

**IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH,
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, AM
&
SHRI RAVISH SOOD, JM**

**ITA No.2596/Mum/2019
(Assessment Year :2014-15)**

M/s. Pooja Marketing C/o. Shri Ketan J. Shah C-1, Ami Darshan D.B. Patil Road Malad (E) Mumbai – 400 097	Vs.	Pr. CIT-31, Room No.301, C-13, 3 rd Floor, Pratykshakar Bhavan BKC, Bandra (E) Mumbai-400 051
PAN/GIR No.AAOF2090F		
(Appellant)	..	(Respondent)

Assessee by	Shri V. Sridharan, Senior Advocate, Shri Ravi Sawana & Shri Samyak Lohade
Revenue by	Shri B.V. Jhaveri
Date of Hearing	24/03/2021
Date of Pronouncement	24/05/2021

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.2596/Mum/2019 for A.Y.2014-15 preferred by the order against the revision order of Pr. Commissioner of Income Tax-31, Mumbai u/s.263 of the Act dated 30/03/2019 for the A.Y.2014-15.

2. We find that though the assessee had raised several grounds of appeal before us, the core issues to be decided are as under:-

a) Whether the Id PCIT was justified in invoking revisionary jurisdiction u/s 263 of the Act in the facts and circumstances of the case.

b) Whether the Id PCIT was justified in directing the Id AO to compute the winnings from lottery not as business income but as income within the meaning of section 115BB of the Act in the facts and circumstances of the case. The interconnected issue involved therein is as to whether the assessee firm is entitled for set off of business loss with the income determined u/s 115BB of the Act in the facts and circumstances of the case.

c) Whether the Id PCIT was justified in directing the Id AO to examine the allowability of expenses within the meaning of section 58(4) of the Act in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the materials available on record. At the outset, we would like to place on record, the elaborate arguments advanced by the counsels of both the sides with regard to the impugned issues in dispute. This Bench deems it fit to appreciate the enormous efforts taken by the counsels for better representation of the issues in dispute before us by appraising the business model and placing all the facts before us. It would be relevant to discuss the business model in which the assessee is operating which sets out the primary facts of the appeal also. We find that the assessee is carrying on the business as a "Sole State Level Distributor" for distributing lottery tickets in the State of Maharashtra since 20.11.2012. The assessee is considered as a "promoter" in the State of Maharashtra, in respect of the lottery tickets organised by the State of Sikkim, the State of Mizoram and the State of Nagaland and

accordingly, is registered under the Maharashtra Tax on Lotteries Act, 2006.

3.1. The Organising States organize lotteries in accordance with the Lotteries (Regulations) Act, 1998 read with the Lotteries (Regulations) Rules, 2010. The lotteries and its draws are wholly under the control of the Organizing State. In respect of each lottery, the Organising State is required to announce, amongst other things, the following details in advance, by way of a notification in the Official Gazette:

- a. The name of lottery;
- b. Prices of the lottery tickets;
- c. Gross value of the tickets printed;
- d. Names of the distributors or selling agents with their addresses and contact information;
- e. Prize structure;
- f. Amount offered as prize money;.,

All the informations are printed in ticket itself.

3.2. The draws of lottery and prize monies in the lottery scheme, are fixed by the Organising State. Legislations mandate a minimum percentage of entire draw should be distributed as a prize money to the winner of lottery tickets and is pre-decided. Generally the prize money offered in a lottery scheme is 65% of size of the lottery scheme. In certain schemes, this prize money can also be 50% of size of the lottery scheme.

3.3. The amount collected on sale of lottery tickets has two components: (i) Contribution towards Prize Fund ("CPF") and (ii) Cost for Right of Participation in the Draw ("CPD"). The prize monies in respect of winning lottery tickets is paid out of the CPF. CPD represents the cost of organising the lottery and margin of the Organising State and Main distributor.

3.4. In order to sell lottery tickets to the end customer, the Organising State enters into an agreement with the "Main Distributor" who acts as National Distributor for sale of lotteries in entire India. The Organising State distributes the lottery tickets to the Main distributor, at an agreed price rate. As discussed above, the sale price to Main distributor would comprise of CPF and CPD. The Main Distributor then appoints "Area Distributors" who is responsible for sale of lottery tickets in a designated area. The area distributor is governed by the terms and conditions agreed by and between the Organizing State and the Main Distributors. The Area Distributor purchases lottery tickets from the Main Distributor for sale / distribution, in their designated area.

3.5. Generally, the unsold lottery tickets purchased by the Area Distributor like the assessee, are not taken back by the Main Distributor. In other words, in the event of lottery tickets remaining unsold with the Area Distributor, these unsold lottery tickets are not taken back by the Main Distributor. In such circumstances, the purchase price paid by the Area Distributor to the extent of unsold lottery tickets, is a loss. However, the losses of Area distributor are mitigated by prize monies attributed to prize winning tickets out of unsold lottery tickets lying with it.

3.6. The Area Distributor then appoints "Stockists" who further sell lottery tickets to the "Retailers". Lastly, the Retailers sell lottery tickets to the public who participate in the draws of lottery. At all levels, the portion of price towards CPF would remain the same and only the CPD portion changes.

3.7. The above business model can be further understood through the following example:-

- In this example, it is assumed that the scheme of lottery involves 10,000 lottery tickets. The maximum retail price of each lottery ticket is Rs. 100/-. Thus, the total size of lottery is Rs. 10,00,000/-. This would comprise of Contribution towards prize fund (CPF) and Cost for right of Participation in the draw (CPD). The prize money in this lottery scheme is fixed at 65% of the total size of lottery, thus amounting to Rs. 6,50,000/- (i.e. 65% of total size of lottery of Rs. 10,00,000/-). The Organising State sells these lottery tickets to the Main Distributor at Rs. 70/- per lottery ticket. Out of this, Rs. 65/- per lottery ticket would be towards contribution towards prize fund and balance Rs. 5/- would be towards cost of right for participation in the lottery (i.e. cost of organising the lottery and margin of the Organising State).

- The Main distributor sells the whole 10,000 lottery tickets to the Area Distributor, at Rs. 80/- per lottery ticket. The margin of Main distributor would be Rs. 10 being the difference between sale price of Rs. 80/- per lottery ticket realised from the Area distributor and purchase price of Rs. 70/- per lottery ticket paid to the Organising State.
- The Area distributor then sells these lottery tickets to its Stockists at Rs. 85/- per lottery ticket. The margin of Area distributor would be Rs. 5 being the difference between sale price of Rs. 85/- per lottery ticket realised from Stockists and purchase price of Rs. 80/- per lottery ticket paid to the Main distributor.
- The Stockists then sells these lottery tickets to its Retailers at Rs. 90/-per lottery ticket. The margin of Stockists would be Rs. 5 being the difference between sale price of Rs. 90/- per lottery ticket realised from Retailers and purchase price of Rs. 85/- per lottery ticket paid to the Area distributor.
- The Retailers then sells these lottery tickets to customers at Rs. 100/-per lottery ticket who participates in the lottery draw conducted by the Organizing State. The margin of Retailers would be Rs. 10/- being the difference between sale price of Rs. 100/- per lottery ticket realised from Customers and purchase price of Rs 90/- per lottery ticket paid to the Stockists.

3.8. In this example, under the ***first scenario***, it is assumed that all 10,000 lottery tickets are sold. In such a case, each party would be realising profit on sale of lottery tickets. The profit margin of all the parties would be as follows:

Particulars	Amount (In Rs.)
Organising State (Rs.5 x 10000 Tickets)	50,000/-
Main Distributor (Rs.10 x 10000 Tickets)	1,00,000/-
Area Distributor (Rs.5 x 10000 Tickets)	50,000/-
Stockist (Rs.5 x 10000 Tickets)	50,000/-
Retailers (Rs.10 x 10000 Tickets)	1,00,000/-
Prize money distributed to the winners	6,50,000/-
Total Value of the Lottery Tickets	10,00,000/-

Viewed from another angle, the loss borne by the public would be Rs. 3,50,000/-.

3.9. In ***second scenario***, out of above said 10,000 lottery tickets purchased by the Area Distributor, only 8,000 lottery tickets are sold and remaining 2,000 lottery tickets are remaining unsold with it. In such case, due to the general business practice, these 2,000 unsold lottery tickets would not be taken back either by the Organising State or by the Main distributors. Thus, the Organising State and Main distributors would not incur any loss whereas the Area distributor would suffer loss on account of unsold lottery tickets lying with it. In such a case, the profit/ (Loss) of Area Distributor would be as follows:

Profit and Loss Account			
Expenses	Amount	Income	Amount
Purchase Price paid to Main Distributor (10,000 lottery tickets purchased at Rs.80/- per lottery ticket)	8,00,000	Sale price realised on sale of 8000 lottery tickets at Rs.85/- per lottery ticket	6,80,000
Net Loss	1,20,000		

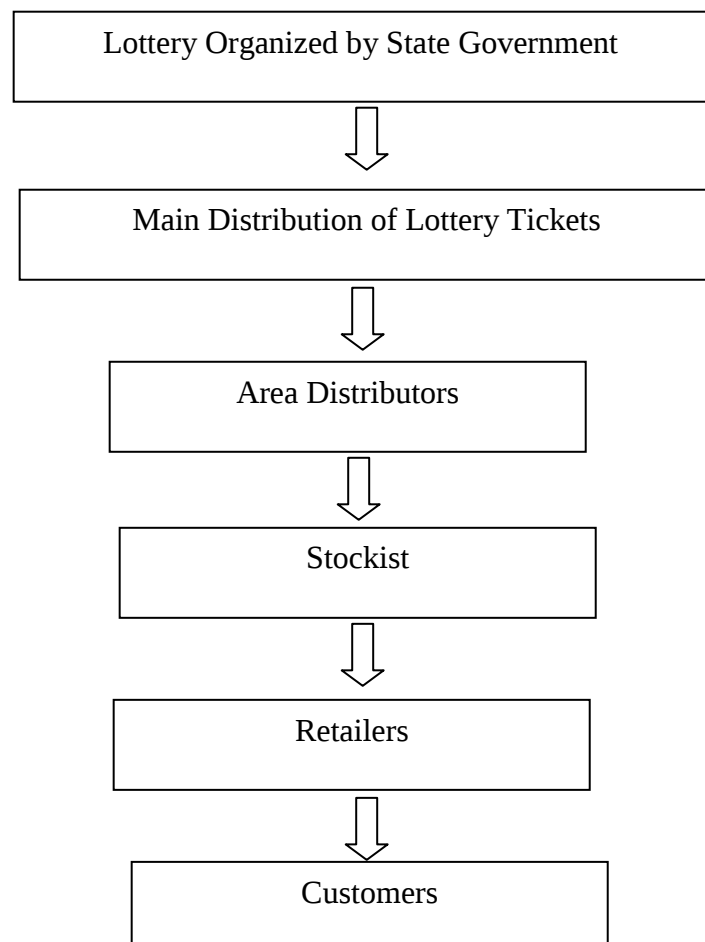
3.10. In the above example, it has been assumed that the unsold lottery tickets lying with the Area distributor fetches no prize in the draw of lottery. However, if these unsold lottery tickets fetch prize to the extent of say Rs. 50,000/-, then to that extent, the loss on account of unsold lottery tickets would be reduced. The net loss would only be Rs. 70,000/-(Rs 1,20,000 *minus* Rs. 50,000). Further, if the unsold lottery tickets fetch high value winnings in the draw of lottery, then the loss would be reduced to the extent of those winnings.

3.11. In ***third scenario***, if the Area distributor is unable to sell any ticket to its stockists, then the entire lot of 10,000 lottery tickets would remain unsold with it. In such a case, the Area distributor would be entitled to receive prize monies on the entire draw on account of holding of lottery tickets. Thus, the net loss of Area distributor would be as follows:

Profit and Loss Account			
Expenses	Amount	Income	Amount
Purchase Price paid to Main Distributor (10,000 lottery tickets purchased at Rs.80/- per lottery ticket)	8,00,000	Prize monies realised on unsold tickets	6,50,000
Net Loss	1,50,000		

3.12. This can be further understood from another angle. The purchase price paid by Area distributor was Rs. 80/- per lottery ticket. This had two components: (i) Contribution towards Prize Fund which was Rs. 65/-per lottery ticket; (ii) Cost for Right of Participation in the Draw which was Rs. 15/- (i.e. margin of the Organising State being Rs. 5/- and margin of the Main distributor being Rs. 10/-). Thus, even if the Area distributor is able to realise all the prize monies on account of all lottery tickets remaining unsold, the Area distributor would be incurring loss to the extent of CPD components in the lottery scheme.

3.13. Thus, in the lottery business, the various parties are involved, and the structure can further be understood with the help of following diagram :-



4. From the above business model prevailing in the lottery business, let us analyse the facts of the assessee case before us for the Asst Year 2014-15. During the year under consideration, the assessee had purchased 9,22,22,350 lottery tickets amounting to Rs 87,11,79,869/-. However, during this year, one new scheme of lottery, announced by the Government of Sikkim, was very big. The lottery tickets in respect of this scheme purchased by the assessee during the year could not be sold to the extent of 73,85,150 lottery tickets amounting to Rs 8,41,74,385/-. Having regard to large quantum of the lottery scheme and to avoid complete wiping off the business of the assessee, M/s Future Gaming Solutions Pvt Ltd, on one of basis, had agreed to take back the unsold tickets. Accordingly, the net purchases for Rs 8,48,37,200 lottery tickets were recorded at Rs 78,70,05,484/- i.e net of purchase returns. The details of the same were enclosed in page 58 of Paper Book I filed before us. Out of total lottery tickets purchased, the assessee could only sell lottery tickets to the extent of 3,77,28,095, amounting to Rs 44,98,41,302/-. Accordingly, 4,71,09,105 number of lottery tickets had remained unsold and as per the usual practice, these lottery tickets were not taken back by the Main distributor. The cost of these unsold tickets was Rs. 41,88,36,709/-. The total prize monies won on these unsold lottery tickets was Rs. 41,86,55,718/-. We find that the assessee had also filed an affidavit before us on 18.3.2021 wherein certain factual details for Asst Years 2014-15 to 2016-17 were affirmed thereon as under:-

A.Y.	Purchase		Sale	
	Qty.	Cost	Qty	Value
2014-15	8,48,37,200	78,70,05,484	3,77,28,095	44,98,41,302
2015-16	11,46,30,350	1,77,72,37,709	6,85,19,304	79,81,64,494
2016-17	4,96,90,000	55,32,73,096	3,41,29,070	40,66,59,063

A.Y.	Unsold Ticket		Prize Money Won	Loss Incurred
	Qty.	Cost		
2014-15	4,71,09,105	41,88,36,709	41,86,55,718	(1,80,991)
2015-16	4,61,11,046	51,18,57,848	46,83,67,965	(4,34,89,883)
2016-17	1,55,60,930	18,56,34,219	18,39,05,610	(17,28,609)

4.1. We also find that the assessee in the said affidavit had duly stated that in respect of weekly draw of lottery for the period 25.3.2013 to 31.3.2013, as per the usual business practice, the purchase invoices would have been raised on Monday i.e 1.4.2013. However, the purchase invoice in respect of this draw of lottery tickets, was raised by the seller of the tickets (i.e National Distributor) on the assessee on **31.3.2013** (Sunday). This is evident from the sample copy of invoice raised by Best & Co. enclosed at Page No. 258 of the Paper Book III filed before us. Similar is the case with other sample invoices which are enclosed at Page Nos. 259,267,268 of the Paper Book III filed before us.

4.1.1. It was affirmed further that in respect of draws of lotteries which are to be organised after the end of a financial year but in respect of which lottery tickets have been delivered earlier, in such cases, the purchase invoices are raised by the seller of the tickets (i.e National Distributor) on the assessee, in the next financial year . We find that the assessee also proved this statement by making specific reference to sample invoice copy raised by Best & Co. at page 261 of the Paper Book III filed before us. This invoice pertains to weekly draw period 1.4.2013 (Monday) to 7.4.2013 (Sunday) and that invoice was raised on 8.4.2013 (Monday). Accordingly, purchase was also recorded in the Financial Year 2013-14 and not in the Financial Year 2012-13. The tickets may have been physically delivered to the

assessee before the close of the financial year 2012-13, but the purchases of these lottery tickets were recorded in the Financial Year 2013-14. Therefore, it was pleaded that there would be no head of account titled as 'opening stock' or 'closing stock' in value terms in the financial statements of the assessee.

4.1.2. Similarly, the invoices relating to sales made by the assessee firm on its stockists, are raised as and when sales are made. This is evident from the sample copy of invoice enclosed at Page No. 273 of the Paper Book III filed before us. This is an invoice dated 3.6.2013 pertaining to weekly draw of lottery to be organised on 17.6.2013, 19.6.2013 , 20.6.2013 and 21.6.2013. In respect of draws of lottery to be held in subsequent financial year, invoices relating to sales for lottery tickets are raised by the assessee on stockists, at the beginning of that financial year. This is evident from the sample copy of invoice enclosed at Page Nos. 271,272,274,275 of the Paper Book III filed before us. This is an invoice dated 1.4.2013 pertaining to weekly draw of lottery to be organised for 1.4.2013 to 7.4.2013.

4.1.3. We find that the assessee had also affirmed that it is using a software programme called "LE" for maintenance of books of accounts relating to lottery business. This software programme provides number wise details of tickets purchased and sold and remaining tickets. From this database, full and complete details of unsold tickets are always available. Therefore during the assessment proceedings, in reply dated 29.11.2016 filed before the Id AO, the quantity of unsold tickets and prize money won on unsold tickets were submitted by the assessee. This reply is enclosed at Page Nos. 56 to 60 of the Paper

Book I filed before us.

4.1.4. We find that the assessee firm had also affirmed in its affidavit that the lottery tickets remaining unsold with it, are not taken back either by the Government who is organising the lottery or by the National Distributor. We find that the assessee firm had further affirmed that the averment that the State Government who is organising the lottery or the National Distributor, does not take back the ticket is proved by commercial reality. The purchase price of a lottery ticket comprises of two elements – CPF and CPD. CPD includes cost of lottery tickets, margins of the Government who is organising the lottery, margins of the Sole Distributor. Even if prize monies are won on entire lot of unsold lottery tickets, then also the assessee would only be getting the CPF and not the payments made in respect of CPD. Thus, the prize monies realized on unsold lottery tickets would be lesser than the cost of purchase. Given a choice, the assessee, as a prudent businessman, would have returned the unsold tickets. But these tickets are not taken back by the State Government or the National Distributor, so as not to bear the losses on account of return of unsold tickets.

4.1.5. We find that the assessee had also affirmed that this practice is followed by the National Distributors throughout the country. This affidavit had not been controverted by the revenue before us and hence the contents stated thereon are taken to be correct and having evidentiary value in terms of the decision of the *Hon'ble Supreme Court in the case of Mehta Parikh & Co vs CIT reported in 30 ITR 181 (SC)*. Hence it could be safely concluded that the assessee had booked purchases of lottery tickets in its financial statements only in

respect of draws held within the end of the financial year ; sales are booked as and when invoices are raised ; unsold tickets are not taken back by the Government who is organising the lottery scheme or the National Distributor and assessee firm, in order to mitigate the loss on account of unsold lottery tickets, engage itself in receipt of winning of prize monies on such unsold tickets and books the differential amount as loss.

4.2. We find that in respect of sales made by the assessee, the stockists were unable to sell certain number of lottery tickets. In such cases, the bundle of lottery tickets remaining unsold with the stockists except the loose tickets, are taken back by the assessee. This is evident from an extract of the ledger account of the stockist named 'Ambika Agency- Dadar' for the period 1.4.2013 to 31.3.2014 filed by the Id AR.

4.3. For the sake of convenience, the comparative chart containing details of net purchases, gross sales, sales returns, net sales and percentage of sales returns to total sales for the Asst Years 2014-15 to 2016-17 are as under:-

Assessment Years				
Sr. No.	Particular	2014-15	2015-16	2016-17
1	Net Purchase Amount	78,70,05,484	1,17,89,20,691	55,32,73,096
2	Gross Sale Amount	58,66,41,200	96,43,82,890	47,19,10,190
3	Sale Return Amount	13,68,01,129	16,62,18,396	6,52,51,128
4	Net Sale Amount	44,98,40,072	79,81,64,494	40,66,59,063
5	Percentage of Sales Return to Sales	23	17	14

4.4. From the perusal of the financial statements of the assessee for the year ended 31.3.2014, we find that assessee had shown net profit

during the year at Rs 94,38,441/- which has admittedly been arrived after considering the prize money from unsold lottery tickets amounting to Rs 41,86,55,718/-. If these winnings from unsold lottery tickets are taken out and dealt separately, then the position of 'income from business' of the assessee firm would be as follows:-

Net profit as per profit and loss account	94,38,441
Add: Donation	5,42,000
Less: Prizes from unsold lottery tickets	(41,86,55,718)

Business Loss	(40,86,75,277)

4.5. We find that during the assessment proceedings, the Id AO had raised the following queries to the assessee firm relating to the issue in dispute and the details of various replies given by the assessee thereon are as under:-

a) Notice u/s 142(1) of the Act dated 16.8.2016 together with questionnaire issued by the Id AO raising the following questions, among others :-

(24) The ratio of refund claimed against the TDS deducted is very large. Please state the reasons.

(25) Winning from lottery or crossword puzzle or horse races as per TDS return is more than the corresponding income in return of income. Explain.

b) The assessee vide submission dated 22.11.2016 submitted as follows:-

(24) The TDS is deducted by the Government on the lottery tickets, but the margins in the business are very low hence there is large refund.

(25) The income is much more than the TDS.

c) The assessee vide further submission dated 29.11.2016 furnished the details of prizes from unsold lottery tickets, quantity wise and value wise which are enclosed in pages 56 to 60 of the Paper Book I filed before us, as under:-

(1) The details of purchases quantity wise and value wise.

(2) The details of Sales quantity wise and value wise.

(3) The details of prizes from unsold quantity wise and value wise.

(9) In respect of your query regarding winning from Lottery as per TDS Return and corresponding income in ITR, we state that , winning from Lottery as per 26AS is Rs 2,95,00,000/- whereas assessee firm has received prizes from unsold to the tune of Rs 41,86,55,718/- hence it much more than what is reflected in 26AS. The TDS is deducted only on the prize above Rs 10,000/-.

(11) The assessee is trader in Lottery tickets and TDS deducted as a winner of Lottery instead of trader of Lottery, hence instead of deducting 10% the TDS is deducted @ 30% therefore is high demand of refund.

4.5.1. We find that the Id AO after considering the submissions filed by the assessee, passed an assessment order u/s. 143(3) of the Act on 27.12.2016, accepting the income declared in the return of income. We find that the Id AO had duly accepted to the nature of business activities carried on by the assessee firm by categorically stating that the assessee is engaged in the business of reselling of

Government lottery tickets and during the year, the assessee has declared income from its business activities.

4.5.2. In the assessment proceedings for the Asst Year 2015-16, the issue had arisen as to whether the income by winnings from lotteries from unsold lottery tickets, is assessable as business income or income from other sources. Further, the Ld. AO had also questioned the allowability of expenses claimed against the winnings from lottery tickets and as to why such winnings should not be assessed u/s. 115BB of the Act. In response to the same, the assessee furnished an explanation on 12.12.2017 which is reproduced in the assessment order for Asst Year 2015-16 enclosed in Page 189 of the Paper Book III filed before us.

4.5.3. For the Asst Year 2015-16, the Id AO held that the winnings from lottery ticket is required to be assessed u/s 56(2)(ib) of the Act and is taxable at 30% u/s 115BB of the Act. Further, the Id AO also held that the cost of unsold ticket is also not allowable as deduction u/s 58(4) of the Act.

4.6. We find that the Id AO based on the findings recorded by him in the assessment order for Asst Year 2015-16 requested the Id PCIT to initiate proceedings u/s 263 of the Act to revise the assessment made u/s 143(3) of the Act for the Asst Year 2014-15. This fact is clearly mentioned in the impugned order i.e order u/s 263 of the Act of Id PCIT in para 4 thereon by stating as under:-

“4.

The AO accordingly sent a proposal u/s 263 to revise / amend the order made u/s 143(3) of the I.T. Act.”

5. Accordingly, the Id PCIT on 30.1.2018 issued a show-cause notice u/s. 263 of the Act, proposing to revise the assessment order dated 27.12.2016 passed for the Asst Year 2014-15 u/s. 143(3) of the Act by treating the order of the Id AO as erroneous in as much as it is prejudicial to the interest of the revenue. In this notice, the Id. PCIT stated that in the subject assessment year, the assessee had income from winning from lotteries from unsold tickets of Rs. 41,86,55,718/-. The entire winnings from lottery was set off against the expenses claimed in the Profit and Loss Account. The income from winning from lotteries is exclusively covered by the provisions of Section 115BB of the Act and no expenses are allowable against the income from winning from lotteries u/s. 58(4) of the Act. Reference was also made to the assessment proceedings for the Asst Year 2015-16 wherein income from winnings from lotteries were taxed at 30% u/s 115BB of the Act and expenses on such winnings were disallowed u/s. 58(4) of the Act.

5.1. In response to this show-cause notice, the assessee filed its submissions on 20.2.2018 and 6.3.2019 before the Id PCIT. We find that on 30.3.2019, the Id PCIT passed the impugned order setting aside the order of the Id AO as erroneous and prejudicial to the interest of the revenue by rejecting the submissions of the assessee. The Id. PCIT directed the Ld. AO to compute the winnings from lottery u/s. 115BB of the Act and the allowability of expense or deduction of any sort from this income u/s. 58(4) of the IT Act.

5.2. The relevant findings of Id PCIT could be summarised as under:-

- a) The income by way of winnings from lotteries has to be computed u/s 56(2) of the Act. Further, no deduction of any expenditure is allowed from the winnings from lotteries. Also, the liability to pay 30% tax u/s 115BB of the Act is on the winnings from lottery.
- b) The assessee's activity was two fold. Firstly, earning of profit on account of sale of tickets at a higher price than the cost borne out by it which would constitute business income. Secondly, the winning from the unsold lottery tickets, which cannot be termed as business activity.
- c) The assessee had purchased lottery tickets from M/s Future and M/s Teesta. Therefore, prize winning retrieved from unsold lottery tickets cannot be considered as retrieval of the cost of tickets. By holding such tickets, the assessee had participated in the draw.
- d) The assessee had returned tickets in substantial number to M/s Future and M/s Teesta.
- e) The factual position involved in the case of Commercial Corporation of India Ltd vs ITO reported in 201 ITR 348 (Bom) is different. Further, from the ratio laid down by the Hon'ble Kerala High Court in the case of CIT vs Manjoo & Co. reported in 335 ITR 527 (Ker) and Hon'ble Allahabad High Court in the case of J N Sharma vs ACIT reported in 270 CTR 594 (All), it is clear that winnings of lotteries from unsold tickets is chargeable to tax at the rate of 30% on the amount of such winnings u/s 115BB of the Act and as per section 58(4) of the Act, no deduction towards expenditure is allowed thereon.

6. Taxability of income by way of winnings from lotteries u/s 115BB of the Act and set off of loss under the head ' Profits and Gains of Business or Profession'

We find that the Id AR before us fairly agreed to the fact that the statute provides for a special rate of taxation u/s 115BB of the Act in respect of winnings from lotteries. But he submitted that the same had to be read together with section 2(24)(ix) of the Act and other relevant statutory provisions. He argued that the Act had to be read as a whole. The Id AR before us drew our attention to various statutory provisions relevant to address the issue in dispute prior to amendments thereon and also the scenario post amendment together with the purpose of the amendment, as under:-

(i) The charge of income-tax u/s. 4 of the Act is on the "total income" of a previous year. As per Section 2(45) of the Act, "total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act.

(ii) Chapter IV of the Act deals with computation of total income. This chapter provides that all income shall be classified under appropriate heads of income. The income chargeable under a head of income shall be computed, in accordance with the computation mechanism laid down in that head.

(iii) Once income including losses are computed under each head of income, thereafter, the total income shall be computed after considering (i) the provisions of Set-off or carry forward of loss, as contained under Chapter — VI of the Act and (ii) deductions under Chapter VIA of the Act.

(iv) Section 71 of the Act provides for set off of loss from one head against income from another, except in certain special circumstances where such set-off is permissible only against income under the same head. Thus, where an assessee has loss under the head 'Profits and gains of business or profession' and income under the head 'Income

from Other Sources', then the business loss can be set off against the other source income.

(v) Once the provisions of set-off of losses have been given effect to, the Gross Total Income so remaining, is subject to deduction under Chapter — VIA of the Act.

(vi) Upon determination of Total Income, the computation of tax payable on such total income, is done. As per Section 4 of the Act, the income-tax is charged on total income, at the rates specified in the Finance Act. However, if an income is chargeable at specified rate as provided for in Chapter XII of the Act, then such income shall be chargeable to tax at such special rate.

(vii) In this background, the Id AR submitted submitted that computation of tax payable on an income whether taxable at special rate or rates specified in the Finance Act, takes place only after giving effect to the provisions of computation mechanism laid down under Chapter IV - Heads of Income, followed by Chapter - VI - Set off or carry forward of losses and lastly, Chapter - VIA - Deductions from gross total income. The exercise relating to computation of tax payable on total income starts after arriving at the total income. The provisions relating to computation of tax, whether special rate or non-special rate, would not take place before giving effect to the provisions of the Act which deals with the determination of total income. In other words, the computation of tax does not precede the computation of total income.

(viii) For computing tax u/s. 115BB of the Act, the total income is to be computed in accordance with the provisions of the Act which includes provisions relating to set-off of losses incurred under one head against income from another head of income. Once total income is computed after giving effect to set-off provisions, then it is to be seen as to which part of total income is chargeable to tax at special rate vis-

a-vis normal rates prescribed in the Finance Act. Unless expressly prohibited, the provisions of section 115BB of the Act cannot be read in isolation to say that income from lotteries etc would be taxable at 30% de hors the computation mechanism laid down in the Act.

(ix) It is trite law that Income-tax is levied on the total income of an assessee and not separately on different sources / heads of income. In fact, it is settled law that the income-tax is one tax which is levied on total income and it is not collection of different taxes which are to be levied on different sources / heads of income.

(x) The Id AR placed in support of aforesaid contentions, relied on the decision of *Hon'ble Supreme Court in the case of Rajapalayam Mills Ltd vs CIT reported in 115 ITR 777 (SC)* wherein it was held as under:-

It is settled law that though the profits of each distinct business carried on by an assessee have to be computed separately in accordance with the provisions of section 10 of 1922 Act the tax is chargeable under that section not separately on the profits of each business, but on the aggregate of the profits of all the business carried on by the assessee: It followed, therefore, that where the assessee carries on several businesses, he is entitled under section 10 of 1922 Act to set off loss in one business against profits in another. If there is any loss in a business carried on by the assessee by reason of the profits of such business not being sufficient to absorb the depreciation allowance, such loss can be set off against the profits of another business carried on by the assessee. If, however, there are no profits chargeable under the head "Business or profession" or if the profits chargeable under that head are insufficient to cover the depreciation allowance the amount of the allowance to the extent to which it is not absorbed can be set off against profits chargeable under any other head for that assessment year.

(emphasis supplied by us)

(xi) The Id AR argued that the set-off of loss is not a choice given to an assessee. It is a statutory provision which is required to be given effect to , in computation of total income. He argued that Section 71 of the Act does not contain any restriction or exclusion for the

assessment year under consideration that income chargeable at special rate shall not be set-off against loss under any head of income. Prior to the amendment by the Finance Act, 1986 w.e.f. 01-04-1987, Section 74A(1) dealt with set-off and carry forward of losses from the lotteries. Section 74A(1) of the Act *inter alia* provided that losses from lotteries can be set-off only against winnings from lotteries. Such losses were not allowed to be set-off against income from any other source or under any other head. However, with the introduction of Section 115BB of the Act, Section 74A(1) of the Act was omitted. Thus, the restriction on set-off of losses from lotteries was removed from the Act. **Hence he argued that there is no bar on set – off of losses u/s 115BB of the Act. Such a bar is there is section 115BBDA of the Act from inception. Such a bar was introduced in section 115BBE of the Act w.e.f. 1.4.2017.** Similarly, section 115BB of the Act does not contain any restriction or prohibition on set-off of losses against the income by way of winnings from any lottery etc. Contrast to this, section 115BBDA of the Act which deals with taxability of dividends received from domestic companies specifically bars the set-off of loss under any provisions of the Act in computing the income by way of dividends referred to in Section 115BBDA(1) of the Act. In support of this, the Id AR placed reliance on the co-ordinate bench of this Tribunal in the case of *Tata Motors Ltd vs DCIT reported in 118 Taxmann.com 427 (Mum Trib)*.

(xii) The Id AR argued that until Asst Year 2016-17, Section 115BBE of the Act did not contain any bar on allowability of set-off of losses against income assessable u/s. 68 or 69 or 69A or 69B or 69C or 69D of the Act. In view thereof, the Courts / Tribunals have taken a view that

set-off of losses is allowable against such income, before computing the tax liability u/s. 115BBE of the Act. In the following cases, such view has been taken:

- a. *PCIT v. Aacharan Enterprises (P.) Ltd. [2020] 273 Taxman 85 (Raj.)*
- b. *Vijaya Hospitality and Resorts Ltd. v. CIT [2019] 419 ITR 322 (Ker.)*
- c. *Satish Kumar Goyal v. JCIT [2016] 70 taxmann.com 382 (Agra - Trib.)*

(xiii) With effect from 1.4.2017 relevant to Asst Year 2017-18, the setoff of losses was barred u/s. 115BBE of the Act. In Circular No. 3/2017 dated 20.1.2017 - Explanatory Notes to the Provisions of the Finance Act, 2016, the CBDT has noted that prior to the Finance Act, 2016, there was uncertainty on the issue of set-off of losses against income referred to in section 115BBE of the Act. Therefore, in order to avoid unnecessary litigation, the provisions of Section 115BBE(2) of the Act has been amended as to expressly provide that no set off of any loss shall be allowable in respect of income u/s. 68 or 69 or 69A or 69B or 69C or 69D of the Act. In a subsequent Circular No. 11/2019 dated 19.6.2019, the CBDT further provided a clarification that an assessee is entitled to claim set-off of loss against income determined u/s. 115BBE of the Act till the Asst Year 2016-17.

(xiv) The Id AR further submitted that Section 112 of the Act which was inserted by the Finance Act, 1992 w.e.f. 1.4.1993 provides that where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", such long-term capital gains shall be chargeable to tax at appropriate rates. This income was chargeable at special rates. In this regard, doubts had arisen as to whether set-off of loss u/s. 71 of the Act

is allowable against the long-term capital gain chargeable at special rates u/s. 112 of the Act. The CBDT vide its Circular No. 721 dated 13.9.1995 clarified the position to say that:

"3. ...The total income is to be computed in the manner prescribed in the Income-tax Act. Set-off of loss as per the provisions of sections 70 to 80 is a stage which is part of this procedure. When this procedure is adopted for computing gross total income or total income, only the amount of income after setoff remains under a head as part of gross total income or total income. Only that amount of long-term capital gains which is included in the total income would be subject to tax at a prescribed flat rate. Thus, if there was a loss of Rs. 10,000 from business and there is long-term capital gains of Rs. 30,000, then after setting off of loss of Rs. 10,000 with long-term capital gains, only Rs. 20,000 would remain under the head "Capital gains" to be included in the gross total income or total income. The flat rate of tax will be applicable in respect of Rs. 20,000 and not Rs. 30,000, since the amount of long-term capital gains included in that total income is Rs. 20,000. (Here it is assumed that the total income ignoring, long term capital gains, is above the exemption limit.)"

(xv) The Id AR also placed reliance on the decision of *Hon'ble Jurisdictional High Court in the case of CIT vs Anuj A Sheth (HUF) reported in 190 Taxman 330 (Bom)* in support of aforesaid contention.

(xvi) The Id AR also submitted that provisions of section 115A of the Act also provides for special rate of taxation in respect of income being dividends, royalty and technical services fees in the case of a foreign companies. The issue had arisen as to whether such income is chargeable to tax at special rate without allowing for any set-off of loss. In this regard, he placed reliance on the co-ordinate bench decision of this Tribunal in the case of *Hitachi Zosen Corporation vs DCIT* reported in 68 ITD 235 (Mumbai Trib) wherein in para 6 of the said order, it was held that provisions of section 70 of the Act containing set off of loss need to be given and on the net result, the special rate of tax is to be applied.

6.1. Per Contra, the Id DR vehemently relied on the order of the Id PCIT in his revision order passed u/s 263 of the Act. He also relied on the decision of Hon'ble Kerala High Court in the case of Manjoo & Co. reported in 335 ITR 527 (Ker) and argued that prize winnings from lotteries had to be taxed as income from other sources at special rate of tax u/s 115BB of the Act without allowing for set off of any losses u/s 71 of the Act. He also supported the order of the Id PCIT in stating that no deduction of expenditure shall be allowed against winnings from lotteries in terms of section 58(4) of the Act.

6.2. In the present case before us, the assessee had offered its entire income including income by way of winnings from lotteries on unsold lottery tickets , as income chargeable under the head "Profits and gains of business or profession". However, the Id PCIT had sought to treat the income by way of winnings from lotteries as separately assessable under the head 'Income from Other Sources". We find that the net profit for the year is Rs 94,38,441/- was arrived at by the assessee after considering the prizes from unsold lottery tickets amounting to Rs 41,86,55,718/-. If these winnings are to be assessed as "Income from Other Sources" u/s 56(2)(ib) of the Act, then the net result of the business of distributing lottery tickets would be a net loss of Rs 40,86,75,277/- as worked out elsewhere in this order.

7. We find lot of force in the argument advanced by the Id AR on the point that there is no bar on set-off of loss provided in section 115BB of the Act as stated supra. Section 115BB of the Act talks only about

taxability of such winnings at a special rate of 30%. Hence only the net winnings is taxable at 30%. The net winnings is to be determined after setting off the business loss of Rs 40.86 crores as worked out above with the income from other sources. We find that the Id AR had not disputed the rate of taxability of winning from lotteries in terms of section 115BB of the Act. We find that even if the prize winnings from unsold lottery tickets is sought to be taxed under the head 'Income from Other Sources' as pointed out by the Id PCIT in his section 263 order, the business loss of Rs 40.86 crores is still required to be set off with the prize winnings from unsold lottery tickets u/s 71 of the Act and the net income thereon would be liable for tax at special rate of 30% in terms of section 115BB of the Act. As long as the tax rate under normal provisions of the Act and tax rate prescribed u/s 115BB of the Act are same, the entire issue becomes revenue and tax neutral. Hence there could be no prejudice that could be caused to the interest of the revenue for the Asst Year 2014-15 even if the order of the Id AO is found to be erroneous. We find that the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd reported in 243 ITR 83 (SC) had categorically held that for the Id PCIT to invoke revision jurisdiction u/s 263 of the Act, the twin conditions should be cumulatively satisfied i.e. the order passed by the Id AO should be erroneous **and** it should be prejudicial to the interest of the revenue. In the instant case, since the entire issue is revenue and tax neutral, the twin conditions stipulated in section 263 of the Act are not satisfied and hence the section 263 order passed by the Id PCIT is eligible to be quashed thereon.

7.1. We also find that the issue could be looked into from another angle. Whether the prize winnings from unsold lottery tickets derived by

the assessee dealer could be assessed under the head 'Income from Business' or under the head 'Income from Other Sources', per se, is clearly a debatable issue. Hence the law is now well settled that a debatable issue cannot be subject matter of revision proceedings u/s 263 of the Act. The existence of the issue becoming debatable is staring on us from the fact that the *Hon'ble Karnataka High Court in the case of Mysore Sales International Ltd vs CIT reported in 117 ITR 64 (Kar)* had decided the issue in favour of the assessee in pre 1972 era, whereas the *Hon'ble Kerala High Court in the case of CIT vs Manjoo & Co. reported in 335 ITR 527 (Ker)* and *Hon'ble Allahabad High Court in the case of J N Sharma vs ACIT reported in 270 CTR 594 (All)* had decided the issue in favour of the revenue. These decisions are considered by us in detail in the later part of this order. Once an issue becomes debatable, the view taken by the Id AO in his scrutiny assessment order could be construed as one of the possible view and hence the order passed by him cannot be termed as erroneous. In such a scenario, the view canvassed by the Id PCIT would only result in substitution of his view in the place of one of the possible view already taken by the Id AO. The law is very well settled on this point that in these circumstances, the revision jurisdiction u/s 263 of the Act cannot be invoked by the Id PCIT. Reliance in this regard is placed on the decision of the *Hon'ble Jurisdictional High Court in the case of Gabriel India Ltd reported in 203 ITR 108 (Bom)* and in the case of *Nirav Modi reported in 71 taxmann.com 272 (Bom)*. It is pertinent to note that the Special Leave Petition preferred by the Revenue against the judgement of Hon'ble Bombay High Court in the case of Nirav Modi supra had been dismissed by the *Hon'ble Supreme Court reported in 77 taxmann.com 15 (SC)*.

7.2. Moreover, we also find that all the requisite details were indeed filed by the assessee before the Id AO in response to the queries raised by the Id AO along with the notice u/s 142(1) of the Act dated 16.8.2016 and thereafter by oral queries raised during assessment proceedings. We find that the assessee had duly replied to those queries before the Id AO in the assessment proceedings vide reply letters dated 22.11.2016 and 29.11.2016 together with all the supporting details and workings for arriving at the profits including prize winnings from unsold lottery tickets. These details are enclosed in pages 56 to 60 of the Paper Book I filed before us. Hence it could be safely concluded that this is not a case where no enquiries at all, were carried out by the Id AO in the assessment proceedings. We hold that requisite enquiries were indeed carried out by the Id AO and after duly getting satisfied on the same, he had proceeded to frame the assessment accepting the contentions of the assessee. It is not necessary for the Id AO to deal with each and every matter that had cropped up in the assessment order. He is not expected to write a thesis in the assessment order. He is only required to address the issues on which he is not agreeable with the contentions of the assessee. Reliance in this regard is placed on the decision of *Hon'ble Jurisdictional High Court in the case of Nirav Modi reported in 71 taxmann.com 272 (Bom)* wherein the operative portion of the said order is reproduced hereunder:-

7. Firstly, the Revenue contends that the exercise of powers under Section 263 of the Act is justified as in this case, as no inquiry in respect of the gifts received during the subject years was done by the Assessing Officer for the Assessment orders for Assessment Years 2007-08 and 2008-09. This according to the Revenue is evident from the Assessment Orders dated 31st December, 2009 and 30th December, 2010 which does not even make a mention of the gifts received much less discuss and/or deal with the same. This issue is no longer res integra as this Court in Idea Cellular Ltd. v. Dy. CIT [2008] 301 ITR 407 (Bom.) has held that if during Assessment proceedings queries were raised and the assessee responded to the same, then even if an Assessment order does not

mention the same, it does not mean that the Assessing Officer has not applied his mind to the issues. It would be well-nigh impossible for an Assessing Officer to complete all assessments assigned to him under Section 143(3) of the Act if he is required to deal with all issues which arose during the Assessment Proceedings. Thus, the Assessment Order primarily deal with only those issues in respect of which the Assessee has not been able to satisfy him and give reasons for his conclusion. This would enable the Assessee to challenge the same, if aggrieved. In fact the Gujarat High Court in CIT v. Nirma Chemical Works Ltd. [2009] 309 ITR 67/182 Taxman 183 has observed that if an assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing Officer issued a query memos to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the identities of the donors, the source from where these funds have come and also the creditworthiness/capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue, cannot be accepted.

8. *It is next submitted that the donor had not been examined by the Assessing Officer. It is not in every case that every evidence produced has to be tested by cross examination of the person giving the evidence. It is only in cases where the evidence produced gives rise to suspicion about its veracity that further scrutiny is called for. If there is nothing on record to indicate that the evidence produced is not reliable and the Assessing Officer was satisfied with the same, then it is not open to the CIT to exercise his powers of Revision without the CIT recording how and why the order is erroneous due to not examining the donors. Thus, this objection to the impugned order by the Revenue is also not sustainable.*

9. *It was next submitted that no enquiry was done by the Assessing Officer to find out whether the donor Mr Deepak Modi (father) had received money from M/s. Chang Jiang as claimed. Nor any inquiry was done to find out whether the sister had in fact earned amounts on account of Foreign Exchange Transactions as claimed by her. We find that this enquiry of a source of source is not the requirement of law. Once the Assessing Officer is satisfied with the explanation offered on inquiry, it is not open to the CIT in exercise of his revisional powers direct that further enquiry has to be done. **At the very highest, the case of the Revenue is that this is a case of inadequate inquiry and not of "no enquiry."** It is well settled that the jurisdiction under Section 263 of the Act can be exercised by the CIT only when it is a case of lack of enquiry and not one of inadequate enquiry. This view has been taken by this Court in the matter of CIT v. Shreepati Holdings & Finance (P.) Ltd. [ITA 1879 of 2013 dated 5th October, 2013], by the Delhi High Court in CIT v. Vikas Polymers [2012] 341 ITR 537/194 Taxman 57 and in D.G. Housing Projects (supra). In fact the Delhi High Court in D.G. Housing Projects (supra) while so holding placed reliance*

upon the decision of this Court in Gabriel (India) Ltd. (supra). It is very important to note that the CIT in his order under Section 263 of the Act has recorded the fact that there has been no adequate inquiry. Thus, this is not a case of no inquiry, warranting order under Section 263 of the Act. Thus, this objection on the part of the Revenue, is also not sustainable.

10. The Revenue placed reliance upon the decision of the Delhi High Court in D.G. Housing Projects Ltd., (supra) that as the Assessing Officer had not enquired into the source of the source of the gifts received by the Assessee, the Assessment Order is erroneous. The aforesaid decision holds that the power of Revision under Section 263 of the Act would normally be exercised in case of no enquiry and not in cases of inadequate enquiry. However, even in case of inadequate enquiry by the Assessing Officer, the order of the Assessing Officer could be erroneous in two classes of situation. The first class would be where orders passed by the Assessing Officer are ex facie erroneous i.e. a decision rendered ignoring a binding decision in favour of the Revenue or where enquiry is per se mandated on the basis of the record available before the Assessing Officer and that is not done. In the second class of cases, where the order is not ex facie erroneous, then the CIT must himself conduct an enquiry and determine it to be so. The Court held that it is not permissible to the CIT while exercising power under Section 263 of the Act to remit the issue to the Assessing Officer to re-examine the same and find out whether earlier order of Assessment is erroneous. It is the CIT who must hold that the order is erroneous, duly supported by reasons. In the present facts, the CIT in exercise of its powers under Section 263 of the Act has merely restored the Assessment to the Assessing Officer to decide whether the gifts were genuine and, if not, then the Assessment could be completed on application of Section 68 of the Act. In this case, the order passed by the Assessing Officer is not per se erroneous and further the CIT has not given any reasons to conclude that the order is erroneous. In fact, he directs the Assessing Officer to find out whether the order is erroneous by making further enquiry. This the decision of the Delhi High Court in D.G. Housing Projects Ltd. (supra), clearly negates. In the above view, the decision of Delhi High Curt in D.G. Housing Projects Ltd. (supra) would not assist the Revenue in the present facts.

(emphasis supplied by us)

7.3. In view of the aforesaid observations, it could be safely concluded that the Id PCIT grossly erred in invoking revisionary jurisdiction u/s 263 of the Act by trying to substitute his own view against the view already taken by the Id AO and also on a purely debatable issue. Hence we have no hesitation in quashing the revision order passed by the Id PCIT u/s 263 of the Act . Accordingly, the first issue framed hereinabove at the beginning of this order is decided in favour of the assessee.

8. Though we have quashed the revision order passed by the Id PCIT u/s 263 of the Act on invalid assumption of jurisdiction, we proceed to adjudicate the issue in dispute on merits also, since very elaborate arguments were advanced by the counsels from both the sides by making reference to various case laws and its applicability / non-applicability thereon.

8.1. During the year under consideration, we find that the assessee had purchased total of 8,48,37,200 lottery tickets. Out of which, only 3,77,28,095 lottery tickets could be sold and remaining 4,71,09,105 tickets had remained unsold. Due to business practice, these lottery tickets were also not taken back either by the Organising State or the Main distributor. After the draw was held for the respective lottery tickets, the value of unsold tickets lying with the assessee, at the year end, had become zero. Thus, the purchase price paid for these unsold tickets amounting to Rs. 41,88,36,709/- became irrecoverable and a net loss of Rs. 40,86,75,277/- under the head "Profits and gains of business or profession" was suffered by the assessee. This business loss of Rs. 40,86,75,277/- is allowable to be set-off u/s. 71 of the Act, against the income chargeable under any other head including Income from other sources. It is irrelevant whether the income is chargeable to tax at special rates as provided under Chapter XII of the Act or at normal rates under the Finance Act, 2013 which is relevant to the year under consideration.

8.2. We find that if the stand taken by the Id PCIT is to be accepted as correct, then it would result in a situation that the income by way of

winnings from lotteries would be assessed as "Income from Other Sources" u/s 56(2)(ib) of the Act whereas the business loss arising on account of unsold tickets would be continued to be carried forward without any set-off. Resultantly, the business loss so determined would become a dead loss in the event of there being no business income. In any case, such a proposition would be contrary to law provided in Section 71 of the Act. We find that the Id AR drew our attention to the chart below to address the prejudice that would be caused to the assessee :-

A.Y.2014-15

Particulars	Amount (In Rs.)
Net Profit as per Profit & Loss A/c.	94,38,441
Add Donation (deductible u/s.80G)	5,42,000
Less: Prizes from Unsold lottery tickets	(41,86,55,718)
Business Loss	(40,86,75,277)
Income from Other Sources (Income by way of winnings from lotteries on unsold lottery tickets u/s.56(2)(ib))	41,86,55,718

A.Y. 2015-16

Particulars	Amount (In Rs.)
Net Profit as per Profit & Loss A/c.	1,16,19,629
Less: Prizes from Unsold lottery tickets	(46,83,67,965)
Business Loss	(45,67,48,336)
Income from Other Sources (Income by way of winnings from lotteries on unsold lottery tickets u/s.56(2)(ib))	46,83,67,965

A.Y.2016-17

Particulars	Amount (In Rs.)
Net Profit as per Profit & Loss A/c.	34,75,490
Less: Prizes from Unsold lottery tickets	(18,39,05,610)
Business Loss	(18,04,30,120)
Income from Other Sources (Income by way of winnings from lotteries on unsold lottery tickets u/s.56(2)(ib))	18,39,05,610

8.2.1. The above table clearly depicts the factual scenario of the assessee wherein the assessee firm had declared net profit only due to prize winnings from unsold lottery tickets being shown as business income.

8.3. At the outset, we find that the Id PCIT had categorically agreed to the fact that the assessee is engaged in the business of purchase and sale of lottery tickets thereby categorizing it as a dealer in lottery tickets. This fact is absolutely not in dispute. We find that the Id PCIT had also stated that the purchase of lottery tickets and sale of lottery tickets are part of business activities of the assessee firm and any profit derived thereon would have to be taxed as business income of the assessee firm. Since purchases and sales are treated as part of business activities, the purchase returns and sales returns also would only be business activity of the assessee. We are now concerned with sales returns of lottery tickets to the assessee. The stockists return the unsold lottery tickets to the assessee firm and which are taken cognizance by the assessee firm as 'sales returns'. We find that the assessee is engaged only in one activity of distribution of lottery tickets. It is not engaged in participation in the draw of lottery tickets. The participation in the draw of lottery tickets in respect of unsold stock lying with it (pursuant to sales returns from stockists) is an automatic fall out of business and becomes indivisible business activity with that of distribution of lottery tickets. Hence prize winnings from unsold lottery tickets would also constitute part of income arising from distribution of lottery tickets and to be construed as part realization of cost of unsold lottery tickets. Therefore, it would be incorrect to construe the unsold lottery tickets

as a separate activity . Obviously, the assessee firm had indeed paid monies for purchasing the tickets and it had indeed made sales to its stockists. If the stockists are not able to ultimately sell the tickets to retailers / consumers, as the case may be, and return those unsold tickets to assessee firm and in the event of Government or National Distributor refusing to get back the unsold tickets from the assessee firm, then any prudent assessee would try to mitigate its loss by atleast winning the prize monies on such unsold tickets to the extent of such tickets qualify as winning tickets in the draw held by the Organising State. Admittedly, the value of unsold lottery tickets in the hands of the assessee , but for the prize monies, would be NIL. If an item of closing stock does not have any market or does not remain a marketable commodity, then such item of closing stock would be valued at NIL. Reliance in this regard is placed on the landmark decision of *Hon'ble Madras High Court in the case of K Mohammad Khan Sahib vs CIT reported in 56 ITR 360 (Mad)* wherein it was held that :-

"It seems exceedingly difficult to accept the reasoning adopted by the Tribunal in justifying the addition. The Tribunal purports to hold that if the assessee had written off this stock, he would have been justified in doing so. It accepts also the position that the fancy market for snake skins had disappeared, as is strongly supported by the circumstance that the turnover had fallen from Rs. 25 lakhs to Rs. 6 lakhs. Its reference to well-accepted; principles of accountancy that the assessee could reduce the value and place; "nil" value only after some lapse of time when it became clear that the skins were only dead stock, in fact, supports the very action taken by the assessee. It has been found as a matter of fact that in so far as variant and baby skins are concerned, during the whole of the previous year, only Rs. 12 worth of the first variety and Rs. 112 worth of the second variety could be sold. In the case of cobra skins, against the total purchases of nearly 2 lakhs of skins, the assessee had been able to sell till February about 1,70,000 skins, and, according to the correspondence which he produced, there had been no demand for these skins subsequently. It also seems to be accepted by the Tribunals below that there was no local market for snake skins of any variety. The question is, whether, in these circumstances, the assessee, in the normal course of its accounting, is not entitled to value the price of the skins at

the market price which, in the present case, happens to be "nil". We are also unable to see how revenue is affected by this method of valuation. If these skins which are valued at "nil" happen to find purchasers in the next accounting year, it is obvious that the entire sale value will figure as a profit in the books and the assessee would have to pay tax on the entire sale value and not only on the difference between the sale value and the purchase value. Indeed, in the contingency of these skins finding a sale, it is revenue that would stand to gain. The observation of the Tribunal that this method of permitting him to value the goods "would open the door for showing these very goods as obsolescent and then sell them off later without bringing the profits into the books" is wholly uncalled for. It seems to suggest that the Tribunal found the assessee's intention to be to make a concealed profit by the sale of the goods in subsequent years. It is unfortunate that the Tribunal should have indulged in such uncalled for aspersions on the assessee's integrity.

.....

There seems to be no quarrelling with the question of fact that there was no market for these skins either locally or abroad. Locally it is certain there was at no time any market, and the observation of the Tribunal that the assessee should have tried to sell them locally is certainly un-under-standable in the context of the evidence. It is for the trader to ascertain what avenues for the sale of the goods are open to him and if he shows that, as far as his contentions establish, there was no prospect of the sale of the goods, for there was no demand, it is not for the income-tax department to order the mode of carrying on the business of the trader. For instance, when the only market for these snake skins was in the United Kingdom and United States all these years, and if that market fell off, the Income-tax Officer cannot ask the assessee why he could not have sold the skins in other foreign countries. That is virtually the stand taken by the Tribunal. As we have also pointed out, if the assessee should gain an initial advantage by valuing his closing stock at "nil", he is bound to value these goods at the same value in his opening accounts of the succeeding year of account, so that any sale of the goods in that year would result in the entire sale price being treated as profit liable to tax, clearly an advantage to the revenue. Even apart from that, it is settled law that the assessee has a right to value his closing stock at cost price or market price whichever is lower, and, in the present case, there is no doubt that the market price was "nil".

8.3.1. Effectively, the prize winnings from unsold lottery tickets is nothing but realization of closing stock of lottery tickets lying with the assessee, which would obviously partake the character of business receipts. When purchases and sales are business activities, any

realization of closing stock of such purchases would also be only business receipt. We hold that the expenditure incurred by the assessee on purchase of lottery tickets were towards the distribution of lottery tickets only and not incurred in order to produce winnings from lotteries.

8.4. We find that the word "business" has been defined in Section 2(13) of the Act in an inclusive manner. As per the said section, *"business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture*". Thus, the word "business" is a word of large and indefinite import. It is something which occupies attention and labour of a person for the purpose of profit. Some of the essential characteristics of a business are continuous and systematic exercise of activity and profit motive. To regard an activity as business, there must be a course of dealings either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure. It predicates a profit making motive pervading a whole series of transactions. In common parlance, it connotes activities in which a person is engaged with a set purpose and frequency or the repetition of the activity. From the financials of the assessee firm for the Asst Years 2014-15 to 2016-17, it could be seen that the assessee had time and again carried out the same set of activity by trying to realize the prize winnings from unsold lottery tickets to mitigate its loss incurred on purchase cost of lottery tickets. This is a purely a prudent business decision taken by the assessee firm with a set purpose to make profit as an ultimate motive under any eventuality. We find that the term 'business' u/s 2(13) of the Act is having widest amplitude and import to cover all incidental activities is also endorsed

by the decision of *Hon'ble Supreme Court in the case of Mazagaon Dock Ltd vs CIT reported in 34 ITR 358 (SC)*. Hence even as per the inclusive definition of the word 'business' u/s 2(13) of the Act, the prize winnings from unsold lottery tickets could only have to be treated as income from business of the assessee firm.

8.5. We hold that the entire activity of the assessee firm should be seen in a holistic manner , wherein it would become apparent that the entire course of dealing namely entering into agreements with the Main distributor, acting as promoter for sale of lottery tickets in the State of Maharashtra under the Maharashtra Tax on Lotteries Act, 2006, purchase of lottery tickets for onward distribution in the State of Maharashtra, appointing Stockists for sale of tickets, is in the nature of business. The unfortunate circumstance of not being able to sell lottery tickets including sales returns from the Stockists, resulting into stock of unsold lottery tickets, would not change the character of the assessee, from being a businessman to that of lottery purchaser who buys lottery tickets to win prizes therefrom. In other words, it would be incorrect to say that assessee is merely participating in the draw of lotteries in respect of unsold tickets lying with it and that is being carried out as a separate activity. Such a conclusion would put the assessee on same pedestal with that of a consumer who is buying lottery tickets , solely with a motive to participate in the draw of lottery. We hold that such a conclusion would only result in disturbing the basic structure of the assessee firm.

8.6. We further hold that realization of prizes on unsold lottery tickets could also be construed as 'adventure in the nature of trade'. In this

regard, we find that the expression 'adventure in the nature of trade' was the subject matter of consideration by the *Hon'ble Apex Court in the case of G Venkataswami Naidu & Co. vs CIT reported in 35 ITR 594 (SC)* wherein it was held as under:-

.....When section 2, sub-section (4) refers to an adventure in the nature of trade it clearly suggests that the transaction cannot properly be regarded as trade or business. It is allied to transactions that constitute trade or business but may not be trade or business itself. It is characterized by some of the essential features that make up trade or business but not by all of them; and so, even an isolated transaction can satisfy the description of an adventure in the nature of trade. Sometimes it is said that a single plunge in the waters of trade may partake of the character of an adventure in the nature of trade. This statement may be true; but in its application due regard must be shown to the requirement that the single plunge must be in the waters of trade. In other words, at least some of the essential features of trade must be present in the isolated or single transaction. On the other hand, it is sometimes said that the appearance of one swallow does not make a summer. This may be true if, in the metaphor, summer represents trade; but it may not be true if summer represents an adventure in the nature of trade because, when the section refers to an adventure in the nature of trade it is obviously referring to transactions which individually cannot themselves be described as trade or business but are essentially of such a similar character that they are treated as in the nature of trade.

.....Cases may, however, arise where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has not intention of holding the property for himself or otherwise enjoying or using it. The presence of such an intention is no doubt a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade.

The appellant, however, is a firm and it was not a part of its ordinary business to make investment in lands. Besides, when the first purchase was made it is difficult to treat it as a matter of investment. The property was a small piece of 28¼ cents and it could yield no return whatever to the purchaser. It is clear that this purchase was the first step taken by the appellant in execution of a well-considered plan to acquire open plots near the mills and the whole basis for the plan was to sell the said lands to the mills at a profit. Just as the conduct of the purchaser subsequent to the purchase of a commodity in improving or converting it so as to make it more readily resaleable is a relevant factor in determining the character of the transaction, so would his conduct prior to the purchase be relevant if it shows a design and a purpose.

8.7. Hence it could be safely concluded that winnings from unsold lottery tickets is incidental to the carrying on of business of distribution of lottery tickets and therefore assessable under the head 'income from business or profession'.

8.8. We find that the assessee in its affidavit had already stated that the unsold lottery tickets lying with the assessee cannot be given back to the Government who is organizing the scheme or the National Distributor. This fact has been controverted by the Id DR before us by placing reliance on the finding given by the Id PCIT in his order that the assessee had indeed returned unsold tickets to M/s Future (National Distributor). We find that during the year under consideration, this was one off case in respect of one new scheme floated by Government of Sikkim , wherein the agreement entered into by the assessee with the National Distributor provided for refund of tickets to the National Distributor. Admittedly, none of the agreements entered into by the assessee with M/s Teesta or M/s Future had been declared to be 'sham' by the Id PCIT. The law is very well settled that the intention of the parties need to be understood from the agreement , if any, entered into between them. The revenue cannot step into the shoes of the businessman and try to rewrite the agreement. As long as the agreements entered into by the assessee are not declared as 'sham' or by way of any colorable device, the obligations discharged by the parties as per the said agreements cannot be questioned to suit the convenience of the revenue. We find that the assessee had also affirmed in its affidavit that the assessee, in one exceptional case, in respect of one scheme

of lottery which was very big, was unable to sell the lottery tickets to the extent of Rs 8,41,74,385/- and M/s Future Gaming Solutions India Pvt Ltd agreed to take back the unsold tickets, as an exceptional case, having regard to large quantum of lottery and to avoid complete wiping off of the business of the assessee. In any case, we find that even if the assessee had refunded the unsold tickets (on one off case) to M/s Future in one scheme of Government of Sikkim, the assessee had only tried to recover its cost of lottery tickets and that is effectively purchase returns made by the assessee firm. That would partake the character of business receipt even according to Id PCIT. Whereas in respect of other schemes floated by the Governments, the assessee could not return the unsold tickets to the Government or to the National Distributor and accordingly had to forcibly retain the same. Obviously, the value of such retained lottery tickets had got NIL value, but for the participation in the draw. Hence prize winnings derived by the assessee from unsold lottery tickets which qualified for prize would have to be construed as an act to mitigate the losses or partial recovery of purchase cost of lottery tickets and hence to be construed as an incidental business activity. Moreover, we find that the prize winning activity on unsold lottery tickets could not be carried out by the assessee independently but for the business of dealing in lotteries. Hence the said prize winning receipts also partakes the character of business receipts only.

8.9. We find that the Id AR vehemently argued that the provisions of section 2(24)(ix) had to be read along with section 56(2)(ib) of the Act as a whole, considering the rules of construction 'noscitur a sociis'

and 'Mischief Rule'. He argued that section 2(24)(ix) read with section 56(2)(ib) of the Act would not cover within its ambit "Income by way of winnings from lotteries" on unsold lottery tickets in the hands of lottery distributor. For the sake of convenience, the provisions of section 2(24)(ix) of the Act are reproduced hereunder: -

"Definitions.

2. In this Act, unless the context otherwise requires,—

(24) "income" includes—

(ix) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.

Explanation.—For the purposes of this sub-clause,---

(i) "lottery" includes winnings from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;

(ii) "card game and other game of any sort" includes any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game ;"

8.9.1. From the reading of the aforesaid definition, it could be safely concluded that the income from nature of activities covered within the ambit of section 2(24)(ix) of the Act are such which are carried out, as part of hobby or enjoyment or pastime. However, if a person is engaged in the business of say lottery or organizing horse races, then income earned by such person cannot be brought within the ambit of section 2(24)(ix) of the Act as the same would be chargeable as regular income from business. The words "winnings from lottery" cannot be read in isolation and would take its colour from the words with which it is associated with. The nature of income covered within its ambit cannot be read in isolation or dissected from

each other. A holistic reading of clause (ix) in section 2(24) of the Act would suggest that it is not intended to apply to a person who is engaged in the business of distribution of lotteries or owning and maintaining race horses or a bookmaker with whom a punter places his bets.

8.9.2. We hold that the rule of construction "***noscitur a sociis***" means that the meaning of a word is to be judged by the company, it keeps. It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them. ***(extracted from the Principles of Statutory Interpretation - Justice G P Singh - 14th Edition - Page 555).***

8.9.3. Thus, when winnings from lottery is read with the other kinds of winnings included within the ambit of section 2(24)(ix) of the Act, it becomes apparent that it is only attracted to those people who have such winnings by reason of their participation in draw of lottery as part of their hobby or enjoyment or pastime. If these winnings have arisen as part of business of distribution of lottery tickets, then such winnings cannot be regarded as 'winnings from lotteries' u/s 2(24)(ix) of the Act but would be taxable as profits and gains of business of distribution of lottery tickets.

8.9.4. In "***Law & Practice of Income Tax by Kanga & Palkhiwala - 8th Edition (1990)- Vol. 1 at page 319 and 320***", it has been noted that if the betting or maintenance of a racing-stable is indulged in as a hobby or a pastime, the winnings would be receipts of a casual and non-recurring nature, not arising from business or the exercise of a profession, vocation or occupation. But if betting or the racing

establishment is conducted on business lines involving an element of commercial enterprise, receipts arising from it would be chargeable as profits of a business or vocation or as income from other sources and any resulting loss may be set off against other income.

8.10. It is also relevant to note that prior to the amendment by the Finance Act, 1972, the income from such activities was regarded as "casual and non-recurring income" and exempt u/s. 10(3) of the Act. We find that the *Hon'ble Punjab & Haryana High Court in the case of CIT vs Chaman Lal reported in 156 ITR 245 (P&H)* had held that prior to the Finance Act, 1972 coming into force, income derived from lotteries did not fall in the ambit of 'income' nor within the ambit of "income from other sources". Similar view was also taken in the case of *CIT vs Sardari Lal Mehta reported in 87 ITR 47 (P&H)*. However, if a person was indulged in a business activity, say in distributing lottery tickets or was acting as a bookmaker in respect of horse races, in such cases, the income from such business activities were chargeable to tax as business income. The exemption u/s. 10(3) was not available to receipts arising from business or the exercise of a profession or occupation. Reliance in this regard was placed on the decision of *Hon'ble Karnataka High Court in the case of Mysore Sales International Ltd vs CIT reported in 117 ITR 64 (Kar)*. In that case, the assessee was sole selling agent of the State of Karnataka for distribution of lottery tickets. Under the agreement, the assessee was responsible for sale of not less than 75% of total number of tickets released for each draw. In case, the 75% of the tickets released are not sold, then it shall be deemed to have been purchased by the sole selling agent. During the assessment year 1971-72, the unsold

tickets out of the 75% of tickets, were deemed to have been purchased by the assessee. On these unsold tickets, the assessee became entitled to certain prizes. In the return of income, the prizes won on unsold tickets were claimed as casual and non-recurring receipts and consequently, exempt u/s. 10(3) of the Act which was accepted by the Income-tax Officer. However, the CIT in 263 proceedings took a view that such receipts are not casual and non-recurring and are chargeable to tax. On appeal, the Hon'ble High Court held that the receipts have arisen out of the business carried on by the assessee and therefore, the sums would be chargeable to tax. The relevant operative portion of the judgement is reproduced hereunder:-

“The Tribunal found in the course of its order that the assessee had shown the sum of Rs. 12,53,186 paid by it in lieu of the tickets as business expenditure and that the assessee was able to realize in addition to the commission a sum of Rs. 6,69,152 on account of the said investment made by it. It, therefore, concluded that the sum of Rs. 6,69,152 was income earned in the normal course of business by the assessee. It is contended by Sri G. Sarangan, learned counsel for the assessee, that what is relevant for deciding the question whether a receipt in question was of a casual or nonrecurring nature, is the fact that it is an amount released by way of prizes on lottery tickets and it should, therefore, be held that the realization was purely of a fortuitous nature. We find it difficult to agree with the above submission on the facts and in the peculiar circumstances of this case. It is not the case of the assessee, which is a limited company, that it was open to it to invest its money on buying lottery tickets as any ordinary person would buy lottery tickets and earn, if possible, prizes declared in respect of such tickets. The assessee bought the tickets in question as a part of the bargain entered into by it with, the department of Lottery with the sole purpose of earning the commission payable thereon. In the instant case, it has so happened that in, addition to the agreed commission the assessee was able to realize the sum of Rs. 6,69,152 also by way of prizes. Secondly, it has treated the entire investment; made on the tickets in respect of which; prizes have been declared as business expenditure. We have, therefore, to hold that the receipt of Rs. 6,69,152 is an income which has arisen out of the business carried on by the assessee and it is difficult to separate it therefrom. We, therefore, hold

that the Tribunal was right in treating the above sum as part of the gross income from the business of the assessee and affirming the order of the Commissioner. We, therefore, answer the two questions referred to us in the affirmative and against the assessee. No costs."

8.11. The Id AR by placing reliance on the aforesaid judgement argued that thus, prior to the Finance Act, 1972, taxability of income by way of winnings from lotteries, can be summarised as under:-

a) If an assessee had participated in a draw of lottery as part of hobby or enjoyment, then such winnings from lotteries were treated as casual and non-recurring and exempt u/s 10(3) of the Act.

b) If an assessee who is a distributor of lottery tickets, became entitled to winnings from lotteries on account of unsold lottery tickets, then such receipts were held to be arising out of the business carried on. Therefore, the same were covered within the exclusion provided in clause (ii) of section 10(3) of the Act and taxable as "Profits and Gains of Business or Profession".

8.12. The Id AR further argued that the Finance Act, 1972 brought in an amendment to the taxation of casual and non-recurring receipts w.e.f. 1.4.1973 relevant to Asst Year 1973-74. Thereafter the position changed as follows:-

a) Clause (ix) was inserted in Section 2(24) of the Act to provide that any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort of from gambling or betting of any form or nature whatsoever, would be treated as "income".

b) Winnings from lotteries were excluded from S. 10(3) of the Act.

c) Clause (ib) was introduced to section 56(2) of the Act to bring within the ambit the income referred to in section 2(24)(ix) of the Act.

d) Section 74A of the Act was introduced in the Act to provide that losses from certain sources being lotteries, crossword puzzles, races including horse races , card games and other games of any sort or from gambling or betting of any form or nature whatsoever, can be set off against income from these sources.

e) Deduction u/s 80TT of the Act was provided for certain portion of income by way of winnings from any lottery.

f) Section 194B of the Act was introduced to cast a liability on the payer to withhold tax on income by way of winnings from lotteries.

8.13. We find from a conjoint reading of the judgement of Hon'ble Karnataka High Court supra, pre-1972 provisions, post 1972 provisions and the intention behind introduction of such provisions, that with effect from Asst Year 1973-74, if an individual earns any winnings from lotteries, then such winnings were taxable as "Income from other sources" subject to deduction u/s. 80TT of the Act. However, as regards a person who is engaged in the distribution of lottery tickets, the Finance Act, 1972 did not bring in any change. The position remained same whether prior to the Finance Act, 1972 or after that. In respect of a distributor of a lottery tickets, any winnings from unsold lottery tickets were always chargeable to tax as business income. We find that the Id AR submitted that in the preceding assessment years i.e. prior to Asst Year 1972-73, the income

by way of winnings from lotteries etc was not chargeable to tax and, such activities were also being resorted for conversion of black money into white money. To curb this practice or to remove this mischief, such income was made taxable with effect from Asst Year 1973-74. The mischief was existing only in respect of income earned by those persons who were doing lottery or crossword puzzle or horse races, as part of their hobby and enjoyment. **There was no mischief in the law with respect to income earned by person who was engaged in the business of organizing lottery** or organizing horse races or a bookmaker.

(emphasis supplied by us)

8.14. Hence it could be safely concluded that the amendments brought in by the Finance Act, 1972 in amending section 2(24) and 56(2) of the Act were not meant for persons who were engaged in the business of distribution of lottery tickets etc. The mischief which was present in the law prior to the amendments by the Finance Act, 1972 was only for persons who were doing these activities as part of their hobby or enjoyment or pastime and such income were windfall gains for them.

8.15. We find that the Id AR also drew our attention to the 'Mischief Rule' of construction, popularly known as "Heydon's case" appreciating the Rule of Purposive Construction. It provides for consideration of four matters in construing an Act :-

- a) What was the law before the making of the Act ;
- b) What was the mischief or defect for which the law did not provide ;
- c) What is the remedy that the Act has provided ; and
- d) What is the reason of the remedy.

8.15.1. The rule further provided that the courts must adopt that construction which "shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro private commondo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*. Applying the mischief rule vis a vis the above four matters for consideration to the income by way of winnings from lotteries, the same could be explained in a tabular form for better understanding:-

Mischief Rule	<u>Individuals other than Distributor</u>	<u>Distributor of a Lottery</u>
What was the law before the making of the Act?	Income by way of winnings from lotteries was treated as casual and non-recurring and hence, exempt u/s.10(3)	Income from sale of lottery tickets as well as winnings as well as winnings on unsold lottery tickets, was taxable as business income
What was the mischief or defect for which the law did not provide	Winnings from lotteries were not taxable leading to tax evasion. This was also used as a source for conversion of black money into white money.	No mischief
What is the remedy that the Act has provided	Income by way of winnings from lottery is taxable as income from other sources.	Pre Finance Act, 1972 or post thereto, income continue to remain taxable as business income
What is the reason of remedy	To curb the practice of conversion of black money into white money	Not applicable

8.15.3. We find that prior to the Finance Act, 1972, income by way of winnings from lotteries were not chargeable to tax. However, by fiction, the scope of "income" u/s. 2(24)(ix) of the Act was expanded by the Finance Act, 1972 to include within its ambit, the income by way of winnings from lotteries. This fiction introduced under the Act, was only for those assesseees whose income was not chargeable to tax in absence of such fiction. However, in respect of assessee who were carrying on the business of distribution of lottery tickets, their

income was already chargeable to tax as business income and no fiction was needed for such kind of persons. Hence considering the mischief rule also, it could be safely concluded that the prize winnings from lotteries would get taxed u/s 2(24)(ix) read with section 56(2)(ib) of the Act in the hands of a person (i.e ultimate consumer) who is just holding the lottery ticket and participates in the draw. The said provisions, in our considered opinion, cannot be made applicable for a person who is a dealer in lottery tickets.

8.16. We find that the aforesaid decision of Hon'ble Karnataka High Court in Mysore Sales International case still holds the field and this High Court order had become final as no further appeal was preferred to Hon'ble Supreme Court by the assessee, as stated by the Id AR (treated as statement made from the Bar). We find that the facts before the Hon'ble Karnataka High Court supra are exactly identical with the facts of the instant case before us.

8.17. We find that the Id DR before us heavily placed reliance on the decision of *Hon'ble Kerala High Court in the case of CIT vs Manjoo & Co. reported in 335 ITR 527 (Ker)* to drive home the point that the prize winnings from unsold lottery tickets would be taxable under the head 'Income from Other Sources' only and not as business income. From the careful reading of the judgement of Hon'ble Kerala High Court supra, we find that the **issue in dispute before the Hon'ble Kerala High Court was on account of rate of tax on the income by way of winnings from lotteries and not the manner of computation of income by way of winnings from lotteries. It did not concern with how to compute the income by way of**

winnings from lotteries. It was also not concerned with set-off of loss u/s. 71 of the Act. In the case of Manjoo & Co, even after excluding the prize winning from unsold lottery tickets, the assessee had a profit. Hence the issue was only concerned with regard to the rate of tax thereon. Whereas in the instant case, if we exclude the prize winning on unsold lottery tickets from the net profit, then there is a loss. This is the crucial difference, which makes the decision of Hon'ble Kerala High Court totally distinguishable on facts. (emphasis supplied by us)

8.17.1. We find that the Id AR placed on record, the assessment order, Id CITA order and Co-ordinate Bench of Cochin Tribunal's order passed in the case of Manjoo & Co. for the Asst Years 2000-01 and 2001-02, both years having identical facts. In the said assessment order, the Ld. AO has noted that Manjoo & Co. was engaged in the business of purchasing and selling lottery tickets. As regards unsold lottery tickets, the Ld. AO noted that these are not appearing in the accounts since these were not of any sale value or scrap value after the date of draw of the lottery which has resulted into a loss. But some of the lottery tickets may be prized in the draw and assessee being the possessor of the tickets becomes entitled for the prize amount. The assessee was of the view that prize monies received on unsold lottery tickets, is business receipts and not subject to special rate of taxation u/s. 115BB of the Act. The AO held that income derived from the winning from the unsold lottery tickets is assessed under the head "Income from other sources" and taxable at special rate u/s. 115BB of the Act. Accordingly, the total income and tax payable was computed as under for Asst Year 2000-01:-

Computation of Total Income:

Particulars	Amount (In Rs.)	Amount (In Rs.)
<u>Income from Business or Profession</u>		7,77,293
Net profit as per P & L Account	76,63,679	
Add:	39,000	
1. 25% on car and motor cycle expense	5,573	
2. 30% on entertainment expenses	3,054	
3. Donation	77,11,306	
Less: Income from lottery winnings	(69,34,013)	
<u>Income from Other Sources</u>		69,29,013
Income from lottery winnings	69,34,013	
Less: Exemption u/s.10	(5,000)	
Gross Total Income		77,06,306
Total Income (rounded off)		77,06,310

Computation of Tax

Particulars	Amount (In Rs.)
Total Income	77,06,310
Income-tax at normal rates	2,72,053
Income-tax at special rates	27,71,605
	30,43,659
Add: Surcharge	3,04,365
	33,48,024
Less: Demanded u/s.143(1)	(29,68,855)
Balance Payable	3,79,169

8.17.2. From the above, it is apparent that even after excluding the "Income by way of winnings from lotteries on unsold lottery tickets", there is a net profit. Thus, the question of set-off of losses u/s 71 of the Act was not an issue in dispute and hence not the subject matter of consideration before the Hon'ble Kerala High Court.

8.17.3. We find that normally the computation of tax payable on total income is separately computed in another form. However, the assessment of Manjoo & Co. was primarily related to taxability of income at special rate u/s. 115BB of the Act. It is also to be noted that in the Asst Years 2000-01 and 2001-02, the rate of taxation for firms was 35% whereas the income by way of winnings from lotteries was chargeable at 40%. Therefore, the computation of tax on such income u/s. 115BB of the Act, assumed more significance. However, the Id CITA reversed the action of the Id AO in that case. Before the Tribunal, the issue was whether the prize winnings out of the unsold lottery tickets held by the wholesale dealer is to be treated as business income of the assessee or to be treated as winnings from lottery and the provisions of section 115BB of the Act, is to be applied or not. We find that the Cochin Tribunal relying on the decision of *Hon'ble Karnataka High Court in the case of Mysore Sales International Ltd. vs CIT reported in 117 ITR 64 (Kar)*, held that the income is assessable as business income. The revenue preferred an appeal before the Hon'ble Kerala High Court. We find that the Hon'ble Kerala High Court in para 5 of its decision held that the winnings from lotteries is not assessable as "Income from Business". However, in Para 6 of the same judgement, the Hon'ble Court while referring to the decision of Hon'ble Karnataka High Court in the case of Mysore Sales International supra, states that there was no specific provision like section 115BB of the Act when Mysore Sales International was decided in 1979. It was then held that winnings from lotteries is assessable under this special provision irrespective as to under what head winnings from lottery falls or even if such winnings are assessable as business income. The relevant part of the judgement of Hon'ble Kerala High Court is reproduced hereunder:-

6. *Between the two decisions of the Karnataka High Court only in Mysore Sales International Ltd.'s case (supra) they are dealing with the issue. However, we notice that in 1979 when the matter was decided there was no specific provision like section 115BB and so much so in our view the decision should not influence interpretation on the scope of section 115BB of the Act. In our view winnings from lotteries is assessable under this special provision irrespective as to under what head winnings from lottery falls. Therefore, assuming for argument sake the contention of the respondent that winnings from lotteries is received by him in the course of his business and is incidental to business and so such it is so his business income is right. Still, we feel, in view of the specific provision contained in section 115BB, the special rate of tax is applicable for all winnings from lottery. What is provided in the said section is that where the total income includes any income by way of winnings from lottery or crossword puzzle etc., the Income-tax payable shall be calculated at the rate of 30 per cent. Total income under section 2(45), read with section 5 of the Act includes income from all sources and necessarily all such income are computed under five heads referred to in A to F of section 14 of the Act. In other words even after computation of income under various heads of income referred to in section 14 in terms of specific provisions of the Act providing for computation of income under each head, such of the incomes specifically covered by Chapter XII shall be identified, separated and should be subject to tax at the special rate provided there. So much so in our view the special rate of tax i.e., 30 per cent provided under section 115BB of the Act is applicable even if winning from lottery is in the nature of business income as claimed by the respondent. We hold that the rate prescribed under section 115BB is applicable for the winnings from lottery received by the respondent assessee irrespective of whether it is an income incidental to business or not.*

8.17.4. From the conjoint reading of para 5 and para 6 of the decision of Hon'ble Kerala High Court supra, we find that the Hon'ble Court categorically held that even if the winnings from lotteries are assessable as business income, yet such income would be chargeable to tax at special rate provided in section 115BB of the Act. It is to be noted that the winnings from lotteries were chargeable at 40% in Asst Years 2000-01 and 2001-02, whereas the maximum marginal rate of taxation was 30% for Individuals and 35% for Firms. Thus, the question before the Hon'ble Court on the rate of tax assumed more significance in those years. In the present case before us and in the subject assessment year, the income by way of winnings from lotteries is taxable at 30% u/s. 115BB of the Act

whereas the maximum marginal rate of taxation was also 30% for both Individuals and firms. In view thereof, the Id AR submitted that the decision in the case of Manjoo & Co. becomes factually distinguishable. At the cost of repetition, the Hon'ble Kerala High Court also did not have occasion to consider the applicability of section 71 of the Act – i.e set off of losses under one head against income from another head, as after exclusion of income by way of winnings from lotteries on unsold tickets from the total profit, the reminder was a positive figure in the case of Manjoo & Co.. This is a crucial distinction with the facts of the instant case before us. In the instant case, if the prize winnings are excluded from the net profit, then the resultant figure is a loss and hence the issue of set off of losses against income by way of winnings from lotteries, assumes significance.

8.17.5. We find that the Id AR placed on record the decision of *Hon'ble Supreme Court in the case of State of Andhra Pradesh vs H Abdul Bakshi and Bros reported in 15 STC 644 (SC)*. Though this decision was rendered in the context of sales tax proceedings, the ratio decidendi of the said judgement would be relevant for the facts of the instant case before us. The operative portion of the said apex court judgement is as under:-

“4. We are unable to agree with this view of the High Court. A person to be a dealer must be engaged in the business of buying or selling or supplying goods. The expression “business” though extensively used is a word of indefinite import, in taxing statutes, it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure. But to be a dealer a person need not follow the activity of buying, selling and supplying the same commodity. Mere buying for personal consumption i.e. without a profit motive will not make a person a dealer within the meaning of the Act, but a person

consumes a commodity bought by him in the course of his trade, or use in manufacturing another commodity for sale, would be regarded as a dealer. The legislature has not made sale of the very article bought by a person a condition for treating him as a dealer, the definition merely requires that the buying of the commodity mentioned in Rule 5(2) must be in the course of business i.e. must be for sale or use with a view to make profit out of the integrated activity of buying and disposal. The commodity may itself be converted into another saleable commodity, or disposal. The commodity may itself be converted into another saleable commodity, or it may be used as an ingredient or in aid of a manufacturing process leading to the production of such saleable commodity.”

8.17.6. We find as per the aforesaid decision of Hon’ble Apex Court, the unsold lottery ticket lying with the assessee, being a dealer in lottery tickets, had fetched some prize monies and those winnings from prize monies need to be construed only as business income and the value of other tickets which did not qualify for prize money becomes NIL. All the unsold lottery tickets were consumed by the assessee dealer itself and one such lottery ticket held by it had fetched prize money, which would only be realization of cost of lottery tickets and thereby to mitigate the loss arising on account of non-saleability of the tickets. The Id AR stated that this decision was not quoted before the Hon’ble Kerala High Court and accordingly the decision of Hon’ble Kerala High Court becomes per incuriam and loses its binding precedence.

8.17.7. We hold that it is settled law that a judgement is an authority in respect of the issue before it. If an issue had not arisen before the Hon’ble Court while deciding a matter, then such decision would not be applicable in situation whenever such issue arises. The precedence value would be only in respect of the issues considered and decided by it and not otherwise. Reliance in this

regard is placed on the decision of *Hon'ble Supreme Court in the case of CIT vs Sun Engineering Works P Ltd reported in 198 ITR 297 (SC)*, wherein it was categorically held that the judgement must be read as a whole and the observations from the judgement have to be considered in the light of the questions which were before the court.

8.17.8. Hence it could be safely concluded that the reliance placed on the decision of Manjoo & Co. is factually distinguishable and accordingly does not advance the case of the revenue in the facts and circumstances of the instant case.

8.18. Yet another decision relied upon by the Id PCIT was the decision of *Hon'ble Allahabad High Court in the case of J N Sharma vs ACIT reported in 270 CTR 594 (All)*. This case related to the Asst Year 1989-90. The assessee was a stockist for sale of lottery tickets. During that year, that assessee had earned income by way of winnings from unsold lottery tickets. The assessing authority treated this receipt as taxable u/s. 115BB of the Act at the rate of 40%. The loss on account of unsold lottery tickets amounting to Rs 21,13,848/- as claimed by the assessee, was restricted to Rs 19,22,168/- by the assessing authority, on account of want of evidences. The matter travelled through appellate authorities and finally reached before the Hon'ble Allahabad High Court. Amongst other questions, two questions were posed for the judgement of Hon'ble Allahabad High Court. One, whether the prize monies on unsold tickets is business income of the assessee or any winnings from lotteries u/s 2(24)(ix) r.w.s. 115BB of the Act. Second, whether the loss of Rs 1,91,680/- could be disallowed. As regards the assessability of prize winnings from unsold lottery tickets, as business

income or other sources, the Hon'ble Court in Para 20 of its judgement held that *"it is not necessary to go into the question whether the amount received by winnings from lotteries is a business income or from other sources. Section 115BB is a special provision under the Act to tax the income by way of winnings from lotteries. Thus, such income is liable to be taxed under the special provision and its nature of income whether it is a business income or income from other sources is wholly irrelevant."*

8.18.1. From the aforesaid decision of Hon'ble Allahabad High Court, it could be safely concluded that the Hon'ble Court had not categorically decided the winnings from lotteries as business income or income from other sources only. What they had held is irrespective of the head of income, the same shall be taxed at a special rate u/s 115BB of the Act. In the instant case before us, there is absolutely no quarrel regarding the applicability of tax rate u/s 115BB of the Act. The real quarrel is only whether the business loss incurred by the assessee after exclusion of prize money from net profit is eligible for set off against winnings from lotteries u/s 71 of the Act.

8.18.2. As regards the second question before the Hon'ble Allahabad High Court, the Court held that the assessee could not prove the claim to the extent of Rs 1,91,680/- and therefore disallowance is confirmed. It is pertinent to note here that the assessing authority had actually allowed the loss on account of unsold tickets to the extent of Rs 19,22,168/- (21,13,848 – 1,91,680) which was then never questioned at any stage including before the Hon'ble Court. Hence this decision had actually addressed the issue in dispute in favour of the assessee with

regard to the set off of business loss with winnings from lottery u/s 71 of the Act to the extent of Rs 19,22,168/-.

8.18.3. Hence it could be safely concluded that the decision relied upon by the Id DR on Hon'ble Allahabad High Court supra actually advances the case of the assessee herein and not the revenue.

9. In view of the elaborate observations on merits and respectfully following the various judicial precedents relied upon hereinabove, we decide the second issue framed at the beginning of this order in favour of the assessee. Accordingly the third issue raised at the beginning of this order on the applicability of provisions of section 58(4) of the Act, becomes academic in nature.

10. Accordingly, the grounds raised by the assessee challenging the validity of assumption of jurisdiction by the Id PCIT u/s 263 of the Act is decided in favour of the assessee both on technicality as well as on merits.

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

Order pronounced on 24/05/2021 by way of proper mentioning in the notice board.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 24/05/2021
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai