxmann.com 391 (Delhi) has observed that if the books of accounts/documents seized do not reflect any undisclosed income, the assessments already made cannot be interfered with. The relevant portion of the judgment is reproduced below:

"35. The AO of the person other than the one searched also, is not, at the stage of issuing notice under Section 153C/153A of the Act, required to conclude that the assets/documents handed over to him by the AO of the searched person represent or indicate any undisclosed income of the Assessee under his jurisdiction. As explained in SSP Aviation (supra), Section 1.53C only enables the AO of a person other than the one searched, to investigate into the documents seized and/or the assets seized and ascertain that the same do not reflect any undisclosed income of the Assessee (i.e a person other than the one searched) for the relevant assessment years. If the seized money, bullion, jewellery or other valuable article or thing seized as handed over to the AO of the Assessee, are duly disclosed and reflected in the returns filed by the Assessee, no further interference would be called for. Similarly, if the books of

accounts/documents seized do not reflect any undisclosed income, the assessments already made cannot be interfered with. Merely because valuable articles and/or documents belonging to the Assessee have been seized and handed over to the AO of the Assessee would not necessarily require the AO to reopen the concluded assessments and reassess the income of the Assessee." (emphasis supplied)

4.13 Once it is not under dispute that the fact of transfer/sale of SEZ to Aachvis IT SEZ Infra Pvt. Ltd. and Standard IT Web Solution Pvt. Ltd. was recorded in books of accounts and corresponding return was filed and intimation u/s 143(1) was received before the date of search, there is inevitable conclusion that the 'documents' referred to in the above reproduced portion of notice dated 14.10.2015 were not incriminating.

4.14 Regarding, statement of Sh. BP Singh (valuer), recorded post search (date of recording of this statement is not mentioned) referred to in para 3.2 of the assessment order, it is mentioned that, "During the post search proceedings, statement of Sh. BP Singh, the valuer who had valued the land @Rs. 50,000/- per sqm was recorded. It was stated by him that the land rate was taken as Rs. 50000/- per sq. metre of the developed and working SEZ project where all the facilities were available for this project as per existing market rate in the nearby locality and considering the FAR. He was asked as to whether he was aware that the land was lease hold land for 90 years and he was also asked to explain as to how the valuation of land changes due to this reason. To this it was stated by him that in such a case the valuation should have been done at Rs. 25,000/- if this sale lease hold land."

4.15 It has been argued by the AR that the fact of land being leasehold has been mentioned in the valuation report prepared by Sh. B.P. Singh as on 31.12.2010 (submitted as Annexure-VIII, page no. 86 to 94 of the paper book submitted on 11.04.2018). The AR, therefore, argued that the fact of land being leasehold was already there in the knowledge of Sh. B.P. Singh and certainly, it was recorded in books of accounts before the action of search & seizure took place. It was not 'unearthed' as a result of search. Therefore, the statement of Sh. B.P. Singh does not come in the category of 'incriminating material' emanating from the search.

4.16 As stated in para 4.3 above, it is noted that the AO has stated in his report dated 12.09.2018 that valuation report as on 31.12.2010 of government approved valuer Sh. B.P. Singh was not a fresh evidence. It was available with the AO. The Form 0-1 of the valuation report is reproduced below:

FROM 0-1
[See rule-8d]
Report of valuation of Immovable (other than agricultural land, Plantations, forest, mines and quarries.)

PART –I, GENERAL

1. Purpose for which valuation is made	:	Fair Market value
2. Date on which valuation is made	:	31st DEC 2010
3. Name of the owner (lessee).	:	M/s AACHVIS SOFTECH P LTD.
4. If the property is under joint ownership. Co-Ownership and Share of each owner Are the Shares undivided.	:	Company - Owner
5. Brief description of property.	:	G +4- Storey with basement Val Only EXL TOWER-B ONLY
6. Location, street ward no.	:	SECTOR-144, NOIDA, ,U.P.
7. Survey/Plot no. Of land.	:	EXL. TOWER-B OF PLOT NO;7
8. Is the property situated in residential/ Commercial/Mixed/Industrial Area.	:	I.T.& SEZ AREA
9. Classification of locality. High class/Middle class/Poor class	:	HIGH CLASS
10. Proximity to civic amenities like schools, Hospital, Office, market, cinemas etc.	:	Available near by.
11. Means and proximity to surface Communication by which the locality is served.	:	By NOIDA-GREATER NOIDA EXPRESSWAY
LAND		
12. Area of land supported by documentary Proof ,shape dimension and physical Feature.	:	5322 sqmt .
13. Road or lanes on which the land is Abutting.	:	NOIDA TO G.NOIDA EXPRESS WAY.
14. Is it Freehold or leasehold land?	:	As per deed
15. If leasehold Land the name of lesser/ Lessee/Nature of the Lease etc.	:	Details given in the land Registrations deed.
(I) Initial premium,	:	N.A.
(ii) Ground rent.		-do-
(iii) unearned increase payable to the lesser in the event of sale or transfer		
16. Are there any agreement of easement? If so, attach copies.	:	Nil

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(B.E. (Civil)
Govt. App. Valuer, Chartered
Engineer, App. Architect
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M.C.D. E-1138

17. Is there any restrictive covenant In regard to use of land? If so Attach a copy of covenant.	:	IT & SEZ AREA
18. Does the land fall in an area i/e in any Town Planning scheme Or development Plans of Govt. or any other statutory body ? If so,give particulars.	:	NOIDA
19. Has any contribution been made towards Development or is any demand for such contribution still outstanding?.	:	Nil
20. Has the whole or part of the land been notified for acquisition by govt. or any statutory body ? Give date of notification.	:	No
21. Attach a dimension site plan	:	to be submitted by owner, if demanded
IMPROVEMENT:		
22. Attach plans elevation of all structure standing on the land and layout plan.	:	-Do-
23. Furnish technical detail of the building on a separate sheet.	:	-do-
[The annexure to this form may be used]		
24.a) Is the building owner occupied /tenant/both b) If parts owner occupied specify portion and extent of area under occupation.	:	self Occupied
25. What is the floor space index permissible & percentage actually utilized.	:	As per site.
RENT		
26.i) Name of the tenants/leases/ license etc. ii) Portion on their occupation. iii) Monthly or annual rent /composition. iv) Gross amount received for the whole Property.	:	AS PER LEASE DEED
27. Are any of the occupants related to or close business associates of the owner.	:	N.A.
28. Give details of water & electric Charge If any born by Owner	:	OWNER
29. Has the tenants to be are the whole Or part Of the cost of repair & maintenance? Give particulars.	:	As per deed
30. If a lift is installed, who has to bear the cost Of maintenance & operation. owner or tenant.	:	Yes

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31.	If pump is installed. Who has to bear The cost Of maintenance & operation owner or tenant.	:	Owner
32.	Who has to bear the cost of electricity Charge For common space like entrance hall, stair Passage compound owner or Tenant .	:	owner
33.	What is the amount of property tax that Is to Bear it? Give detail white documentary proof.	:	Owner
34.	Is the building insured/ if so give the policy. No. Insured amount & the annual premium.	:	
35.	Is any dispute between tenant & landlord Regarding rent pending court of law.	:	No
36.	Has any standard rent been fixed for The premises any law relating to the control of rent?	:	No
37.	Give instance of sales of immovable Property In the locality on a separate sheet, indicating the name & address of the property Registration No. price& area Sold.	:	N.A.
38.	Land rate adopted in this valuation.	:	Land rate @ Rs.50,000/sqmts Market rate
39.	If sale instances are not available or not relied upon the base of arriving at the land rate.	:	N.A.
	COST OF CONSTRUCTION		
40.	Year of commencement of construction & year of Completion.	:	2007-2010
41.	What was the method of construction By Employing Labor direct / both.	:	Contract
42.	For item of work done contract, produce copies of agreement.	:	
43.	For item of work done by engaging labor Labor directly give basic rated materials and labor supported , by documentary proof.	:	-

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4.17 It can be seen from column 14 and 15 of the above reproduced From 0-1 that in response to a question, "Is it free hold or lease hold land/", the valuer did not say that it was freehold land. The valuer has stated, 'as per deed'. In view of this documentary evidence, it is clear that the valuer was already aware that the land was leasehold land. Therefore, it is difficult to brush aside the argument of the AR that the fact of land being leasehold was not unearthed as

a result of search and the statement of Sh. B.P. Singh does not come in the gory of 'incriminating material' emanating from the search.

4.18 In case of statement recorded u/s 132(4) {which is recorded during the search and can be argued to be emanating from the search} Hon'ble Delhi High Court while delivering judgment in case of Best Infrastructure (India) (P.) Ltd. Vs. Pr. CIT, Delhi-2 [2017] 84 taxmann.com 287 (Delhi) referred to another judgment of Hon'ble Delhi High Court in case of CIT v. Harjeev Aggarwal [2016] 70 taxmann.com 95/241 Taxman 199 (Delhi) and stated that statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material. The relevant portion of the judgment is reproduced below:

> *"38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra)."*

4.19 Since, it has been mentioned in the assessment order that the statement of Sh. B.P. Singh was recorded during post search investigation, therefore, it is not recorded u/s 132(4) and hence, prima facie it is not coming under the category of material unearthed during the search. Therefore, it is a material which emanated from the search. However, this onus has not been discharged."

