N. Sandeep Reddy, S/O N. Mal Reddy vs Acit, Circle 1(1) on 21 December, 2004

Equivalent citations: (2005)96TTJ(HYD)315

ORDER

J. Sudhakar Reddy, Accountant Member

1. This is an appeal filed by the assessee, directed against the order of the CIT (Appeals), Tirupati, dated 20-11-2003, for asst. year 1999-2000. There ate two issues that arise out of this appeal: first, whether the reopening of the assessment was validly made under a 147 of the Income-tax Act, 1961; and second, whether the amount of Rs. 25,00,000 received by the assessee from Natco Pharma Ltd. is a capital receipt or a revenue receipt. Brief facts of the case are as follows.

2. The assessee is a graduate in Computer Engineering and had done MBA in Switzerland. He was working as a Management Consultant with M/s Price Waterhouse, Sanfransisco, USA, from 1989 to 1995. Thereafter, he shifted to UK and he was working with M/s Anderson Consulting, London. The assessee claimed that during the year 1993, he learnt about the existence of Ascorbic Acid Technology (hereinafter referred to as AAT) developed in the United States of America. After several investigations and efforts, he established contact with Genencor International Inc. (GIC in short), which is an incorporated body in USA. GIC agreed for granting licence for use of AAT. The assessee thereafter developed contacts with Tamilnadu Industrial Development Corporation (TIDCO in short). The assessee along with TIDCO entered into an agreement with GIC, which allowed them access to AAT. Later, at the suggestion of TIDCO, to involve some other parties, and after evaluating the list of possible partners, the assessee contacted NATCO Pharma Ltd. and NATCO Pharma USA, represented by Shri V.C. Nannapaneni. All the three parties, i.e. the assessee, TIDCO and NATCO, approached GIC for obtaining licence for AAT. GIC, on its own behalf and on behalf of Lubrizol Business Development Company, on 27-1-1995 granted a Letter of Intent (LOI in short). In this LOI, GIC agreed to part with AAT on certain conditions mentioned therein.

3. Thereafter, the assessee, for some reasons, decided to extricate himself from the joint activity. NATCO Pharma Ltd. and NATCO Pharma USA entered into an agreement with him on 31-1-1995. In this agreement, the assessee agreed to relinquish all his rights in the LOI in favour of NATCO and Shri V.C. Nannapaneni in consideration of Rs. 1,00,00,000 to be received in instalments.

4. NATCO and V.C. Nannapaneni had not discharged their part of the contract for paying an amount of Rs. 1 crore and the assessee approached the Superior Court of New Jersey, Law Division, Somerset County, vide Complaint dated 2-12-1997. The said court issued summons to NATCO Pharma Ltd. and NATCO Pharma USA separately, on 3-12-1997, and enclosed the complaint made by the assessee. Thereafter, within three months the issue was settled between the assessee and NATCO Pharma Ltd. and NATCO Pharma USA out of court and accordingly they entered into an agreement on 10-2-1998, styled as "Agreement for Cancellation of Memorandum of

Understanding". As per this agreement, which is an out of court settlement, the assessee had to receive an amount of Rs. 25,00,000 in lieu of the promised amount of Rs. 1 crore from NATCO Pharma Ltd., NATCO Pharma USA and V.C. Nannapaneni. The assessee had to withdraw the case filed before the US court. The assessee also entered into another agreement on 10-2-1998, styled as "Non-competition Agreement". In that agreement, it was stated: "SR agrees not to enter into any line of activity of trading or otherwise dealing in any goods which will compete with the line of activity to be carried on as per the agreement between SR, NATCO and TIDCO on 27-1-1995. He shall not also help, advise, assist, aid any company, person, Body corporate in establishing, managing, providing or developing or act as a consultant or as a technical advisor or an agent on his own account or on behalf of any other person which/who is engaged in a line of activity which will compete in any way with the activity of the above venture."

5. According to the said agreement, NATCO paid an amount of Rs. 25 lakhs to the assessee. The assessee, while filing his return of income for the asst. year under consideration, disclosed this amount in the income and expenditure account of the HUF. As the assessee was not married at that point of time, both his HUF and individual accounts were clubbed and a single return was being filed. In the statement of income, under the head "Profession", a note was given as follows:

6 "Technical Fees received from M/s NATCO Organics Ltd., Rs. 25,00,000/- is exempt from tax"

> The said return was filed on 29-6-2000 and the same was processed under Section 143(1)(a) on 25-9-2000 without any adjustment or addition. 6. Later, the Assessing Officer issued a notice under Section 148. The AO had made the following note in the order sheet:-
>
> "For the asst. year 1999-2000, the assessee was in receipt of fees of Rs. 25 lakhs for non-competition in trading from Natco Pharma Ltd. The assessee has shown the same as capital receipt and non-taxable. In the HUF account, the assessee has shown the amount of Rs. 25 lakhs as income in the income and expenditure account and arrived at excess of income over expenditure for the year at Rs. 29,93,948/-. As seen from the records, the assessee has not filed any return of income in the capacity of HUF. I am therefore satisfied that the income chargeable to tax had escaped assessment for the asst. year 1999-2000."

After further discussion with the assessee's authorised representative, the AO recorded the following findings at page 3 of the order sheet:-

> "A notice Under Section 148 was issued to consider the taxability of Rs. 25 lakhs received by the assessee for non-competition in trading from NATCO Pharma Ltd. The assessee has shown the same as capital receipt and non-taxable. In the HUF account the assessee has shown the amount of Rs. 25 lakhs as income in the income and expenditure account. No separate return was filed in the status of HUF.

> During the course of hearing the assessee's AR Sri KGM Gupta appeared and stated that the assessee was unmarried during the accounting year 1998-99 relevant to the asst. year 1999-2000 and the income of HUF is also being admitted in Individual hands. The assessee's AR relied on Supreme Court's decision. The facts of the present case are different from those decisions. Hence, the technical fees of Rs. 25 lakhs received by the assessee is treated as revenue receipt and added to total income."

Aggrieved by the addition of Rs. 25 lakhs so made by the AO, the assessee filed an appeal before the CIT (A). The CIT (A) dismissed the appeal of the assessee on various grounds. Aggrieved by the order of the CIT (A), the assessee has filed the appeal before us.

7. The learned counsel for the assessee made two-fold argument, firstly that the reopening of assessment was bad in law and secondly that the receipt in question was a capital receipt.

8.1. On the issue of reopening, the learned counsel submitted that the learned CIT (A) extracted the reasons recorded by the AO on the order sheet in paragraph 1 of his order and wrongly held that the AO was justified in reopening the assessment. He submitted that the AO did not mention the reason as to why the non-competition fee received by the assessee represented income and that in the absence of such a finding, the AO cannot conclude that there was a possible escapement of income, particularly when the judicial view in the matter suggests that the amount received towards non-competition is not taxable. It is his contention that by the time the return of income was filed and was processed under Section 143(1)(a), the judgment of the Hon'ble Supreme Court in the case of Oberoi Hotels Pvt. Ltd. v. CIT, 236 ITR 903, was available and that the amendment to Section 28 was with effect from 1-4-2003 and thus not available to the AO. Thus, he submits that the reason recorded by the AO that the amount of Rs. 25 lakhs is taxable and that such income had escaped assessment, is totally wrong. He further submitted that the AO in his reasons recorded mentioned that the HUF recorded the receipt in its receipts and payments account and that the HUF did not file its return of income. He submitted that this observation of the AO is factually incorrect as the assessee was not married by then and though the HUF did exist, the income of the HUF was included in the return of income in the status of Individual and that this factually incorrect reason for reopening makes the notice bad in law. Referring to paragraphs 5 to 8 of the order of the learned CIT (A), the learned counsel submitted that the finding that the issue of notice under Section 148 is valid in view of the Explanation to Section 147 and also for the reason that after the amendment with effect from 1-4-1989 it is enough if the AO had reason to believe that income chargeable to tax had escaped assessment, is not correct. He submitted that the law on the issue is same both prior to and after the amendment with effect from 1-4-1989 and for this he relied on the decision of Full Bench of the Hon'ble Delhi High Court in the case of Kelvinator of India Ltd., 256 ITR 1, and the judgment of the Hon'ble Supreme Court in the case of CIT v. Foramer France, 264 ITR 566, and other judgments.

8.2. The learned counsel vehemently contended that the CIT (A) ought to have considered the fact that the issue whether non-competition fee received is taxable or not was already decided by the Hon'ble Supreme Court in a number of cases and, therefore, the AO was not correct in reopening the assessment to tax the non-competition fee received by the assessee. He emphasized the fat that the

AO did not record any finding that the amount received does not represent non-competition fee, and submitted that the AO cannot be said to have reached a satisfied conclusion that income had escaped assessment.

8.3. The learned counsel further contended that the AO has two options when the assessee files a return of income, the first being processing the return under Section 143(1)(a) if he is satisfied with the correctness of the return, and the second being initiating scrutiny proceedings by issue of notice under Section 143(2) within one year from the end of the month in which the return of income is filed. It is his contention that non-issue of notice under Section 143(2) within one year cannot be made good by issue of notice under Section 148. He emphasized that the AO who succeeded the earlier AD, entertained a different opinion on the issue of taxability of this amount on wrong inferences and misappreciation of facts, and that the notice so issued, under Section 148 is bad in law. He further contends that the audit objection raised by the Internal Audit Party could not be considered as information for the purpose of reopening of the assessment. For this, he relied on the judgment of the Hon'ble Supreme Court in the case of Indian and Eastern Newspaper Society v. CIT, 119 ITR 996. He emphasized that the observations of an audit party which are contrary to the decision of the apex court, cannot form information for the purpose of reopening. He further submitted that the AO had not recorded this finding of the CIT (A) i.e. the observation of the internal audit party triggered reopening, while recording his reasons for reopening. He relied on the following judgments:-

> Vipan Khanna v. CIT, 255 ITR 220 (P & H) CIT v. Sun Engineering Works Pvt. Ltd., 198 ITR 297 (SC) VXL India Ltd. v. ACIT, 215 ITR 295 (Gujarat) Kaira Dist. Co-op. Milk Producers Union Ltd. v. ACIT, 220 ITR 224 (Gujarat) Jindal Photo Films Ltd. v. DCIT, 234 ITR 170 (Delhi)

9.1. On merits, the learned counsel submitted that the amount of Rs. 25 lakhs received is capital in nature. He submitted that the assessee had contended before the AO that the amount was received towards non-competition fee and that, it is a capital receipt and not taxable. He vehemently contended that the AO had not given any reason whatsoever as to why the decision of the Hon'ble Supreme Court in the case of Gillanders Arbuthnot & Co. Ltd. v. CIT, 53 ITR 283, is not applicable to the facts of the case. He submitted that the Hon'ble Supreme Court has on various occasions held that the amount received against loss of income is capital in nature and also that the amount received for relinquishment of any right is also capital in nature. He reiterated that the AO did not give any reason whatsoever as to how he considered the amount of Rs. 25 lakhs as a taxable revenue receipt.

9.2. The learned counsel further submitted that the AO mentioned in his order that the system of accounting followed by the assessee was "Mercantile" and at the same time he had considered the income on receipt basis. His contention is that the receipt had not accrued during the previous year and thus, going by the system of accounting followed by the assessee and accepted by the Revenue, the same cannot be brought to tax in this year. He submitted that the view that the assessee had himself shown the income as a revenue receipt in the statement prepared for the HUF is wrong as the assessee had clearly stated that the receipt in question was capital in nature and not liable to tax.

9.3. On the observations of the CIT (A) in his order, the learned counsel submitted as follows:

(a) The view of the CIT (A) that the assessee was a mere MBA graduate who specialized in Management and that he had no technical expertise and, therefore, he was not aware of the formulae of production or distribution of ascorbic acid, is totally incorrect. The factors of production of wealth include land, labour, capital and management. The learned CIT (A) accepted that the assessee possesses managerial skill which is one of the inputs for production of wealth. The learned counsel strongly disputed the finding of the learned CIT (A) that the assessee did not possess any potential for commencing an industry, especially when the assessee, who is a Computer Engineer from USA and MBA from Switzerland and who has been working as a Management Consultant with an international firm i.e. Price Water House for a period of 6 years and thereafter with Anderson Consulting, London. He submitted that the learned CIT (A) omitted to notice the capability of the assessee in pursuing QIC and in being able to enter into letter of intent for supply of technology in ascorbic acid. He further submitted that the assessee was personally engaged as Vice Chairman of M/s I-Labs Limited, Director of M/s Venturetech Solutions Pvt. Ltd., Director of M/s SIFY Ltd., Director of M/s Unifi Wealth Management Ltd., and is also presently involved in Telecommunication-Internet-Life Sciences and Development Technology Fields - to demonstrate that the assessee had the capability and that the conclusions of the CIT (A) are wrong.

(b) The learned counsel strongly disputed the view of the CIT (A) that the LOI dated 27-1-1995 was typed on a plain paper and was not on a stamp paper, that TIDCO was represented by a Development Manager and not by Chairman or MD and that, therefore, the LOI lacked authenticity. He submitted that the CIT (A) came to this hasty conclusion without examining any of the parties to the agreement and that the LOI was executed in USA and that the Indian Stamp Act has no application there. He further submitted that TIDCO is an organization formed by the Government of Tamilnadu and the Development Manager, who was a party to the agreement, was one Mr. Sharma who is an IAS officer and that under the Companies Act, Principal Officer includes a Manager and that the CIT (A) has absolutely no reason to doubt the authenticity of the LOI dated 27-1-1995.

(c) On the view of the CIT (A) that the Memo of Understanding dated 10-2-1998 was typed only on a plain paper and that out of the four parties only two parties had signed the agreement, the learned counsel submitted that the suit was filed in a US court and that the agreement was entered into as an out-of-court settlement which had to be produced before the US court and that no stamp duty is required for the same. He submitted that Shri V.C. Nannapaneni is the person in charge of both NATCO Pharma USA and NATCO Pharma Ltd. and that he signed the said agreement not only on behalf of both those companies but also on his own behalf and that this resulted in only two signatures appearing on the document though the agreement is between four parties. He submitted that three parties were represented

by Shri V.C. Nannapaneni and the fourth party was the assessee and that the observation of the CIT (A) as to the evidentiary value of the document is totally uncalled for.

(d) On the view of the CIT (A) that there was no contemporaneous for various agreements entered into, he vehemently contended that the LOI was dated 27-1-1995 and the letter relinquishing the right for a consideration of Rs. 1 crore was dated 31-1-1995 and both these documents were filed before the US court along with the complaint by the assessee and that the document dated 10-2-1998 whereunder an out-of-court settlement was reached, was also filed in the US court. He submitted that these documents prove that the CIT (A) was not correct in mentioning that there was no contemporaneous evidence. Thus, he submits that the observations made by the CIT (A) doubting the agreement are totally baseless.

9.4. The learned counsel further submitted that the assessee had no relationship whatsoever with either NATCO or with V.C. Nannapaneni or with TIDCO and that the transaction entered into was purely commercial in nature. While submitting that the CIT (A) had come to the conclusion without any evidence or examination of parties, he submitted that the CIT (A) imagined the reasons for payment of Rs. 25 lakhs by NATCO to the assessee and that by discarding the genuine agreement he came to a wrong conclusion that the amount received was not a non-competition fee. He referred to paragraph 17 of the order of the CIT (A) and submitted that he imagined the reasons as to why the assessee would have received Rs. 25 lakhs and came to a wrong conclusion that the assessee acted as an agent or a broker for transfer of technology from GIC to NATCO and also imagined that the amount was paid for such services rendered. The conclusion of the CIT (A), he submitted, was on mere surmises and presumptions and without any basis.

9.5. The learned counsel further submitted that the CIT (A) ought to have seen the fact that if a view were to be taken that there were services rendered, then it has necessarily to be held that they were rendered prior to January 1995 and that too outside the country, which would have led to a conclusion that the amount was not taxable in the asst. year 1999-2000.

9.6. Coming to the observation of the CIT (A) that the assessee did not possess any technical knowledge and thus cannot be a competition to NATCO and, therefore, could not have been paid any non-competition fee, the learned counsel submitted that the CIT (A) failed to realize the fact that the assessee was instrumental in pursuing GIC in transferring AAT to the Indian companies. He submitted that it was because of his managerial skill and capability that the assessee could obtain the technology from GIC. He again referred to economical theories and submitted that there are various factors for production of wealth, mostly the four viz. money, material, men and management, and that there is no dispute that the assessee had abundant managerial skills and that by using these managerial skills the assessee is capable of obtaining similar technology for himself and for any other person or concern which could be a potential competitor for NATCO. He submitted that NATCO had every reason to believe that the assessee is a potential danger to their business activity and, therefore, had entered into this agreement with the assessee.

9.7. Referring to the judgments relied upon by the learned CIT (A), the learned counsel submitted that the decision of the Hon'ble Supreme Court in the case of Barendra Prasad Ray and Ors. v. FLO, 129 ITR 295, has no application as the apex court considered the amount received during the course of profession, which was a revenue receipt and not an amount towards non-competition fee. The decision in the case of Assam Pesticides and Agro Chemicals, 227 ITR 846, according to the learned counsel, also has no application to the facts of the case as the question therein was whether the expenditure incurred was revenue expenditure or capital expenditure. He also submitted that the decision of Hon'ble Supreme Court in the case of Mc Dowell and Company Ltd. v. CTO, 154 ITR 148, has no application as the assessee entered into various agreements in the process of his business activity and they represented a genuine business transaction. None of the agreements, he submitted, was entered into to avoid tax particularly-between persons who are not connected. Referring to the suit filed by the assessee in the US court and the fact that a public sector company of Tamilnadu was one of the parties, he submitted that the genuineness of the transaction cannot be doubted.

9.8. The learned counsel also disputed the finding of the learned CIT (A) that the amendment to Section 28 by introduction of Section 28(va) with effect from 1-4-2003 is retrospective. He relied on the decision of the Hon'ble Supreme Court in the case of CIT v. Podar Cements Pvt. Ltd., 226 ITR 625, and submitted that the amendment to Section 28 w.e.f. 1-4-2003 is about the taxability of an amount and represents substantive law and it cannot be considered an explanatory law, and therefore the amendment cannot be considered as a retrospective amendment.

10. The learned counsel further submitted that the confirmation of the addition by the CIT (A) was totally based on facts and grounds which are different from the stand taken by the AO and that the CIT (A) had not provided any opportunity to the assessee. He submitted that if the CIT (A) treated the amount as received in view of agreement dated 31-1-1995 and consequent documents, he should have necessarily taken a view that the receipt represents a capital receipt towards the relinquishment of the assessee's right obtained through a Letter of Intent and also that it does not relate to the year of account. He further submitted that if the CIT (A) had taken a view that the amount received was as per the agreement dated 28-4-1998, he should have taken a view that the receipt was towards non-competition. Thus, he argued that the CIT (A) was wrong in treating the amount as a revenue receipt.

11. In the alternative, the learned counsel submitted that it has to be held that the amount was received for two reasons: (a) for relinquishing the right acquired under LOI dated 27-1-1995 by entering into an agreement with NATCO on 31-1-1995, and (b) for refraining himself from carrying on the line of activity, as per agreement dated 28-4-1998. In both cases, he submitted, it is a capital receipt.

12. On the proposition that the amount received for relinquishment of right as per agreement, is not a taxable receipt, the learned counsel relied upon the following judgments:-

> P.L.M. Firm v. CIT, 68 ITR 856 (Madras) CIT v. Kashmiri Mal Vasdev, 39 ITR 150 (P & H) For the proposition that compensation received for an immobilization, sterilization or destruction or loss, total or partial, of a capital asset, is capital receipt,

he relied upon the following decisions:-

CIT v. Manilal Rayaram Mehta, 30 ITR 53 (SC) CIT v. Kashmiri Mal Vasdev, 39 ITR 150 (P & H) Bombay Burmah Trading Corporation Ltd. v. CIT, 81 ITR 177 (Bom) He also relied upon the following decisions:-

Narayana Prasad Kundu v. CIT, 204 ITR 740 (Calcutta) B.G. Shah v. CIT, 162 ITR 23 (Bom) K. Eapen Jacob v. CIT, 166 ITR 199 (Madras) Oberoi Hotels Pvt. Ltd., v. CIT, 236 ITR 903 (SC) Gillanders Arbuthnot and Co. Ltd. v. CIT, 53 ITR 283 (SC) CIT v. Saraswathi Publicities, 132 ITR 207 (Mad) CIT v. Best and Co. Pvt. Ltd., 60 ITR 11 (SC)

13. The learned departmental representative, on the other hand, vehemently controverted the submissions of the learned counsel for the assessee. He argued that the issue of notice under Section 148 was perfectly valid and that the reopening was correctly made under the law and that the receipt in question was a revenue receipt.

14.1. On the issue of reopening of the assessment, the learned departmental representative submitted that the AO had earlier processed the return under Section 143(1)(a) and that there was no application of mind on the part of the AO to the point in issue and that the AO cannot be said to have formed any opinion and that it cannot be claimed there was a change in opinion. He vehemently contended that the intimation under Section 143(1)(a) cannot be treated as an order of assessment and it was only deemed to be a notice under Section 156 for the limited purpose of meeting the machinery provisions relating to recovery of tax. He relied on the following decisions :-

Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT, 246 ITR 173 (Delhi) CIT v. Kelvinator of India Ltd., 256 ITR 1 (Delhi) ACIT v. Gujarat Bitumen Ltd., 82 ITD 614 (Ahmedabad) A. Pusalal v. CIT, 169 ITD 215 (AP) Jorawar Singh Baid v. CIT , 198 ITR 47 (Cal) Elegant Chemicals Enterprises (P) Ltd. v. ACIT, 91 ITD 85 (Hyd); 271 ITR 56 (AT) He relied on Explanation 2(b) to Section 147 and submitted that it makes it abundantly clear that when a return of income is furnished by an assessee but no assessment has been made and it is noticed by the AO that the assessee had understated the income or had claimed excessive loss, deduction, allowance or relief in the return, it would be deemed to be a case where income chargeable to tax had escaped assessment.

14.2. On the contention of the assessee that the reasons recorded by the AO for the issue of notice under Section 148 are not correct, the learned DR submitted that the receipt in question was shown as technical fee in the computation of total income filed and it was also shown as an item of income and expenditure in the statement enclosed with the return and that this was prima facie material before the AO for entertaining a bona fide belief that income chargeable to tax had escaped assessment. He vehemently contended that it is not correct to say that the notice was issued without recording proper reasons and without finding that income chargeable to tax

had escaped assessment. He submitted that what the court has to see is whether there was prima facie material on the basis of which the AO could issue notice under Section 148 and that the sufficiency or correctness of the material is not justiciable. He placed reliance on the following decisions:

Raymond Woolen Mills Limited v. ITO and Ors., 236 ITR 34 (SC) Swaraj Engine Limited v. ACIT, 260 ITR 202 (P & H) Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT, New Delhi, and Anr., 246 ITR 173 (Delhi) ACIT v. Gujarat Bitumen Ltd., 82 ITD 614 (Ahmedabad) 14.3. On the argument of the learned counsel for the assessee that the observations of Audit do not form information, the learned DR submitted that after the amendment of provisions with effect from 1-4-1989 wherein Section 147 has undergone a change, the ratio of the decision of the Hon'ble Supreme Court in the case of Indian and Eastern Newspaper Society, 119 ITR 996, has no application. The only requirement as per the amended section, he argued, is that the AO should have reason to believe that income chargeable to tax had escaped assessment. In the instant case, he submitted, the AO had prima facie material for entertaining the belief that income chargeable to tax had escaped assessment and this is not a case of reassessment under Section 147(b). He submitted that the audit party had only brought certain facts to the notice of the AO and that the technical fee received from NATCO was claimed as exempt and that taxability of the same required examination. For the proposition that reopening can be made on factual information given by the audit party, he relied on the following decisions:-

CIT v. P.V.S. Beedies Pvt. Ltd., 237 ITR 13 (SC) Nagrath Chemicals Works (P) Ltd. v. CIT, 265 ITR 401 (All) He distinguished the judgments relied upon by the learned counsel for the assessee and submitted that in the case of Vipin Khanna (supra), the proceedings initiated by the AO to write back excess depreciation claimed by the assessee were in fact upheld by the court and that the case does not come to the rescue of the assessee. The broader proposition in that decision was that general enquiries could not be made by issue of notice under Section 148 and that what could be assessed was only the income that had escaped assessment. On the judgment of the Hon'ble Delhi High Court in the case of Kelvinator of India Ltd. (supra), he submitted that that was a case where an original assessment was made under Section 143(3). Similarly, he distinguished the judgment of the Hon'ble Supreme Court in the case of CIT v. Foramer France, 264 ITR 566.

14.4. As regards the submission of the learned counsel for the assessee that the decision of the Hon'ble Supreme Court in the case of Oberoi Hotels Pvt. Ltd. (supra) was available at the time of filing of the return and that the amended provisions of Section 28 were not available to the AO as the same were effective from 1-4-2003, the learned DR submitted that the assessee had shown the receipt as technical fees received from NATCO under the head "profession" in the computation of income filed along with the return of income and claimed the same as exempt from tax, but had not filed any details whatsoever which indicate as to how the said fee shown as

an income from profession was exempt from tax except stating that the fee of Rs. 25 lakhs was received for non-competitional trading from NATCO. He submitted that in the computation of income, the assessee had not placed reliance on the decision of the Hon'ble Supreme Court in the case of Oberoi Hotels (supra). The assessee had also not furnished any details in the return of income regarding the nature of non-competitional trading, the period of non-competition, copy of agreement etc., in support of the claim that the receipt is exempt from tax. He vehemently contended that it was never explained as to how the assessee could compete in trading with NATCO when the return of income does not indicate any such trading activity being carried on by the assessee, as in the computation of income, income was declared only under the head "profession", "property" and "other sources". Thus, he argued that it is not correct to say that the AO had formed an opinion while processing the return under Section 143(1)(a) that the amount in question was received for a restrictive covenant and thus not taxable.

14.5. Even otherwise, he submitted, the judgment of the Hon'ble Supreme Court in the case of Oberoi Hotels Pvt. Ltd. (supra) is totally different from the facts existing in the present case. He submitted that in that case the assessee received consideration for giving up a right to purchase property (accrued by virtue of agreement) before it was transferred or let out to other persons, and the Hon'ble Supreme Court held that it was not a settlement of right under a trading contract but it was for the injury inflicted on the capital asset of the assessee which resulted in loss of source of income and, therefore, the amount received was a capital receipt. He submitted that in the present case no such right to acquire a capital asset had accrued to the assessee under the LOI and it was only after the formation of the designated entity and signing of the agreement, such right, if any, can be said to have accrued to the designated entity and, in any event, not to the assessee.

14.6. He further submitted that the receipt was shown as a technical receipt by the assessee under the head "profession" in the statement of income and the assessee has never furnished any details as to how the amount was received. He also submitted that the receipt was shown in the income and expenditure account of the HUF and that prima facie material was available with the AO who had every reason to believe that income chargeable to tax had escaped assessment. He thus submitted that the reopening of the assessment was rightly made.

15.1. On merits, the learned DR. submitted that the issue for consideration is whether the amount of Rs. 25 lakhs received from NATCO Organics Ltd. during the relevant year is for non-competition in trading as claimed by the assessee or is amount received for services rendered by the assessee to NATCO. He submitted that the assessee's claim that the amount had been received by him as per agreement dated 28-4-1998 styled as "Non-competition agreement", under which he was not to help, advise, assist, aid any company, person, body corporate in establishing, managing, providing or developing or act as a consultant or as a technical advisor or an agent on

his own account or on behalf of any other person which/who is engaged in a line of activity which will compete in any way with the activity of the above venture for a period of five years, and his alternative contention that the amount was received for surrender or relinquishment of rights accrued to the assessee, i.e. right to acquire licence for manufacture and sale of AAT, are not supported by the facts existing on the record. He referred to the paper book filed by the assessee wherein at page 45 a copy of the complaint dated 2-12-1997 filed by the assessee before the Superior Court of New Jersey, USA, was included, and specifically relied on the following:-

"Second Count

27. Plaintiff reiterates the allegations contained in the First Count and incorporates them herein.

28. Sandeep Reddy performed services which provided substantial benefits to NATCO.

29. Mr. Reddy is entitled to be paid the reasonable value of the services he rendered, which benefited NATCO.

30. To date, Mr. Reddy has not been paid the reasonable value of the services he rendered, which benefited NATCO."

"Third Count

31. Plaintiff reiterates the allegations contained in the First and Second Counts and incorporates them herein.

32. Sandeep Reddy performed services which provided substantial benefits to NATCO.

33. NATCO has been unjustly enriched as a result of the services performed by Mr. Reddy."

15.2. The learned DR referred to para 8 of the above complaint, which is at page 41 of the assessee's paper book, and submitted that the nature of services rendered by the assessee to NATCO include investigative work for establishing contact with the person or persons at Genecor International Corporate (GIC) responsible for licensing Ascorbic Acid Technology. He vehemently contended that the amount was received only for services rendered by the assessee to NATCO. Thus, he submits that the contention of the assessee that the amount was received for non-competition in trading is contrary to the facts. He submits that the assessee is a Management Consultant and the services rendered to NATCO are incidental to and part of the profession and, therefore, the amount received partakes the character of revenue receipt in the hands of the assessee.

15.3. Alternatively and without prejudice to the above, he submitted that it is well settled that a receipt can be treated as a capital receipt if there is a genuine restrictive covenant i.e. non-competition in the same, line of business and as a result of such restrictive covenant, the trading structure of the assessee is impaired or there is a loss of what may be regarded as a source of income. In this case, he submits, the assessee is merely an MBA graduate and has been a Management Consultant for several years and was never a technical expert or a technical consultant in any firm or business, much less in chemical technology. As per the learned DR, the assessee has done only liaison work between GIC and IMATCO for transfer of AA Technology for which he has been finally paid an amount of Rs. 25 lakhs. He vehemently contended that it is unthinkable that the assessee, being a Management Consultant without any experience in chemical technology, would be in a position to compete with a pharmaceutical company like NATCO having global presence, by starting a competing industry or distribution or sale of ascorbic acid. He thus submitted that the assessee could not even be a threat of competition to NATCO. He further submitted that there was no clause in the agreement specifying the nature and quantum of interest, if any, that the assessee would have earned had he continued with the project. The assessee, as per the learned DR, did not even acquire any technology, assets or intangibles in the field of chemical technology by virtue of the LOI. He submitted that there was no rationale in the assessee's claim as competition could be between two equals producing the same commodity and the assessee was no match to NATCO.

15.4. The learned DR further submitted that the assessee has not produced any documentary evidence to show that he was promised yearly payments/commissions/profits etc., and that the question of sterilization or destruction of any permanent profit-earning apparatus did not arise. He submitted that the assessee continued to pursue his professional activities. Referring to the complaint filed before the US court, he submitted that the assessee had decided that it was in his best interest to extricate himself from the Ascorbic Acid Project so that he could pursue other entrepreneurial opportunities. By virtue of the agreement and assignment of interest dated 31-1-1995, the profession of the assessee was not at all impaired nor did it deprive the assessee of his existing source of income and there was no injury whatsoever inflicted on the source of income of the assessee. Thus, he submitted that the amount received by the assessee was not for non-competition nor destruction of source of income and, therefore, the amount received cannot be regarded as capital receipt but was a receipt for services rendered and thus a revenue receipt. He submitted that in the light of the complaint filed before the US court, the agreement called Non-competition Agreement was a self-serving document. He submitted that the label or nomenclature given by a party to an agreement will not decide the taxability of the receipt but its true nature and substance have to be looked into. For this proposition, he relied on the following decisions:-

> CIT v. Durga Prasad More, 82 ITR 540 (SC) Sunil Sidharth Bhai v. CIT, 156 ITR 509 (SC) Sundaram Finance Ltd. v. State of Kerala, AIR 1966 SC 1178

16. On the issue whether the assessee acquired any right under LOI dated 27-1-1995, the learned DR submitted that it was only the designated entity which will acquire a licence in AAT. He submitted that the LOI was not executed on a stamp paper and thus it was not an agreement between parties. He referred to the agreement styled as Agreement and Assignment of Interest dated 31-1-1995 and

submitted that the designated entity had not acquired any interest or right to the licence, much less the assessee as an individual. He contended that it was only the intention of the parties to acquire the licence for AAT from GIC and no rights whatsoever accrued either to the designated entity or to the assessee. Therefore, the question of assigning, surrendering, relinquishment etc. did not arise. Even otherwise, he submitted, presuming that a right to licence had accrued to the parties involved, it was contingent upon formation of designated entity and subsequent signing of the agreement by the designated entity and GIC. On the contrary, he submitted, the amount received was in lieu of financial benefits as is evident from paragraph 3 of the agreement and assigning of interest dated 31-1-1995. Thus, he submitted that the amount received by the assessee was not for assignment or surrender or relinquishment of any rights but only for services rendered by the assessee to NATCO. He relied on the following case laws:-

> CIT v. Shamsher Printing Press, 39 ITR 90 (SC) CIT v. Manna Ramji, 86 ITR 29 (SC) Blue Star Ltd. v. CIT, 217 ITR 514 (Bom) CIT v. State Trading Corporation of India, 247 ITR 114 (Delhi) etc. He distinguished the case laws relied upon by the assessee on the ground that in those cases the very source of income had come to an end and that the facts of the case are entirely different.

17. On the issue as to the place of accrual of income and services rendered, the learned DR submitted that the entire income of the assessee was shown on actual receipt basis and expenditure was claimed on payment basis and that merely because the AO had recorded the method of accounting as mercantile in the assessment order, no conclusion can be drawn that the assessee was in fact following mercantile system of accounting. He referred to the statement enclosed to the return of income and submitted that it clearly demonstrates that the income was declared only on receipt basis and not on accrual basis. He vehemently contended that the amount of Rs. 25 lakhs was never shown on accrual basis in the earlier years and thus the claim that the same had not accrued during the relevant accounting year is without any basis. Referring to the place of accrual, he submitted that in the return of income, the assessee had shown his status as a resident and under Section 5, in the case of a resident, the entire income derived is taxable. Without prejudice to the above, the learned DR submitted that the amount accrued to the assessee only in this year as the dispute was amicably settled with NATCO only in this year. Alternatively, he submitted that if it is to be held that the assessee was a non-resident when the services were rendered, the point of consideration for taxation should be as to what is the place where the services were rendered. He relied on Explanation 2 to Section 9(1)(vii) and the decision of the Hon'ble Andhra Pradesh High Court in the case of Elkem Technology v. Dy. CIT, 250 ITR 164, and submitted that the place where the services were utilized was India and thus the receipt was rightly brought to tax in India.

18. On the issue as to why the CIT (A) had not examined NATCO or TIDCO before expressing doubts on the genuineness of the document, he submitted that the entire document was a self-serving document and that there was mutual accommodation between two interested persons and that it was a colourable device to avoid tax liability and that this plea of the assessee has no merit. He further submitted that Hyderabad Bench 'A' of the Tribunal in the case of K.V.D. Prasad Rao in I.T.A. No. 336/Hyd/1999, order dated 31-12-2001, has dealt with the issue and held that the payment of non-competing fee covered in terms of agreement was only part of the sale consideration

for the transfer of shares and was not received as compensation for restraint of trade. He argued that in the present case the so-called restrictive covenant was only a make-believe arrangement and that the amount of Rs. 25 lakhs was paid by NATCO not for warding off a future potential threat by way of alleged, competition in chemical technology from the assessee but for the professional services rendered by the assessee in the form of liaison work with GIC. He thus submitted that the agreement should be rejected and the order of the CIT (A) treating the receipt as a revenue receipt should be upheld.

19.1. Replying to the contentions of the learned Dr, the learned counsel for the assessee submitted that in the computation statement annexed to the return of income, which is at page 2 of the paper books of the assessee, it is clearly stated that the fee of Rs. 25 lakhs received was for non-competition in trading, from NATCO Pharma Ltd. and it is a capital receipt and not taxable and also under the head "profession", it was mentioned, "Technical Fees received from M/s NATCO Organics Ltd., Rs. 25,00,000/- is exempt from tax" and that in the income and expenditure account also it was clearly shown that the amount was received for non-competition in trading. He submitted that it can be seen from the statement of income filed by the assessee that the amount was received for non-competition in trading from NATCO Pharma and that the learned DR is not correct in his submission that the details provided in the return of income and the accompanying statement do not indicate the assessee's claim. On the argument of the learned DR that the AO had while processing the return under Section 143(1)(a) had no occasion to examine the issue and formed opinion about the taxability of the receipt in question in the light of the judgment of the Hon'ble Supreme Court in the case of Oberoi Hotels Pvt. Ltd., he submitted that the AO had an occasion to examine the return of income and he had chosen to process the return under Section 143(1)(a) and did not choose to issue a notice under Section 143(2) and that this shows that the AO came to a correct conclusion that the amount of Rs. 25 lakhs is not taxable and only the succeeding AO took a different view and issued notice under Section 148. Thus, he submits that there is a difference of opinion between the Assessing Officers, which resulted in the issue of notice under Section 148.

19.2. On the argument of the learned DR that there should be a trading activity carried on by the assessee for receipt of non-competition fee, he submitted that this is totally wrong and that non-competition fee means an amount received by the assessee based on an agreement when he agreed that he would not carry on similar activity and that it would be enough if the assessee undertakes not to carry on same activity. He vehemently contended that the assessee, through his actions, was able to obtain the LOI from GIC and this demonstrated that he was capable of obtaining similar technology and furnishing the same to any other person as he had done in the case of NATCO and TIDCO.

19.3. On the argument of the learned DR that no right accrued to the assessee because of the LOI entered into between the assessee, NATCO Pharma Ltd. and TIDCO on the one part and GIC on the other, the learned counsel submitted that a perusal of paragraph 2 of the LOI clearly shows that right accrued to the assessee. The paragraph reads as follows:-

> "WHEREAS NATCO, Reddy and TIDCO (hereinafter collectively "the Licensees") have expressed an interest in and an intent to acquire a licence in the AA Technology on behalf of a designated entity (the "Licensing Entity"), in which each of them shall be an enquiry owner and which entity shall be acceptable to GIC, on terms and conditions not inconsistent with those set out below:"

He submitted that this shows that the licence was intended to an entity which is to be created by all the three parties and that it is clear that the assessee had obtained a joint right in the licence to be granted by GIC. He submitted that this is an asset in itself and that the right is a right of property and that it was a capital asset. He vehemently contended that the right of participation in the licence is a capital asset. He, therefore, submitted that the learned DR is not correct to say that the reopening of the assessment is valid and the amount does not represent non-competition fee.

19.4. On the extract from the complaint dated 2-12-1997 filed by the assessee in the US court, relied upon by the learned DR, the learned counsel drew the attention of this Bench to Paragraph 6 to 12 of that complaint and submitted that the entire complaint has to be looked as a whole and that the learned DR tried to read parts and pieces of the complaint to support his contention. Relying heavily on this document, he submitted that the assessee had acted on his own in obtaining contact with GIC before signing a non-disclosure agreement, which allowed access to the science associated with AAT. It was only later, he submitted, the assessee and TIDCO thought of involving another Indian pharmaceutical company for the purpose and in the process chose NATCO. He submitted that this clearly proves that the services, if any, rendered by the assessee were only prior to his coming into contact with NATCO. This, he argues, proves that there were no services whatsoever rendered by the assessee to NATCO. The words used by the assessee, according to him, do not indicate that he rendered services to NATCO. What it means was that the assessee rendered services to his own self, the result of which was later transferred to NATCO. He vehemently contended that the assessee had not contacted GIC on behalf of NATCO and when the process of investigation and contact with NATCO was nowhere in the picture and only after the assessee's efforts were fruitful, NATCO had come into the picture. Thus, he argued that this is not a case of services being rendered.

19.5. Quoting an example, the learned counsel submitted that if a person constructs a house on behalf of another, it is to be called as services rendered to the said other person, and if the construction is made on his own and the building is sold, then it is a sale of building and not rendering service. He submitted that the right derived by the assessee consequent to his work done prior to the entry of NATCO into the field cannot be considered as services rendered to NATCO.

19.6. He strongly disputed the view of the learned DR that the complaint filed by the assessee clearly shows that the amount received was for services rendered by the assessee. Mere reading of the complaint dated 2-12-1997, he submits, clearly indicates that no services had been rendered by the assessee.

19.7. The learned counsel further controverted the argument of the learned DR that there is no restrictive covenant and submitted that a restrictive covenant need not always impair the trade structure of the assessee. He submitted that even if the assessee imposes a restriction on himself

against conducting any trade in the same line of activity, it will be a restrictive covenant. He relied on Clauses 1, 2 and 3 of the Non-competition Agreement which is at page 8 of the assessee's paper book, for this proposition, and submitted that from the said clauses it is clear that the assessee restrained himself from entering into a trade in the same line of activity. He vehemently contended that it would be enough if the assessee accepted a restrictive covenant of not entering into an activity which would impair the activity of the other party to the agreement. He disputed the argument of the learned DR and submitted that it is not necessary that the assessee should be carrying on a trading activity before entering into non-competition agreement. He relied on the agreement and assignment of interest as well as the complaint filed by the assessee and submitted that it clearly indicates that the assessee did not carry on any liaison work. He strongly disputed the argument of the learned DR that it is unthinkable for the assessee to compete with a pharmaceutical company like NATCO having global presence, as the restrictive covenant in Clause 1 clearly mentions that the assessee shall not "help, advise, assist, aid any company which is engaged in a line of activity which will compete in any way with the activity of NATCO". He submitted that the learned DR is doubting without any basis the capabilities of the assessee and that the assessee can establish a project or can introduce another company to establish a similar project.

19.8. Referring to the argument of the learned DR on the assessee deciding to extricate himself from AAT project, the learned counsel submitted that the restrictive covenant need not specify that the assessee would not carry on any other professions activity and that it is enough if it specifies that the assessee agrees not to do the same activity again. The assessee, having obtained the right to be a joint owner of the licence, abstained himself from Utilizing such right and allowed NATCO to obtain such licence and entered into restrictive covenant as it restricts his right of utilization of the licence and also restricts his right to transfer such right, which is capital in nature.

19.9. The learned counsel also disputed the learned DR's contention that the amount of Rs. 25 lakhs received from NATCO was for professional services rendered by the assessee to NATCO. He reiterated that the assessee never rendered any services to NATCO. He again relied on paragraph 2 of the LOI which is at page 29 of the assessee's paper book, and submitted that the assessee, NATCO and TIDCO (undertaking of Govt. of Tamilnadu) were jointly entitled to obtain the licence and to facilitate the transfer, the three parties accepted to acquire licence on behalf of designated entity. The assessee's right is to obtain a licence jointly with the two others. The right is to receive licence and it is a property which is jointly held. The assessee, he submitted, also had the right to join the designated entity as one of the parties. This right, he submitted, was surrendered along with the right to carry on similar activity.

20. On the issue of system of accounting, the learned counsel submitted that the words "paid" and "received" were used in accordance with the system of accounting followed and that the learned DR's contention that in the income and expenditure account the terminology "interest received" and "interest paid" was used indicating that the assessee followed cash system of accounting, is wrong. He submitted extracts of accounts in the books of the assessee to demonstrate that mercantile system of accounting was followed. He submitted that the AO accepted the fact that the system of accounting of the assessee was mercantile and mentioned the same in the assessment order and that the learned DR is disputing the finding of the AO, without any basis, though the same has become

final.

21. The learned counsel further submitted that the learned DR has raised fresh issues which are settled by the AO, and to support his claim he also filed extracts of the accounts of the assessee in the books of Shri Mal Reddy.

22. On the issue raised by the learned DR regarding residential status of the assessee, the learned counsel drew the attention of the Bench to page 7 of the department's paper book and submitted that it clearly shows that the assessee is a non-resident. On the applicability of Section 9(1)(vii), he submitted that the section applies to income received by way of fee for technical services rendered and as the assessee had not received any fees for technical services rendered, the judgment of the Hon'ble Andhra Pradesh High Court in the case of Elkem Technology v. DCIT, 250 ITR 164, does not apply to the facts of the case.

23. On the theory of collusion between the parties, the learned counsel submitted that neither the AO nor the CIT (A) conducted any enquiries in this regard and all the authorities including the learned departmental representative are expressing personal views without any basis and any examination of documents. He emphasized that TIDCO is a wholly owned government company and that a person from the Indian Administrative Service, who was the Development Officer, signed the document on behalf of the company and that the allegations are totally false and without any evidence. The AO, he submitted, never made any such allegations nor even discussed such allegations. The CIT (A), he submitted, based his surmises on procedural aspects of the creation of a document and cast aspirations on the genuineness of such document. He submitted that the learned DR went a step further and argued that the documents are collusive in nature. The word "collusion" implies the existence of a fraud of some kind or employment of fraudulent means to obtain an object forbidden by law. It may even be a secret combination of conspiracy between two or more persons for fraudulent or deceitful purpose. It should also benefit both the parties to the agreement. The learned counsel submits that these are grave allegations which were never made by the AO or the first appellate authority, but by the learned DR without an iota of evidence. He referred to the sequence of events and submitted that the transactions carried out are legally valid transactions and there was no intention on the part of any of the parties to gain by defrauding others.

24. The learned counsel once again submitted that the amount paid was in accordance with agreement dated 31-1-1995 for surrendering the right held by the assessee jointly with TIDCO and NATCO to obtain licence from GIC and also for not helping any other concern or company in carrying on a similar activity and that the allegations made by the learned DR are not borne out of record, especially when the Principal Officers of NATCO and TIDCO have not been examined either by the AO or by the CIT (A). He submitted that the apparent is always real unless the contrary is proved.

25. The learned counsel concluded his argument by submitting that -

> (a) the amount was received both for surrender of right jointly held with two others and also for not carrying on similar activity and thus a capital receipt;

(b) the transaction took place on 31-1-1995 and, therefore, does not relate to assessment year 1999-2000;

(c) the assessee maintained accounts under mercantile system and the amount did not accrue during the relevant previous year; and

(d) the reopening of the assessment was bad in law.

26. We have heard rival contentions. On a careful consideration of the facts and circumstances of the case, we hold as follows.

27. On the first issue of validity of reopening, we are convinced with the argument of the learned DR. The assessee had filed his return of income wherein he had made a disclosure that an amount of Rs. 25,00,000 had been received by him and that the same is not taxable. The return was processed under Section 143(1)(a). Though the assessee had made full and true disclosure, it cannot be said that the AO had taken a considered view while processing the return under Section 143(1)(a). The Income-tax Appellate Tribunal, Hyderabad Bench 'B', in the case of Elegant Chemicals Enterprises P. Ltd. v. Asstt. CIT, 271 ITR 56 (A.T.), held as follows as per head note:-

"The Legislature in its wisdom has given two options to the Assessing Officer to reopen assessments: (a) accepting the return of income by merely processing it under Section 143(1) of the Income-tax Act, 1961, without making investigation, and (b) taking up the case for scrutiny and completing the assessment under Section 143(3) of the Act. Merely because the Assessing Officer has two options for reopening the matter processed under Section 143(1), non-exercise of option under Section 143(2) to correct the assessment made under Section 143(1), does not exclude the Assessing Officer's power to reopen the assessment under Section 147 of the Act.

Pusa Lal (A.) v. CIT (1988) 169 ITR 215 (AP) relied on.

The assessee carried on the business of manufacture of various pharmaceutical formulations and the business of rendering job works. It declared a total income of Rs. 15,15,242 for the assessment year 1998-99. While processing the return, it was noticed that the assessee had received Rs. 87.33 lakhs as compensation from P & G for the losses suffered by it due to discontinuance of the project work and the same was not offered to tax on the ground that it was a capital receipt. The Assessing Officer was of the prima facie view that the compensation amount was a revenue receipt and issued notice under Section 148 of the Income-tax Act. After discussing with the assessee, the Assessing Officer completed the assessment on a total income of Rs. 1,02,86,160. The assessee raised objection before the Commissioner (Appeals) with regard to the validity of reopening of assessment as well as the legality of the addition made by the Assessing Officer. The assessee contended that the amount was received as a compensation for sterilisation of capital asset resulting in extinction of the profit-earning source and thus it was a capital receipt. The Commissioner

(Appeals) directed the Additional Commissioner to furnish a remand report. After noticing the fact that the assessee continued the claim of depreciation on the plant and machinery, the Commissioner (Appeals) held that there was no impairment of source of income but the cancellation of the contract resulted in loss of profit, for which compensation was received by the assessee; that processing of the return could not be equated to an assessment and it would be sufficient if the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment. On further appeal to the Appellate Tribunal:

Held, dismissing the appeal, (i) that the assessee had manufactured on trial run basis the new formulations without procuring extra machinery or assets. The letter of the assessee addressed to the Deputy Commissioner showed that it already had business relations with P & G, and by agreement with regard to the manufacture of two new formulations, it only wanted to extend business relations and it could not be said that it was a new business altogether. By cancellation of the agreement, the assessee was merely deprived of the job work charges which it would have otherwise earned. Further the letter before the Assistant Commissioner also indicated that the assessee was in the business of manufacture of pharmaceutical formulations on job work basis to various principals. It was not the case of the assessee that the assets, which were acquired for manufacture of specific formulations were completely abandoned. Merely because a particular contract for job work was terminated, it could not be said that there was loss of what may be regarded as the source of the assessee's income but could be termed as a normal incidence of the business. The claim for compensation made by the assessee immediately after the termination of the contract showed that the compensation was claimed towards reimbursement of expenses of revenue nature. The detailed claim did not indicate that it was for sterilisation of capital assets. Thus, the amount of Rs. 87.33 lakhs received by the assessee from P & G was a revenue receipt liable to tax.

(ii) That the amended provisions of Section 148/147 provide ample power to the Assessing Officer to initiate reassessment proceedings when he is of the opinion that income chargeable to tax has escaped assessment. In the case of the assessee, the return of income was merely processed under Section 143(1) and it could not be equated to assessment. Thus, the reopening of assessment was valid in law in the circumstances of the case.

Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT (2000) 246 ITR 173 (Delhi) and Bharat V. Patel v. Union of India (2004) 268 ITR 116 (Guj) followed."

Respectfully following the same, we uphold the validity of reopening of assessment, on the ground that processing of a return under Section 143(1)(a) cannot be equated with an assessment and it cannot be said that the Assessing Officer, who had processed the return under Section 143(1)(a), had formed an opinion. As no opinion has been formed, it cannot be said that there is a change in opinion. Thus, the judgments relied upon by the learned counsel for the assessee on this issue do not

come to his rescue.

28. On the issue of 'information' based on which the assessment was reopened, we are of the considered opinion that reopening was based on factual information from audit party. Though the Assessing Officer has not worded his reopening note in such explicit terms, he did want to examine the taxability of the issue in question. It is well settled that sufficiency of the reason is not to be gone into by this Tribunal. All that has to be seen is whether he has a 'reason to believe'. In this case, we cannot say that the AO had no reason at all. He wanted to examine the taxability of this receipt in the hands of the HUF and this was based on the income and expenditure account submitted by the assessee where he did make a claim. It is well settled that non-issue of notice within 12 months under Section 143(2), does not bar the AO from reopening the case under Section 148. There is no bar that information given by audit cannot be the basis on which the Assessing Officer can form an opinion that income has escaped assessment. Thus, we cannot be say that the AO had no reason, or had recorded totally wrong reasons, or that he changed his opinion, or that he had no information. Thus, we hold that the reopening is validly made under Section 147 of the Act, read with Explanation 2(b).

29. On merits, we find sufficient force in the arguments of the learned counsel for the assessee. The sequence of events clearly demonstrates that the assessee had with his own talent and skill contacted GIC of USA, to obtain licence in AAT and was successful in obtaining information and methodology to avail the technology in the year 1993. In the year 1994, TIDCO signed a non-disclosure agreement with GIC, which allowed them access to the science associated with AAT. It was only at that stage that the assessee and TIDCO jointly thought it necessary to obtain association of an Indian pharmaceutical company to utilize the licence to be granted by GIC. It is only at the suggestion of TIDCO that the assessee contacted NATCO and on 27-1-1995, all the three parties got a letter of intent from GIC of USA. On 31-1-1995, the assessee wanted to extricate himself from AAT project and also entered into an agreement with NATCO for payment of Rs. 1 crore. NATCO did not comply with the agreement. The assessee filed a complaint in a US court on 2-12-1997 seeking enforcement of the agreement dated 31-1-1995. On 10-2-1998, an out-of-court settlement was reached and the assessee agreed to receive Rs. 25 lakhs in lieu of the payment of Rs. 1 crore from NATCO. NATCO made the payment of Rs. 25 lakhs but, at the same time, extracted an agreement from the assessee not to enter into the same line of business and also not to help, advise or assist any other company carrying on similar activity. The complaint filed in the US court clearly demonstrates that the assessee had acquired certain rights due to his investigative and professional work. A copy of the complaint is at pages 36 to 46 of the assessee's paper book. For ready reference and clarity on facts, we extract the complaint below:-

> "Plaintiff, Sandeep Reddy, by way of complaint against defendants, Natco Pharma Limited and Natco Pharma USA, L.L.C., states as follows:
>
> First Count
>
> 1. Defendant Natco Pharma Limited ["NATCO"], is a corporation of India engaged in the business of pharmaceutical manufacturing, with its principal corporate offices at

Natco House, Road No. 2, Banjara Hills, Hyderabad, Andhra Pradesh, India 500 033.

2. NATCO is the parent company of defendant Natco Pharma USA, L.L.C. ["USA"].

3. USA and NATCO are part of one cohesive economic unit.

4. USA was created solely to fulfill the needs of NATCO in the United States of America. USA is the instrumentality of NATCO in the United States.

5. USA is merely the alter ego of NATCO, such that NATCO so controls and dominates USA as in effect to disregards USA's separate corporate existence.

6. In or about mid-1993, plaintiff Sandeep Reddy learned of the existence of an ascorbic acid technology developed in the United States with the potential for manufacture, use and sale in India and other Asian markets.

7. Mr. Reddy embarked upon an effort to ascertain whether he could obtain a licence for the technology.

8. After months of investigative work, Mr. Reddy established contact with the person or persons at Genencor International Inc., a corporation organized and existing under the laws of the State of Delaware, located at 1870 S. Winton Road, Rochester, New York, responsible for licensing the ascorbic acid technology.

9. In early 1994, Mr. Reddy and Tamil Nadu Industrial Development Corporation ["TIDCO"], an Indian governmental body charged with promoting industrial development, signed a non-disclosure agreement which allowed them access to the science associated with the ascorbic acid technology.

10. After the science and the potential for exploiting the technology were analyzed, it was recommended to Sandeep Reddy by TIDCO, because of the significant capital needed for the project, that Mr. Reddy involve an Indian pharmaceutical company.

11. TIDCO suggested several candidates to Mr. Reddy, including NATCO.

12. On or about July 4, 1994, Sandeep Reddy and NATCO agreed in principle to act together with TIDCO as a consortium to obtain a licence for the ascorbic acid technology.

13. On or about January 27,1995, Genencor International, Inc. entered into a Letter of Intent whereby it was agreed that the ascorbic acid technology would be licensed to, collectively, plaintiff Sandeep Reddy, NATCO and TIDCO, for the manufacture, use and sale of ascorbic acid in a delineated territory, including India, Pakistan, Malaysia, Burma, Thailand, Laos, Cambodia, Vietnam, Sri Lanka and Bangladesh

[the "Letter of Intent"].

14. Mr. Reddy determined that it was in his best interest to extricate himself from the ascorbic acid project so that he could pursue other entrepreneurial opportunities.

15. On or about January 31, 1995, Reddy and NATCO entered into an Agreement and Assignment of Interest whereby Reddy assigned and transferred to NATCO all of his right, title and interest in, to and under the Letter of Intent and the licence intended to be acquired thereunder [the "Agreement and Assignment of Interest", a copy of which is annexed hereto as Exhibit A].

16. In consideration for the assignment by Reddy, NATCO agreed, by the terms and conditions of the Agreement and Assignment of Interest, to pay to Reddy the sum of Rs. 100 Lakhs (approximately US $ 300,000) as follows: One-third of the sum was payable upon the execution of the licence agreement, one-third of the sum was payable upon the three month anniversary of the signing of the licence agreement, and the final one-third of the sum was payable on the six month anniversary of the signing of the licence agreement, said payments to be in the form of shares of NATCO or Natco Laboratories Limited or some combination thereof, the number of shares to be determined such that ninety percent of the market value of the shares at the time of issuance equaled the amount of the payment due resulting in a market value of Rs. 111.11 Lakhs.

17. The Agreement and Assignment of Interest further provided that "Reddy and NATCO agree that this agreement shall be governed by the substantive laws, without reference to the conflict of laws, of either the State of New Jersey or the State of California and that any action taken to enforce the terms of this agreement shall be commenced in the state courts or the United States district courts for either the State of New Jersey or the State of California."

18. By oral agreement between Reddy and the Chairman and Managing Director of NATCO, Venkhiah C. Nannapaneni, the Agreement and Assignment of Interest was modified to provide for payment to Reddy by check rather than by shares of stock. Reddy confirmed the oral modification in writing. See Exhibit B.

19. In reliance upon the Agreement and Assignment of Interest, Reddy forbeared from enforcing his rights under the Letter of Intent.

20. TIDCO and NATCO created an India corporation, NATCO Organics Ltd., to hold the licence to be acquired pursuant to the Letter of Intent.

21. Pursuant to the Letter of Intent, a License Agreement was in fact entered into on or about July 31, 1995.

22. Under the Agreement and Assignment of Interest and the oral modification thereof, NATCO was required to pay to Reddy by check one-third of Rs. 111.11 Lakhs on July 31, 1995; another one-third on October 31, 1995 and the final one-third on January 31, 1996.

23. NATCO failed to make each instalment payment to Reddy as it became due and owing.

24. NATCO ignored Reddy's repeated requests for payment.

25. NATCO intentionally, willfully, and without justification, breached the Agreement and Assignment of Interest and oral modification thereof.

26. As a direct and proximate consequence thereof, Reddy has suffered significant economic loss and damage.

WHEREFORE, plaintiff Sandeep Reddy demands from defendant Natco Pharma Limited and defendant Natco Pharma USA, LLC compensatory damages, attorneys fees, interest, costs, and such other relief as the Court deems equitable and just.

Second Count

27. Plaintiff reiterates the allegations contained in the First Count and incorporates them herein.

28. Sandeep Reddy performed services which provided substantial benefits to NATCO.

29. Mr. Reddy is entitled to be paid the reasonable value of the services he rendered which benefited NATCO.

30. To day, Mr. Reddy has not been paid the reasonable value of the services he rendered which benefited NATCO.

WHEREFORE, plaintiff Sandeep Reddy demands from defendant Natco Pharma Limited and defendant Natco Pharma USA, LLC compensatory damages, attorneys fees, interest, costs, and such other relief as the Court deems equitable and just.

Third Count

31. Plaintiff reiterates the allegations contained in the First and Second Counts and incorporates them herein.

32. Sandeep Reddy performed services which provided substantial benefits to NATCO.

33. NATCO has been unjustly enriched as a result of the services performed by Mr. Reddy.

WHEREFORE, plaintiff Sandeep Reddy demands from defendant Natco Pharma Limited and Natco Pharma USA, LLC, compensatory damages, attorneys fees, interest, costs, and such other relief as the Court deems equitable and just."

The AO had not discussed the claim of the assessee. He never expressed any doubt on the documents. No reasons are given. Basis of his conclusions is not known. The case laws cited by the assessee are not distinguished or met. How an amount received for a restrictive covenant becomes taxable is not sated. The claims of the assessee are not controverted. It is at best a slipshod order.

30. Though the AO has not disputed the authenticity and genuineness of any of the agreements produced before him, for the first time, the learned CIT (A), without even a prima facie enquiry, doubted the genuineness of the documents. The learned DR went a step further and suggested that they are all collusive documentation. This argument is devoid of merit and not backed by any evidence whatsoever. The fact remains that the entire issue started in the year 1993 when the assessee started his investigative work and established contact with GIC and then through TIDCO came into contact with NATCO and formed a consortium to obtain a licence for AA Technology. These are all legal transactions and cannot be dismissed just based on surmises and conjectures. Allegations of fraud, collusion etc., cannot be made in the air. If the CIT (A) had any doubt, he should have called for a remand report or at least made some preliminary enquiries with TIDCO, which is a governmental body. What the assessee had obtained was a right to exploit the licence of AAT along with NATCO and TIDCO and by surrendering this right, what he received was a capital receipt and thus not a taxable receipt. Section 28(va) is a substantive provision and cannot be given retrospective operation when the legislature has not specifically said so.

31. We fully agree with the arguments of the learned counsel for the assessee that the receipt in question was for surrendering of rights jointly held and for not carrying on similar activity. The documents are genuine and Tamil Nadu Industrial Development Corporation acted as a catalyst and brought these parties together. None of them are related to each other. Cases Were fought in Court of law and thus the theory of collusion does not simply stick. We agree with the arguments of the learned counsel for the assessee on this issue and we reject the arguments of the learned DR as without any merit. It cannot be said that the assessee had rendered services to NATCO, for the simple reason that NATCO was never in the picture when in the year 1993 the assessee, through his investigative work, learnt about the existence of Ascorbic Acid Technology and also when TIDCO came into the picture. It is not a case where NATCO had employed the assessee for obtaining certain specified object. By becoming a joint owner along with two others, the assessee cannot be said to have been a simple consultant working; for a fee in this case. In fact, he became a joint equal owner and part of the management for the proposed business. The Revenue's contention that only a scientist having specialized knowledge in chemistry can be a potential threat for future business, is, to say the least, amusing. A professional management consultant, who is an Engineer and an MBA and who is working for the most well reputed multi-national management consultant firms like Price Waterhouse of USA and Anderson Consulting of UK and who had demonstrated his capability by obtaining certain technology which he could, on equal terms, share with multi-national pharmaceutical companies, can obviously do the same with any other business concern. In fact, a pure scientist might not be as much a potential threat as a person of the calibre of the assessee. All

these conclusions are imaginations based on each person's perceptions and level of intellect. These do not substitute business acumen and a commercial decision. Possibilities and perceptions cannot form basis of decisions.

32. The complaint filed before the US court by the assessee should be read as a whole. Threat perceptions should be viewed from the angle of NATCO and V.C. Nannapaneni, and not from the angle of revenue collection. Huge sum of money is not parted by NATCO just like that to an unconnected and unrelated person. NATCO recognised the rights of the assessee as well as his capacity to compete by himself or joining or teaming up with somebody else. The doubts entertained by the learned CIT (A) have been effectively answered by the assessee. The decision of this Bench in the case of K.V.D. Prasad Rao in I.T.A.no.336/Hyd/1999 dated 31-12-2002, does not come to the rescue of the Revenue as, in that case, it was held that the documents produced were only a pretence. In this case, it is not so. This is neither a make-believe arrangement nor a sham transaction, between connected persons. The amount in question was received by the assessee for giving up some rights that he came into possession due to his long drawn out professional work. By giving up his right to be joint owner in the proposed project, he is permanently deprived of a source of income. His right to ownership and running the proposed company is sterilized as he has extricated himself from the arrangement. The amount is received for relinquishment of the rights. The assessee has also entered into a restrictive covenant. NATCO paid this amount for both transfer of rights as well as to ward off competition. It is settled law that such receipts are capital receipts and are not liable to tax. A person who has been accepted as an equal partner by a Government organization as well as by a Multinational Pharmaceutical Company, cannot be said to have no capacity. NATCO never appointed him as a consultant for a fee and thus the receipt cannot be said to have been received as fee for services as a professional. Thus, the receipt in question, in our considered opinion, on the facts of the case, is a capital receipt.

33. Even on the issue of the system of accounting, the AO had concluded the issue and held that the assessee followed mercantile system of accounting. Extracts of the accounts clearly indicate that the assessee follows mercantile system of accounting. Thus, the claim of the learned DR that the assessee follows cash system of accounting is without any basis. On this count also, the argument of the learned DR fails, though we need not dwell on this issue and the applicability of Section 9(1)(vii) and the issue of residential status etc., as it would be of academic value, in the light of our finding that this is a capital receipt not exigible to tax.

34. As the facts of the case clearly indicate, the receipt in question is a capital receipt, we hold that the same is not taxable in the asst. year under consideration. We need not delve into the catena of case laws relied upon by both the parties, as the facts based on which the conclusions are arrived at, do not require discussing the case laws at length. Suffice it to say, each and every judgment is based on given set of facts of that case. Thus, we uphold the contention of the learned counsel for the assessee and allow the appeal of the assessee.

35. In the result, the appeal of the assessee is allowed.