2.2 Thereafter, the Ld. CIT(A) following the judicial precedents on the issue in dispute quashed the impugned reassessment order of the Assessing Officer, observing as under :

> *"5.3 It is held that the AO was not within the jurisdiction bestowed on him by law to make the impugned addition and, therefore, ground (nos. 7 and 8) are allowed the re-assessemnt order under reference is accordingly quashed."*

2.3 Aggrieved, the Revenue is in appeal before the Income Tax Appellate Tribunal (in short 'the Tribunal') challenging the finding of the Ld. CIT(A).

3. We have heard representative of both the parties, who appeared through videoconferencing facility.

3.1 The Learned DR relied on the order of the Assessing Officer and referred to para 5(f) of the impugned order, which is

reproduction of the remand report of the Assessing Officer. The Learned DR submitted that in the remand report, the Assessing Officer has mentioned that disallowance of section 80IAB is based on the documents and statement recorded both during the search and post search proceedings, and therefore the Ld. CIT(A) is not justified in quashing the reassessment proceeding.

3.2 The Learned Counsel of the assessee, on the other hand, relied on the order of the Ld. CIT(A) and submitted that the Learned DR has merely repeated the contention of the Learned Assessing Officer in the remand report, which have already been considered and rejected by the Ld. CIT(A) and no new arguments have been raised by the Learned DR. According to him, the disallowance of deduction under section 80IAB has been made by the Assessing Officer on the basis of the statement of the Valuer, Sh. BP Singh i.e. the property transferred was leasehold property. He submitted that Ld. CIT(A) has already dealt this issue and held that the statement was recorded in post search proceeding and not in the nature of incriminating material found during the course of the search, and therefore Ld. CIT(A) is justified in holding that no addition could have been made in case of 153A proceeding in absence of an incriminating material.

3.3 We have heard rival submission of the parties and perused the relevant material on record. In the instant case, the only legal issue before us, is that whether the ratio of the Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla, (2016) 380 ITR 573 (Del) is applicable of the facts of the case of the assessee. In the case of Kabul Chawal (supra) Hon'ble High Court has held

that addition could be made under section 153A proceedings, if following two conditions are satisfied:

(a) assessment was pending as on the date of the search for the relevant assessment year

(b) incriminating material was found during the course of the search qua the addition/disallowance made.

3.4 In the instant case before us, both the parties agreed that no assessment was pending as on the date of the search and therefore the first condition is not disputed. The only dispute is regarding the second condition whether there was any incriminating material found during the course of the search qua the part disallowance of deduction under section 80 IAB of the act. The Learned Assessing Officer held transfer of land at the rate of Rs. 50000/ per square metre to M/s standard IT Web solutions private limited as excessive and applied the rate of ₹ 25,000 per square metre and reduced the profit accordingly. The Learned Assessing Officer in para 3.6 to 3.7 of the assessment order has given the basis for reduction in the rate of land. For ready reference , the relevant paragraph are reproduced as under:

> *"3.6 On consideration of replies of the assessee and facts of the case, it is evident that the assessee has transferred its assets and liabilities to its subsidiary companies and ip the process generated profits on account of revaluation of land, which has been leased out to its subsidiaries. This land was shown as work in progress in the books of assessee. Thus, the profits are related to the assets of the approved SEZ and therefore, the profits have to be treated as generated from the operation and maintenance of the SEZ, which is the condition provided in the Sec. 80IAB for availing deduction. However, the contention of the assessee as mentioned w.r.t differential valuation of land is not correct. It is stated by the valuer that in the case of lease hold land, the value is taken at 50% of its valued The valuer had also provided a copy of the relevant rules*

which were furnished to the assessee on its request. In these rules, under the head of "adjustment for unearned increase in the value of land, it is stated as under:

> *"Where the property is constructed on land obtained on lease from the Government, a local authority or any authority referred to in clause (20A) of section 10 of the Income Tax Act, and the Government or any such authority is, under the terms of the lease, entitled to claim and recovery specified part of the unearned increase in the value of the land at the time of the transfer of the property, the value of such property as determined under rule 3 shall be reduced by the amount so liable to be claimed and recovered or by an amount equal of fifty percent of the value of the property as so determined, whichever is less, as if the property had been transferred on the valuation date.*
>
> *Explanation. For the purpose of this rule, unearned increase means the difference between the value of such land on the valuation date as determined by the Government or such authority for the purpose of calculating such increase and the amount of the premium paid or payable to the Government or such authority for the lease of the land. "*

3.7 It is noted from the .reply that the assessee has merely stated that the above rule is not applicable for valuation of its land. It was not stated as to how then valuation is to be done and on the basisof which rule. Further, a valuer is an expert in his field and his opinion and basis of valuation cannot be rejected without any plausible reasons, the valuation has to be done on the basis of above rule and. the rule was-incorrectly applied by the valuer as he was not aware of the fact that the land was a leasehold land. Thus, assessee's submission regarding non-application of above rule is not acceptable.

Further, the assessee has contended that under section 80IAB, deduction is to be provided from total income and so, even if the excess valuation amount is treated as income from other sources, deduction is to be allowed. This interpretation by the assessee is incorrect as the section clearly provides that the deduction under this section is limited to the extent of 100% of profits and gains from the business. Gain from incorrect or excess valuation of land cannot be treated as profit and gains from the business of development and maintenance of SEZ.

Then, as discussed above, the assessee has claimed deduction u/s 80IAB of the Act. Deduction is provided under this section for eligible business income and not any artificially inflated income. Section

80IAB (3) provides that "the provisions contained sub Section (5) and sub section (7) to (12) of section 80IA shall apply to the special economic zones for the purpose of allowing deductions under sub section (1). Further, sub section (8) & (10) of section 80IA provide as under:

a) Section 80IA(8).:- "Where any goods [or services] held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods [or services] held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods [or services] as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods [or services] as on that date."

b) Section 80IA(10): "Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefore."

3.5 On perusal of the above paragraph of the assessment order, we find that basis of reducing the rate of transfer of land to M/s standard IT Web Solutions Private Limited, is statement of the Valuer Sh. B. P. Singh. The Ld. CIT(A) in the impugned order has dealt this issue and held that statement of the BP Singh has been recorded in post search proceeding. The fact that statement of the Sh. B.P. Singh was recorded in post search proceeding, has been mentioned by the Assessing Officer himself in para 3.2 of the assessment order. For ready reference, relevant paragraph is reproduced as under:

*"3.2 It is seen from the above table that the major part of the profit has been generated on account of sale of land part, which is not the actual business of the SEZ. Further, during the pose search proceedings, the assessee was asked the rationale of valuing one piece of land at Rs. 27,500/-sqm and another piece of land at Rs. 50,000/-sqm while they were in the same plot. The assessee stated that the plot valued at Rs. 27500/-sqm had a FAR of 2 while the other block had a FAR of 3.8. (2,21,000 (actual built area)/ 1,14,529 (as allowed for FAR 2)). This led to valuation of land of other block at Rs. 50,000 (Rs.27,500*3.8/2=Rs. 52250/-). As mentioned above, value of land given to two subsidiaries was Rs. 27,500/- sqm in one case and Rs. 50,000/-sqm in the other case.* ***During the post search proceedings, statement of Sh. B.P. Singh, the valuer who had valued the land at Rs. 50,000/- sqm was recorded.*** *It was stated by him that the land rate was taken as Rs. 50000/- per sq. metre for the developed and working SEZ project where all the facilities were available for this project as per existing market rate in the nearby locality and considering the FAR. He was asked as to whether he was aware that the land was . lease hold land for 90 years and he was also asked to explain as to how the valuation of land changes due to this reason. To this it was stated by him that in such a case the valuation should have been done at Rs. 25,000/- if this was lease hold land."*

3.6 Evidently, the statement of the BP Singh was not recorded during search proceeding and therefore, there is no question of considering the same as part of the incriminating material found during the course of the search.

3.7 The learned DR has further referred to the remand report of the Assessing Officer, wherein it is mentioned that disallowance in question was based on documents and statement recorded both during and post search proceeding. The learned DR was given opportunity to produce any such search material related to part disallowance under section 80IAB, which is in the nature of the incriminating, but he failed to produce any such incriminating material. The Ld. CIT(A) has already rejected the contention of the Assessing Officer in remand proceeding which were based on the appraisal report. Merely, if it is mentioned in

the appraisal report that certain documents are found during the course of the search, which are incriminating in nature, it cannot be presumed that such material was found. The onus is on the Revenue to substantiate their claim with the help of producing relevant incriminating material either before the Ld. CIT(A) or before the Tribunal. The Revenue cannot take shelter of the appraisal report, which is a confidential document between the Investigating Wing and the Assessing Officer and not a documentary evidence to be relied upon by the Appellate Authority.

3.8 In view of the above facts and circumstances, in our opinion, the second condition of the ratio of the decision in the case of Kabul Chawla (supra) is not satisfied in the facts of the instant case. The finding of the Ld. CIT(A) on the issue in dispute is well reasoned and accordingly, we uphold the same. The grounds raised by the Revenue are accordingly dismissed.

4. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 28th June, 2021

Sd/-	***Sd/-***
(KULDIP SINGH)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 28th June, 2021.
RK/-(DTDS)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi