IT : Where upon conversion of a private limited company into assessee-LLP entire undertaking of the erstwhile company got vested into the LLP, no separate cost other than the 'book value' were attributable to the individual assets and liabilities, hence such 'book value' could only be regarded as 'full value of consideration' for purpose of computation of capital gain under section 48

• Since transfer of the assets and liabilities of the erstwhile company took place as per the Limited Liability Partnership Act, 2008 (LLP Act) at the 'book value' itself, the difference between the transfer value and the cost of acquisition being 'Nil' would render the machinery provision of computing 'capital gains' unworkable.

■■■

[2018] 100 taxmann.com 129 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'J'

Assistant Commissioner of Income-tax, Mumbai

v.

Celerity Power LLP

G.S.PANNU, VICE-PRESIDENT
AND RAVISH SOOD, JUDICIAL MEMBER
IT APPEAL NO. 3637 (MUM.) OF 2015
C.O. NO. 2 (MUM.) OF 2016
[ASSESSMENT YEAR 2011-12]
NOVEMBER 16, 2018

Rajesh Kumar Mishra, D.R *for the Appellant.* **Yogesh A. Thar** and **Manish Shah**, A.Rs *for the Respondent.*

ORDER

Ravish Sood, Judicial Member - The present appeal filed by the revenue is directed against the order passed by the CIT(Appeals)-30, Mumbai, which in turn arises from the order passed by the Assessing Officer (for short 'A.O') under Sec. 143(3) of the Income-tax Act, 1961 (for short 'Act'), dated 19.03.2014 for Assessment Year 2010-11. Further, the assessee is also before us as a cross-objector. The revenue has raised before us the following grounds of appeal:

"1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that consideration received on transfer of asset took place is same as that of value of asset in the books of M/s Celerity Power Co. Pvt. Ltd.*

2. *On the facts and in the circumstances of the case and in law. the Ld. CIT(A) has erred in not confirming the value of consideration received as computed by the A.O for the purpose of Capital Gain u/s 47A(4) of the Income Tax Act, 1961.*

3. *On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing the assessee's claim of deduction u/s 80-IA of the I.T.*

Act. 1961 without appreciating that the assessee has failed to furnish form 1OCCB during the course of assessment proceedings, despite being required to furnish the same by the A.O.

4. *The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the A.O is restored.*
5. *The appellant craves leave to amend or alter or add a new ground which may be necessary."*

The assessee on the other hand has raised before us the following cross-objections :

"Cross-Objection 1 :

1. *On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the AO of charging capital gains under section 45 of the Act in the hands of the successor assessee LLP by invoking the provisions of section 47A of the Act.*
2. *The cross-objector prays that the AO be directed to delete the addition on account of capital gains computed under section 45 of the Act in the hands of the appellant.*

Cross-Objection 2 :

1. *On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of the AO that the conversion of the private limited company , Celerity Power Private Limited, into the LLP, would be a taxable transfer chargeable to tax under Sec. 45 of the Act on the alleged ground that the conditions laid down under section 47(xiiib) of the Act were not complied with.*
2. *The Cross-Objector prays that the AO be directed to delete the addition on account of capital gains computed under section 45 of the Act.*

Cross-Objection III :

1. *On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to consider that no consideration was received by the private limited company and accordingly the charging provisions of section 45 would not apply due to the inapplicability of computation provisions under section 48 of the Act.*
2. *The Cross-objector prays that the AO be directed to delete the addition on account of capital gains computed under section 45 of the Act.*

Cross-Objection IV :

1. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in denying the carry forward of loss of the private limited company for set off against future profits of the Cross objector on the ground that the conditions laid down under section 47(xiiib) of the Act are not complied with and therefore the provisions of section 72A(6) of the Act are attracted.*
2. *The Cross-objector therefore prays that the AO be directed to allow the carry forward and set off of the losses of the erstwhile private limited company against the profits of the Cross objector."*

2. Briefly stated, the assessee which is a Limited Liability Partnership (for short 'LLP') engaged in the business of power generation had e-filed its 'return of income' for A.Y 2010-11 on 30.09.2011, declaring income of Rs. 5,41,90,840/-. Thereafter, the assessee on the same date e-filed a revised 'return of

income'. In its revised 'return of income' the assessee after claiming the 'set off' of brought forward loss of Rs. 5,79,93,084/-, had shown its returned income at Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee had acquired the status as that of a LLP with effect from 28.09.2010, and resultantly its financial year under consideration was spread over the period 28.09.2010 to 31.03.2011. It was observed by the A.O that prior to 28.09.2010 the assessee undertaking was being run by a private limited company viz. M/s Celerity Power Pvt. Ltd. The A.O noticed that for the earlier period i.e 01.04.2010 to 27.09.2010 relevant to the A.Y 2010-11 the 'return of income' was filed in the name of M/s Celerity Power Pvt. Ltd. In the backdrop of the aforesaid facts, it was noticed by the A.O that from 28.09.2010 the entire business, assets and liabilities of the aforesaid company were transferred to the assessee viz. M/s Celerity Power LLP. The A.O was not persuaded to subscribe to the contention of the assessee that the conversion of the company viz. M/s Celerity Power Pvt. Ltd. into M/s Celerity Power LLP did not involve any 'transfer' of the property, assets, liabilities etc. Further, the alternate submissions of the assessee that the capital gains, if any, could only be brought to tax in the hands of the erstwhile company also did not find favour with the A.O. Rather, the A.O was the view that as per the provisions of Sec. 47A(4) of the Act, the benefit availed by the company was to be deemed as the profits and gains of the successor LLP. Hence, the contention of the assessee for not taxing the capital gains in the hands of the LLP was rejected, and on estimation basis an amount of Rs. 1,76,50,566/- was added to the total income of the assessee as 'capital gains' under Sec. 47A(4) of the Act. Further, the claim of the assessee as regards 'carry forward' of depreciation loss of the erstwhile company was also rejected by the A.O. In so far, the claim of deduction raised by the assessee under Sec. 80-IA of the Act, the same too did not find favour with the A.O. The A.O was of the view that as the assessee had failed to file the 'Audit Report' in 'Form 10CCB' alongwith its return of income, thus the conditions contemplated under Sec. 80IA were not satisfied. On the basis of his aforesaid deliberations the A.O assessed the income of the assessee at Rs. 7,56,43,650/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the issue under consideration, declined to accept the contention of the assessee that the conversion of the private limited company into a LLP only involved vesting of the assets and liabilities of the private limited company in the successor LLP, and thus did not involve any transfer of the property, assets, liabilities etc. In order to fortify his aforesaid view, it was observed by the CIT(A) that clause (6) of the Third schedule' to the Limited Liability Partnership Act, 2008 provided that 'upon conversion', all tangible and intangible properties of the company shall be transferred to and shall vest in the LLP. Further, it was observed by the CIT(A) that the assessee did not fulfil the mandate of clause (e) of the *proviso* to Sec. 47(xiiib), as per which the total sales, turnover or gross receipts of the business of the erstwhile company in any of the three previous years preceding the previous year in which the conversion took place was not to exceed Rs. 60 lac. It was observed by the A.O that the turnover of the erstwhile company in the F.Y 2009-10 was Rs. 8,87,08,620/-. The CIT(A) observed that as the assessee had failed to satisfy clause (e) of the *proviso* to Sec. 47(xiiib), thus, it was caught under the mischief of Sec. 47(xiiib) r.w.s 47A(4). However, the CIT(A) was in agreement with the claim of the assessee, that as there was absence of any consideration involved in the transaction of conversion of the private limited company into a LLP, therefore, the machinery for computation of 'capital gain' contemplated in Sec. 48 was rendered as unworkable. Still further, the CIT(A) was also of the view that as the entire undertaking of the erstwhile company got vested into the LLP, therefore, no separate cost other than the 'book value' could be attributed to the individual assets and liabilities. On the basis of his aforesaid observations, the CIT(A) concluded that the 'book value' could only be regarded as the 'full value of consideration' for the purposes of Sec. 48 of the Act. In sum and substance, the CIT(A) was of the view that even though there was a 'transfer' of the assets from the erstwhile private limited company to the assessee LLP by virtue of

the provisions of Sec. 47(xiiib), however, as the difference between the transfer value and the cost of acquisition was Nil, therefore, the machinery provision contemplated in Sec. 48 for computing the capital gains was rendered as unworkable. The CIT(A) also declined to accept the claim of the assessee that though it was not granted exemption under Sec. 47(xiiib), however, it was entitled to carry forward the losses to the tune of Rs. 5,79,93,084/- from the erstwhile company as per Sec. 58(4) of the Limited Liability Partnership Act, 2008. The assessee submitted before the CIT(A) that Sec. 58(4) of the Limited Liability Partnership Act, 2008 provided that notwithstanding anything contained in any other law for the time being in force, all tangible (movable or immovable) and intangible property vested in the company, all assets, interests, rights, privileges, liabilities, obligations relating to the company shall be transferred to and shall vest in the LLP without any further assurance, act or deed. It was the contention of the assessee, that on the basis of the non-obstante sub-section (4) of Sec. 58 of the Limited Liability Partnership Act, 2008, the right to 'carry forward' the losses of the erstwhile company also got vested with it. However, the said claim of the assessee did not find favour with the CIT(A). The CIT(A) was of the view that Sec. 58(4) of the Limited Liability Partnership Act, 2008 was in context of the tangible and intangible property, interests, rights etc., and had nothing to do with the carry forward of losses which was the creature of a specific statute in the form of the Income-tax Act, 1961. In so far, the entitlement of the assessee towards deduction under Sec. 80-IA was concerned, the CIT(A) was persuaded to subscribe to the claim of the assessee as regards the same. The CIT(A) after necessary deliberations admitted as 'additional evidence' the 'Audit Report' that was filed by the assessee in 'Form 10CCB' in respect of its claim of deduction under Sec. 80-IA. Further, the CIT(A) being of the view that the benefit of deduction under Sec. 80-IA was attached to the 'undertaking' and not to its 'owner assessee', thus observed that as long as the identity of the undertaking remained as such, the claim of deduction under the said statutory provision would be available for the residual term to the new owner i.e the successor entity. The CIT(A) while concluding as hereinabove took support of the CBDT letter F.No. 15/5/63 (A-1) which was issued in context of Sec. 84, and corresponded to the then Sec. 80J and the present Sec. 80IA. Further, it was also observed by the CIT(A) that the embargo made available on the statute by sub-section (12A) of Sec. 80IA, which w.e.f 01.04.2007 restricted the entitlement of the successor company towards claim of deduction under the said statutory provision, was applicable only in the case of an amalgamated/demerged company, and had no application in a case where a private limited company was converted into a LLP. On the basis of his aforesaid deliberations the CIT(A) partly allowed the appeal.

5. The revenue being aggrieved with the order of the CIT(A) has carried the mater in appeal before us. Further, the assessee is also before us as a cross-objector. The ld. Departmental representative (for short 'D.R') took us through the facts of the case. It was submitted by the ld. D.R that as the sales in the business of the erstwhile company was more than Rs. 60 lac in the period contemplated under clause (e) of Sec. 47(xiiib), therefore, the A.O had rightly held that the conversion of the erstwhile company to the assessee LLP involved a 'transfer'. It was submitted by the ld. D.R, that as the case of the assessee was not a transaction that was not to be regarded as a 'transfer' under Sec. 47(xiiib), thus the A.O had rightly worked out the 'capital gains' involved in transfer of the factory building and power plant, and brought the same to tax. It was further averred by the ld. D.R that as the assessee did not fulfil the conditions of Sec. 47(xiiib), thus the A.O had rightly declined the 'carry forward' of the losses of the erstwhile company under Sec. 72A(6A) of the Act. It was submitted by the ld. D.R that as the assessee had not claimed the deduction under Sec. 80-IA in its 'return of income', thus the same was rightly declined by the A.O. Further, it was submitted by the ld. D.R that the deduction Sec. 80-IA(4) was only available to a company and not to a LLP. In support of his contention the ld. D.R relied on the order of the ITAT, Chennai in the case of M/s Eshwaranath Constructions Vs. The ACIT, Chennai [ITA No. 185/Mds/2012; dated 15.01.2013].

6. Per contra, the ld. Authorised representative (for short 'A.R') for the assessee Shri. Yogesh Thar

submitted, that the conversion of the erstwhile company into a LLP did not involve any 'transfer'. The ld. A.R fairly admitted that clause (e) of the *proviso* to Sec. 47(xiiib) was not satisfied by the assessee. In support of his contention that no 'transfer' was involved in the aforesaid transaction, the ld. A.R relied on the judgment of the Hon'ble High Court of Bombay in *CIT* v. *Texspin Engg. & Mfg. Works* [2003] 263 ITR 345 (Bom). It was further submitted by the ld. A.R that as no consideration was involved in the transaction of conversion of the erstwhile private limited company into the assessee LLP, hence the machinery proviso for computing the 'capital gains' was rendered as unworkable. Alternatively, it was submitted by the ld. A.R that even if there was a 'transfer', then what was transferred was the 'undertaking' which had no determinable cost of acquisition, therefore, on the said count also no 'capital gain' was chargeable in the hands of the assessee. The ld. A.R in support of his aforesaid contentions relied on the judgment of the Hon'ble High Court of Bombay in *CIT* v. *Texspin Engg. & Mfg. Works* [2003] 263 ITR 345 (Bom) and that of the Hon'ble High Court of Gujarat in *DCIT* v. *R.C Kalathia & Co*. [2016] 381 ITR 0180 (Guj). The ld. A.R rebutting the observations of the lower authorities submitted, that as the assessee in the present case had neither claimed nor was ever allowed the exemption under Sec. 47(xiiib), therefore, the issue of withdrawal of the same by invoking Sec. 47A would not arise at all. In order to drive home his aforesaid contention the ld. A.R relied on the judgment of the Hon'ble High Court of Bombay in the case of *CIT* v. *Umicore Finance Luxemborg* [2016] 76 taxmann.com 32 (Bom). The ld. A.R taking support of the judgment of the High Court in the case of *Umicore Finance Luxemborg* (*supra*) submitted, that even otherwise Sec. 47(xiiib) r.w Sec. 47A cannot be construed to read a fiction, to the effect that the income which is not liable to be taxed as capital gains can be deemed as 'capital gains'. The ld. A.R further referring to Sec. 58(4) and the Third schedule' to the Limited Liability Partnership Act, 2008 submitted, that on conversion from a private limited company to LLP, all tangible and intangible property of the company is transferred to and stands vested in the LLP. It was submitted by the ld. A.R that as per Clause 6(b) of the 'Third schedule', on the grant of registration as LLP under Clause 4, all the tangible, intangible property including assets, interests etc. stands vested in the LLP without any further assurance, act or deed. On the basis of his aforesaid deliberations, it was submitted by the ld. A.R that the term 'transfer' used in the Limited Liability Partnership Act, 2008 cannot be construed as a 'transfer' within the meaning of the Transfer of property Act, 1882. It was submitted by the ld. A.R that the conversion of a company into a LLP involved only a change of cloak, and the same by no means could be construed as a 'transfer' either under the Transfer of Property Act, 1882 or the Income-tax Act, 1961. The ld. A.R submitted that even otherwise as no consideration had either accrued, or was received by the transferor, thus the said transaction even on the said ground could not be taxed as 'capital gains'. Alternatively, it was the contention of the ld. A.R that even if a transfer was to be assumed to have taken place, then as the asset which was transferred was an 'undertaking' as a going concern of the company, which had no determinable cost of acquisition, therefore, the mechanism to charge capital gains under Sec. 48 was in itself rendered unworkable. The ld. A.R further submitted that non-satisfaction of the conditions of the *proviso* to Sec. 47(xiiib) would not automatically lead to taxing of the transaction under consideration. Rather, it was the contention of the ld. A.R that as the assessee had not availed the exemption under Sec. 47(xiiib), therefore, the lower authorities were in error in invoking Sec. 47A(4), as the same would come into play only for withdrawal of an exemption that was earlier claimed by an assessee. It was submitted by the ld. A.R that in absence of appropriate charging section and appropriate computation section, mere ineligibility for claim of exemption in Sec. 47(xiiib) cannot lead to creation of a charge. It was averred by the ld. A.R that if the legislature in all its wisdom had intended to create a charge, then merely providing for the same in Sec. 47(xiiib) was not sufficient, and the same could safely be held to be legislative misfire. In support of his said contention the ld. A.R relied on the judgments of the Hon'ble High Court of Bombay in *Elphinstone Spg. & Wvg. Mills Co. Ltd.* v. *CIT* [1955] 28 ITR 811 (Bom) and The Deccan Cement Products Co. (1957) 8 STC 100 (Bom). The ld. A.R further submitted, that the CIT(A) after duly appreciating the facts of the case had rightly allowed the claim of deduction of the assessee under Sec. 80-IA of the Act.

It was submitted by the ld. A.R that as the assessee in its revised 'return of income' had disclosed a loss, therefore, for the said reason it had not raised a claim of deduction under Sec. 80-IA. It was submitted by him that the Audit report in Form No. 10CCB was filed by the assessee in the course of the appellate proceedings before the CIT(A).

7. The ld. D.R rebutting the aforesaid contentions of the counsel for the assessee submitted, that as the conversion of the company into a LLP involved two separate and distinct entities, thus, it was incorrect on the part of the ld. A.R to state that in the absence of co-existence of the 'transferor' and 'transferee' the transaction could not be brought to tax under the head 'Çapital gains'. The ld. D.R relied on the order of the A.O. In order to fortify his contention that the conversion of the company to a LLP involved a 'transfer', the ld. D.R relied on the Finance Bill, 2010 explaining both the purpose and intent of making Sec. 47(xiiib) available on the statute. The ld. D.R in order to buttress his claim that non-compliance of the conditions of the *proviso* of Sec. 47(xiiib) would lead to disallowance of the exemption under Sec. 47A, relied on the order of the ITAT, Kolkata in the case of *Aravali Polymers LLP* v. *JCIT*, Range-34, Kolkata ....

8. We have heard the authorised representatives of both the parties, perused the orders of the lower authorities and the material available on record. We find that the revenue has sought our indulgence for adjudicating, as to whether the CIT(A) is right in law and facts of the case in concluding that though there was a 'transfer' of capital assets from the erstwhile company to the assessee LLP by virtue of Sec. 47(xiiib), however, as the difference between the transfer value and the cost of acquisition was Nil, therefore, the machinery provision for computing the 'capital gains' would be rendered as unworkable. Further, the revenue has also assailed before us the allowing of the assesses claim of deduction under Sec. 80-IA of the Act by the CIT(A). On the other hand, the assessee has in its cross-objection assailed the observation of the CIT(A) that as the assessee had failed to comply with the conditions laid down under Sec. 47(xiiib), therefore, the conversion of the erstwhile company into a LLP involved a taxable transfer chargeable under Sec. 45 of the Act. Further, the assessee has also assailed the declining by the CIT(A) of the carry forward of the losses of the erstwhile company by the assessee LLP.

9. We are of the considered view that as the 'Grounds of appeal no. 1 & 2' raised by the revenue, and the 'Grounds of cross-objection No.1 to 3' raised by the assessee revolves around the common issue pertaining to the scope and gamut of Sec. 47(xiiib), therefore, the same are being taken up and disposed off together. On a perusal of the order of the CIT(A), it emerges that he had observed that as the assessee was caught under the mischief of Sec. 47(xiiib) r.w.s 47A(4), therefore, there was a 'transfer' of the capital assets from the erstwhile company to the assessee LLP. However, it was further observed by him that as the assets and liabilities of the erstwhile company had got vested with the assessee LLP at the 'book value', thus as the difference between the transfer value and the cost of acquisition of the said assets was Nil, therefore, the machinery provision for computing the 'capital gains' under Sec. 48 was rendered as unworkable,. The assessee has assailed before us the order of the CIT(A) to the extent he had concurred with the A.O, and had concluded that the conversion of the erstwhile company into the assessee LLP involved a 'transfer' within the meaning of the charging section i.e Sec. 45 of the Act.

10. We find that Sec. 47(xiiib) of the Act, as had be made available on the statute by the Finance Act, 2010 w.e.f 01.04.2011 reads as under :

> "47. *Transactions not regarded as transfer*.—Nothing contained in section 45 shall apply to the following transfers,—
>
> (*xiiib*) any transfer of a capital asset or intangible asset by a private company or unlisted public company (hereafter in this clause referred to as the company) to a limited liability partnership or any transfer of a share or shares held in the company by a shareholder as a result of conversion of the company into a limited liability partnership in accordance with the provisions of section 56 or

section 57 of the Limited Liability Partnership Act, 2008 (6 of 2009):

Provided that—

(*a*) all the assets and liabilities of the company immediately before the conversion become the assets and liabilities of the limited liability partnership;

(*b*) all the shareholders of the company immediately before the conversion become the partners of the limited liability partnership and their capital contribution and profit sharing ratio in the limited liability partnership are in the same proportion as their shareholding in the company on the date of conversion;

(*c*) the shareholders of the company do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of share in profit and capital contribution in the limited liability partnership;

(*d*) the aggregate of the profit sharing ratio of the shareholders of the company in the limited liability partnership shall not be less than fifty per cent at any time during the period of five years from the date of conversion;

(*e*) the total sales, turnover or gross receipts in business of the company in any of the three previous years preceding the previous year in which the conversion takes place does not exceed sixty lakh rupees;

(*ea*) the total value of the assets as appearing in the books of account of the company in any of the three previous years preceding the previous year in which the conversion takes place does not exceed five crore rupees; and;";]

(*f*) no amount is paid, either directly or indirectly, to any partner out of balance of accumulated profit standing in the accounts of the company on the date of conversion for a period of three years from the date of conversion.

Explanation.— For the purposes of this clause, the expressions "private company" and "unlisted public company" shall have the meanings respectively assigned to them in the Limited Liability Partnership Act, 2008 (6 of 2009);'

It is discernible from a cursory glance of Sec. 47, that the 'transfers' referred to in the said statutory provision would not be chargeable to income-tax under the head "Çapital gains" under Sec. 45 of the Act. In other words, though the transactions referred to in Sec. 47 are 'transfers', however, the same subject to cumulative satisfaction of the conditions contemplated in the respective sub-sections would fall beyond the sweep of chargeability to income-tax as 'Capital gains' under Sec. 45 of the Act.

11. We thus are of the considered view that the transaction involving conversion of a private limited company or unlisted public company to a LLP as contemplated in Sec. 47(xiiib) would though be a 'transfer', however, the same on cumulative satisfaction of conditions (a) to (f) of the *proviso* to Sec. 47(xiiib) would not be chargeable to 'capital gains' under Sec. 45 of the Act. Our aforesaid view stands fortified from a perusal of the 'Memorandum' explaining the Finance Act, 2010, which reads as under (relevant extract) :

"Conversion of a private company or an unlisted public company into a limited liability partnership (LLP):

The Finance (No. 2) Act, 2009 provided for the taxation of LLPs in the Income-tax Act on the same lines as applicable to partnership firms. Section 56 and section 57 of the Limited Liability Partnership Act, 2008 allow conversion of a private company or an unlisted public company (hereafter referred as company) into an LLP. Under the existing provisions of Income-tax Act,

conversion of a company into an LLP has definite tax implications. Transfer of assets on conversion attracts levy of capital gains tax. Similarly, carry forward of losses and of unabsorbed depreciation is not available to the successor LLP.

It is proposed that the transfer of assets on conversion of a company into an LLP in accordance with section 56 and section 57 of the Limited Liability Partnership Act, 2008 shall not be regarded as a transfer for the purposes of capital gains tax under section 45, subject to certain conditions. These conditions are as follows:

(*i*) the total sales, turnover or gross receipts in business of the company do not exceed sixty lakh rupees in any of the three preceding previous years;

(*ii*) the shareholders of the company become partners of the LLP in the same proportion as their shareholding in the company;

(*iii*) no consideration other than share in profit and capital contribution in the LLP arises to partners;

(*iv*) the erstwhile shareholders of the company continue to be entitled to receive at least 50 per cent of the profits of the LLP for a period of 5 years from the date of conversion;

(*v*) all assets and liabilities of the company become the assets and liabilities of the LLP; and

(*vi*) no amount is paid, either directly or indirectly, to any partner out of the accumulated profit of the company for a period of 3 years from the date of conversion.

It is also proposed to allow carry forward and set-off of business loss and unabsorbed depreciation to the successor LLP which fulfils the above mentioned conditions.

It is also proposed that if the conditions stipulated above are not complied with, the benefit availed by the company shall be deemed to be the profits and gains of the successor LLP chargeable to tax for the previous year in which the requirements are not complied with.

It is also proposed that the aggregate depreciation allowable to the predecessor company and successor LLP shall not exceed, in any previous year, the depreciation calculated at the prescribed rates as if the conversion had not taken place.

It is further proposed that the actual cost of the block of assets in the case of the successor LLP shall be the written down value of the block of assets as in the case of the predecessor company on the date of conversion.

It is also provided that the cost of acquisition of the capital asset for the successor LLP shall be deemed to be the cost for which the predecessor company acquired it.

Credit in respect of tax paid by a company under section 115JB is allowed only to such company under section 115JAA. It is proposed to clarify that the tax credit under section 115JAA shall not be allowed to the successor LLP.

These amendments are proposed to take effect from 1st April, 2011 and will, accordingly, apply in relation to the assessment year 2011-12 and subsequent years.

[Clauses 8, 11, 13, 18, 19, 20, 22, 29]"

12. We find from a perusal of the 'memorandum' explaining the purpose and intent behind the enactment of sub-section (xiiiib) to Sec. 47, that prior to its insertion, the 'transfer' of assets on conversion of a

company into a LLP attracted levy of "capital gains" tax. The legislature in all its wisdom had vide the Finance Act, 2010 made Sec. 47(xiiib) available on the statute, with the purpose that the transfer of assets on conversion of a company into a LLP in accordance with the Limited Liability Partnership Act, 2008, subject to fulfilment of the conditions contemplated therein, shall not be regarded asa 'transfer' for the purposes of Sec. 45 of the Act. In so far, the reliance placed by the ld. A.R on the judgment of the Hon'ble High Court of Bombay in the case of *CIT* v. *Texspin Engg. & Mfg. Works* [2003] 263 ITR 345 (Bom) is concerned, the same in our considered view is distinguishable on facts. In the case before the Hon'ble High Court, the issue was in context of a partnership firm being treated as a company under the statutory provisions of Part-IX of the Companies Act. It was observed by the Hon'ble High Court that the case before them was as that of a succession of a firm by a company. In context of the aforesaid issue, it was observed that on a firm being treated as a company under Part IX of the Companies Act, there was a statutory vesting of the properties in the company as the firm is treated as a limited company. It was further observed, that on vesting of all the properties statutorily in the company, the cloak given to the firm is replaced by a different cloak and the same firm is now treated as a company, after a given date. Further, it was observed that when a firm is treated as a company under Part IX, it is a case similar to transmission of assets. In this regard, it would be relevant to point out that that the Hon'ble High Court of Bombay in a subsequent decision in the case of *CIT* v. *Umicore Finance Luxmeborg* [2017] 244 Taxman 43 (Bom) has approved an order of the 'Authority for Advance Ruling' (for short 'AAR') passed in the case of *Umicore Finance Luxembourg, In re (2010) 323 ITR 25 (AAR-New Delhi).* One of the issue before the 'AAR' was as to whether the conversion of a partnership firm to a private limited company under Part IX of the Companies Act, 1956 in September, 2005 was to be regarded as a 'transfer' within the meaning of Sec. 2(47) and other relevant provisions of the Income-tax Act, 1961? The 'AAR' while answering the said issue had observed in its order that the question whether vesting by operation of law would be a 'transfer' had not been decided by the Hon'ble High Court of Bombay in its decision in the case of *CIT* v. *Texspin Engg. & Mfg. Works* [2003] 263 ITR 345 (Bom). In the backdrop of the said observations, the 'AAR' had observed that they were not inclined to express a final opinion on the point of 'transfer', and in the said context had stated as under :

> *"No final opinion is expressed in regard to the question whether on the registration of company under Part IX of the Companies Act, there was 'transfer' of capital assets."*

Thereafter, the 'AAR' had concluded that as no profit or gain had arisen at the time of conversion of the partnership firm into a company, hence there were no 'capital gains' chargeable to tax in the hands of the assessee. We find that the aforesaid order of the 'AAR' had thereafter been approved and held to be a reasoned order by the Hon'ble High Court of Bombay in *CIT* v. *Umicore Finance Luxmeborg* [2017] 244 Taxman 43 (Bom).

13. In so far, in the case before us, the issue therein involved pertains to conversion of a private limited company to a LLP. As per Sec. 56 of the Limited Liability Partnership Act, 2008, a private limited company may convert into a limited liability partnership in accordance with the provisions of Chapter X of the Limited Liability Partnership Act, 2008 and the Third Schedule'. We find that the term "convert", in relation to a private company converting into a limited liability partnership is defined in Clause 1(b) of the Third Schedule', and reads as under :

> *"1(b). "Convert", in relation to a private company converting into a limited liability partnership, means a transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of the private company to the limited liability partnership in accordance with this schedule."*

On a perusal of the definition of the term "convert", it can safely be gathered that the conversion of a private company into a LLP involves transfer of the property, assets etc. The ld. A.R has tried to impress

upon us that the term "transfer" used in Clause 1(b) of the Third Schedule' cannot be construed and equated as that used in the Transfer of Property Act, 1882. The ld. A.R drawing our attention to Sec. 5 of the Transfer of Property Act, 1882, submitted that "transfer of property" therein meant an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and to "transfer property" is to perform such act. The ld. A.R in order to buttress his contention took us through Clause 6(b) of the 'Third Schedule'. It was submitted by the ld. A.R that Clause 6(b) provided that all tangible (movable or immovable) and intangible property vested in the company, all assets, interests, rights, privileges, liabilities, obligations relating to the company and the whole of the undertaking of the company shall be transferred to and shall vest in the limited liability partnership without further assurance, act or deed. In the backdrop of the aforesaid facts, the ld. A.R submitted that as the vesting of the assets of the company in the LLP did not require any further act, thus the term "transfer" used in the definition of the term "convert" in Clause 1(b) of the "Third Schedule" cannot be read as a "transfer" under the Transfer of Property Act, 1882. We have given a thoughtful consideration to the contention of the ld. A.R, and are unable to persuade ourselves to subscribe to the same. Interestingly, we find that as Sec. 5 of the Transfer of property Act, 1882 states that "to transfer property" is to perform such act, therefore, in our considered view, the "transfer" of the property by the company to the LLP as per Clause 6(b) of the Third Schedule' would in itself satisfy the requirement of Sec.1 of the Transfer of property Act, 1882. Be that as it may, we are of the considered view that the scope of the term "transfer" has to be read in context of the Income-tax Act, 1961, and cannot be narrowed down to that defined in the Transfer of Property Act, 1882. In this regard, it would also be relevant and pertinent to point out that unlike the conversion of a private limited company into a LLP (as is the issue before us), in the case of succession of a partnership firm by a company as per Part IX, there is only "vesting" of the property of the partnership firm in the company from the date of its registration as per Sec. 575 of the Companies Act, 1956, which reads as under:

> *"575. Vesting of property on registration - All property, movable and immovable (including actionable claims), belonging to or vested in a company at the date of its registration in pursuance of this part, shall, on such registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein"*

In the backdrop of our aforesaid observations it can safely be concluded that conversion of a company into a LLP as in the case before us, is differently placed as in comparison to succession of a partnership firm by a company under Part IX of the Companies Act, 1956. Thus, in terms of our aforesaid observations, we are unable to persuade ourselves to subscribe to the contention of the ld. A.R that on the conversion of the company into the assessee LLP no 'transfer' of capital assets was involved. The **Cross Objection No. II** is dismissed.

14. We shall now advert to the contention of the ld. A.R that the A.O has wrongly invoked Sec. 47A(4) and taxed the 'capital gains' in the hands of the assessee. It was the contention of the ld. A.R that Sec. 47A(4) would come into play only for withdrawing of an exemption earlier availed by an assessee under Sec. 47(xiiib), and not for judging the eligibility of an assessee as regards the same in the year of claim itself. In the backdrop of his aforesaid contention, it was the case of the ld. A.R that the A.O was in error in invoking Sec. 47A(4) for disallowing the claim of exemption of the assessee in the year of claim itself. We have deliberated at length on the issue under consideration and find substantial force in the contention advanced by the ld. A.R. On a bare perusal of Sec. 47A(4), it can safely be gathered that the same comes into play for the purpose of withdrawing of the exemption of the amount of profits or gains arising from the transfer of a capital asset or intangible assets or share or shares, which had not been charged to tax under section 45 by virtue of conditions laid down in the proviso of Sec. 47(xiiib). Such amount of profits or gains arising from the transfer of a capital asset or intangible assets or share or shares, shall be deemed to be the profits and gains chargeable to tax of the successor LLP or the

shareholder of the predecessor company, as the case may be, for the previous year in which the requirements of the said proviso are not complied with. In our considered view the invocation of Sec. 47A(4) can be better understood by bifurcating the same into two parts viz. (i). there are profits or gains from the transfer of capital assets or intangible assets or share or shares which are not charged under Sec. 45 by virtue of conditions laid down in the *proviso* to Sec. 47(xiiib); and (ii). such profits or gains from the transfer of a capital asset or intangible assets or share or shares shall be deemed to be chargeable to tax of the successor limited liability partnership or the shareholder of the predecessor company, as the case may be, for the previous year in which the requirements of the said proviso are not complied with. We are of the considered view that from a plain literal interpretation of the aforesaid statutory provision i.e Sec. 47A(4), it can safely be gathered that the same comes into play only for the purpose of withdrawing an exemption earlier availed by an assessee under Sec. 47(xiiib), and deeming the same as the profits and gains of the successor LLP or the shareholder of the predecessor company, as the case may be, for the previous year in which the requirements of the said proviso are not complied with. Our aforesaid view is fortified from a perusal of the 'Notes on Clauses' of the Finance Act, 2010, which in context of the aforesaid statutory provision, reads as under (relevant extract):

> "12.4 The Act has been amended to provide that if the conditions stipulated above are not complied with, **the benefit availed by the company** or by the shareholders, **shall be deemed to be the profits and gains of the successor LLP** or the shareholder of the predecessor company, as the case may be, **chargeable to tax for the previous year in which the requirements are not complied with**."

On the basis of our aforesaid observations, we are persuaded to subscribe to the claim of the ld. A.R that the lower authorities had erred in invoking Sec. 47A(4) for judging the eligibility of the assessee LLP towards exemption under Sec. 47(xiiib) of the Act. In our considered view, the failure on the part of the assessee to have satisfied Clause (e) of the *proviso* of Sec. 47(xiiib), would in itself suffice for dislodging the claim of the assessee LLP that the 'transfer' of the capital assets on the conversion of the private limited company into a LLP was not to be regarded as a 'transfer' within the meaning of Sec. 45 of the Act. We are of the considered view that as the issue involved in the case before us does not relate to withdrawing of an exemption earlier availed by the assessee under Sec. 47(xiiib), therefore, there was no occasion for invoking the provisions of Sec. 47A(4) of the Act. Rather, the issue in the case before us pertains to determining of the eligibility of the assessee towards claim of exemption under Sec. 47(xiiib) of the Act. In the backdrop of our aforesaid observations, we are of the considered view that the lower authorities had failed to appreciate that Sec. 47A(4) which could come into play only for revoking an exemption earlier availed by an assessee under Sec. 47(xiiib), could not have been pressed into service for concluding that the assessee LLP was not eligible for claim of exemption under Sec. 47(xiiib) in the year of raising of such claim itself. We thus not being persuaded to subscribe to the invoking of Sec. 47A(4) by the lower authorities, set aside the order of the CIT(A) to the said extent.

15. We are of the considered view that in terms of our aforesaid observations, the transaction involving conversion of the private limited company to the assessee LLP *de hors* compliance of the conditions contemplated in the *proviso* to Sec. 47(xiiib), would thus involve 'transfer' of the capital assets. However, as we have ousted the applicability of the provisions of Sec. 47A(4) to the facts of the case before us, therefore, the 'deeming fiction' therein facilitating assessing of the profits and gains arising from the transfer of the capital assets in the hands of the transferee i.e the assessee LLP would also meet the same fate and thus, would not be principally applicable in the case before us. In the backdrop of the aforesaid facts, the issue involved in the present case boils down to the chargeability of the profits and gains arising from the 'transfer' of the capital assets in pursuance to conversion of a private limited company to the assessee LLP. We are of the considered view that as per Sec. 45 r.w Sec. 5 of the Act, the profits or gains arising from the 'transfer' of the capital assets effected in the previous year shall be

principally chargeable to income-tax under the head "Capital gains" in the hands of the 'transferor', as its income of the previous year in which the transfer took place. In the backdrop of our aforesaid deliberations, we are of the considered view that the "Capital gains", if any, arising from the 'transfer' of the capital assets on conversion of the private limited company to the assessee LLP, *de hors* the applicability of Sec. 47A(4), could not have been principally brought to tax under Sec. 45 as 'Capital gains' in the hands of the assessee LLP. Further, we find that as per Sec. 170(1)(b) of the Act, a 'successor entity' which continues to carry on the business of the person who has been succeeded (hereinafter referred to as "predecessor") shall be liable to be assessed only in respect of the income of the previous year after the date of succession. However, the said liability of a successor entity is subject to an exception carved out in Sec. 170(2), as per which, where the predecessor cannot be found, there the assessment of the income of the previous year in which the succession took place up to the date of succession, and of the previous year preceding that year shall be made on the successor in the like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may be, apply accordingly. In so far, the term 'Income' is concerned, the same as per the *Explanation* to Sec. 170 includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession. We thus in terms of our aforesaid observations are of the considered view that though the "Capital gains", if any, involved in the transfer of the capital assets on conversion of the private limited company to the assessee LLP, *de hors* applicability of Sec. 47A(4) to the facts of the case, would not be liable to be assessed in the hands of the assessee LLP as per Sec. 45 r.w Sec. 5 of the Act, however, the same would be subject to the liability of the assessee LLP (as a successor entity) under Sec. 170 of the Act. The **"Cross Objection No. I"** of the assessee is disposed off in terms of our aforesaid observations.

16. We shall now advert to the issue that as to whether the conversion of a company into a LLP involves any 'capital gain', or not. We may herein observe that the exemption under Sec. 47(xiiib) which contemplates that certain transactions on satisfaction of the conditions therein provided are not to be regarded as a 'transfer', cannot be construed as a fiction to the effect that the income which is not liable to be taxed under the other provisions of the chapter of 'capital gains' can be deemed to be capital gains, if the conditions contemplated in Sec. 47(xiiib) are not satisfied. In so far, for determining that as to whether on the failure to satisfy the conditions provided in Sec. 47(xiiib), the conversion of the company into a LLP would involve any 'capital gain', the charging provision in Sec. 45 has to be looked into. Admittedly, the conversion of the assets and liabilities of the erstwhile company to the assessee LLP in the case before us took place as per the Limited Liability Partnership Act, 2008 at the 'book value' itself. Rather, as the entire undertaking of the erstwhile company got vested into the LLP, therefore, no separate cost other than the 'book value' was attributable to the individual assets and liabilities. As per the settled position of law, the provisions of Section 48 which provides for the mode of computation of the capital gains has to be read as an integral part of the charging provision in Section 45 of the Act. The Hon'ble High Court of Bombay in the case of *CIT* v. *Texspin Engg. & Mfg. Works* [2003] 263 ITR 345 (Bom), has observed that the said two sections viz. Sec. 45 and Sec. 48 are to be read together, as the charging section and the computation section constitute one package. Also, the Hon'ble Supreme Court in the case of *CIT* v. *B.C Srinivasa Setty* [1981] 128 ITR 294 (SC) and *Navin Jindal & Ors*. v. *ACIT* [2010] 320 ITR 708 (SC) had observed that for the purposes of Sec. 48 of the Act, one must keep in mind an important principle, namely, that chargeability and computation has to go hand in hand. In other words, computation is an integral part of chargeability under the Act. Now, under Sec. 48 it is laid down, *inter alia,* that the income chargeable under the head 'capital gains' shall be computed by deducting from the 'full value of consideration received or accrued' as a result of the transfer, the cost of acquisition of the asset and the expenditure incurred in connection with the transfer. The expression "full value of consideration" used in Sec. 48 cannot be construed as the 'market value' of the asset on the date of transfer. As observed by the Hon'ble High Court of Bombay in the case of *Texspin Engg. & Mfg.*

Works (*supra*), the consideration for the transfer of a capital asset is what the transferor receives in lieu of the assets he parts with, viz. money or money's worth, and, therefore, the asset transferred or parted with cannot be the consideration for the transfer. It was further observed that the expression "full value of the consideration" cannot be construed as having a reference to the 'market value' of the asset transferred, and that the said expression only means the full value of the things received by the transferor in exchange for the capital asset transferred by him. Our aforesaid view that 'full value of consideration' used in Sec. 48 cannot be construed as the 'market value' of the asset on the date of transfer is fortified by two judgments of the Hon'ble Supreme Court viz. (i). *CIT* v. *George Henderson and Co. Ltd*. [1967] 66 ITR 622 (SC) and (ii). *CIT* v. *Gilanders Arbuthnot and Co.* [1973] 87 ITR 407 (SC). The Hon'ble Apex Court in the said judgments had observed that the expression 'full value of the consideration' does not mean the 'market value' of the asset transferred, but it shall mean the price bargained for by the parties to the transaction. We thus in terms of our aforesaid observations are persuaded to subscribe to the view of the CIT(A), that as the assets and liabilities of the erstwhile private limited company had got vested in the assessee LLP at their 'book values', a fact which has not been negated, hence such 'book value' could only be regarded as the 'full value of consideration' for the purpose of computation of 'capital gains' under Sec. 48 of the Act. The **Grounds of appeal Nos. 1 and 2** raised by the revenue are dismissed.

17. In so far, the cost of acquisition of the assets of the erstwhile company are concerned, as per Sec. 49(1)(iii), where the capital assets becomes the property of the assessee by succession, inheritance or devolution, the cost of acquisition of the assets shall be deemed to be the cost for which the previous owner of the property had acquired the same. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of *CIT* v. *Manjula J. Shah* [2013] 355 ITR 474 (Bom). In the said order, it was observed by the Hon'ble High Court in context of a capital asset that was acquired by the assessee by way of a gift from her daughter [one of the mode of acquisition under Sec. 49(1)], that if one reads Explanation 1(i)(b) to Sec. 2(42A) together with ss. 48 and 49, it becomes absolutely clear that the object of the statute is not merely to tax the 'capital gains' arising on transfer of a capital asset acquired by an assessee by incurring the cost of acquisition, but also to tax the gains arising on transfer of a capital asset *inter alia* acquired by an assessee under a gift or will as provided under s. 49, by deeming the assessee to have incurred the cost of acquisition. Further, the Hon'ble High Court of Calcutta has in the case of *CIT* v. *Delta Jute Mills* [1986] 159 ITR 215 (Cal) and in *CIT* v. *Budge Budge Amalgamated Mills Ltd.* [1980]122 ITR 561 (Cal), observed that in case of an amalgamation where the assessee became the owner of the capital asset of the amalgamating company by way of devolution, the cost of acquisition of the amalgamating company was to be considered as the cost of acquisition for computing the capital gains. We thus in terms of our aforesaid observations are in agreement with the view taken by the CIT(A), that though there was a transfer of capital assets from the erstwhile private limited company to the assessee LLP by virtue of the provisions of Sec. 47(xiiib), however, as the difference between the transfer value and the cost of acquisition was Nil, therefore, while computing the 'capital gains' the machinery provision was rendered as unworkable. The **Cross-Objection No III** is disposed off in terms of our aforesaid observations.

18. We shall now take up the claim of the assessee that the CIT(A) had erred in concurring with the A.O, and therein concluding that the assessee LLP had rightly been disentitled from carrying forward the losses of Rs. 5,79,93,084/- of the erstwhile company. In our considered view, before adverting to the issue under consideration, it would be relevant to cull out the provisions of sub-section (6A) of Sec. 72A, which reads as under:

> "(6A) Where there has been reorganisation of business whereby a private company or unlisted public company is succeeded by a limited liability partnership fulfilling the conditions laid down in the proviso to clause (xiiib) of section 47, then, notwithstanding anything contained in any other

provision of this Act, the accumulated loss and the unabsorbed depreciation of the predecessor company, shall be deemed to be the loss or allowance for depreciation of the successor limited liability partnership for the purpose of the previous year in which business reorganisation was effected and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly:

Provided that if any of the conditions laid down in the proviso to clause (xiiib) of section 47 are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the successor limited liability partnership, shall be deemed to be the income of the limited liability partnership chargeable to tax in the year in which such conditions are not complied with."

On a perusal of the aforesaid statutory provision i.e Sec. 72A(6A) as had been made available on the statute by the Finance Act, 2010 w.e.f 01.04.2011, it stands revealed that where a private limited company is succeeded by a LLP, then the accumulated loss and the unabsorbed depreciation of the predecessor company, shall be deemed to be the loss or allowance for depreciation of the successor limited liability partnership for the purpose of the previous year in which business reorganisation was effected, and other provisions of this Act relating to 'set off' and 'carry forward' of loss and allowance for depreciation shall apply accordingly. However, there is an innate requirement that the condition laid down in the *proviso* to clause (xiiib) of section 47 are fulfilled. Rather, as is discernible from a perusal of the *proviso* to Sec. 72A(6A), if any of the conditions laid down in the *proviso* to clause (xiiib) of section 47 is not complied with, then the 'set off' of loss or allowance of depreciation made in any previous year in the hands of the successor limited liability partnership, shall be deemed to be the income of the limited liability partnership chargeable to tax in the year in which such conditions are not complied with. Admittedly, in the case before us the assessee had failed to cumulatively satisfy the conditions laid down in the *proviso* to clause (xiiib) of section 47.

19. We have deliberated on the contention of Mr. Yogesh Thar, ld. counsel for the assessee, that as per Sec. 58(4) of the Limited Liability Partnership Act, 2008, which deals with effect of conversion of a private limited company into a LLP, there is a non-obstante clause which provides that notwithstanding anything contained in any other law for the time being in force, all tangible (movable or immovable) and intangible property vested in the company, all assets, interests, rights, privileges, liabilities, obligations relating to the company shall be transferred to and shall vest in the LLP without any further assurance, act or deed. The ld. A.R has tried to impress upon us that on the basis of the superseding effect of Sec. 58(4) of the Limited Liability Partnership Act, 2008, on conversion the assessee LLP also stood vested with the right to 'carry forward' the losses of the erstwhile private limited company. We have given a thoughtful consideration to the issue under consideration and are unable to persuade ourselves to accept the same. We find ourselves as being in agreement with the view taken by the CIT(A), that sub-section (4) of Sec. 58 of the Limited Liability Partnership Act, 2008 is only in context of the tangible and intangible property, interests, rights etc., and has nothing to do with the 'carry forward' of losses, which is the creature of a specific statute in the form of the Income-tax Act, 1961. We are of the considered view that Sec. 72A(6A) which entitles a LLP to 'carry forward' the losses of the erstwhile private limited company, is in clear and loud terms preconditioned by a statutory requirement that the assessee should have complied with the conditions of the *proviso* to clause (xiiib) of section 47. In the backdrop of our aforesaid observations, we are of the considered view that as the claim of the assessee LLP as regards 'carry forward' of the loss of the erstwhile private limited company, *de hors* satisfaction of the conditions laid down in the *proviso* to clause (xiiib) of section 47, clearly militates against the aforesaid statutory provision, thus, the same cannot be accepted. Our aforesaid view is further fortified from a perusal of the 'Memorandum' explaining the Finance Act, 2010, which in context of the issue under consideration, reads as under (relevant extract):

"It is also proposed to allow carry forward and set-off of business loss and unabsorbed depreciation

to the successor LLP which fulfils the above mentioned conditions."

We thus in terms of our aforesaid observations find no infirmity in the order of the CIT(A), who in our considered view, after taking cognizance of the fact that the assessee had failed to satisfy the conditions laid down in the *proviso* to clause (xiiib) of section 47 had rightly declined the 'carry forward' of the losses of the erstwhile company by the assessee LLP. The order of the CIT(A) to the said extent is upheld. The **Cross-Objection No. IV** of the assessee is dismissed.

20. We shall now take up the assailing of the order of the CIT(A) by the revenue, on the ground that he has erred in allowing the assesses claim of deduction under Sec. 80-IA of the Act. Briefly stated, on the basis of conversion of a private limited company viz. M/s Celerity Power Pvt. Ltd. into a LLP, the assessee viz. Celerity Power, LLP had came into existence on 28.09.2010. The assessee LLP which is engaged in the business of power generation had in its revised 'return of income' for A.Y 2010-11, filed on 30.09.2011, declared Nil income. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act. During the course of the assessment proceedings, the assessee raised a claim of deduction under Sec. 80-IA of the Act. However, the A.O observing that the assessee had failed to file the Audit Report' in 'Form 10CCB' alongwith its return of income, and thus not satisfied the conditions contemplated under Sec. 80-IA, declined the claim of deduction raised by the assessee. On appeal, the CIT(A) after necessary deliberations admitted as 'additional evidence' the Audit Report' filed by the assessee in 'Form 10CCB' in respect of its claim of deduction under Sec. 80-IA. Further, on merits the CIT(A) was persuaded to subscribe to the claim of the assessee as regards its claim for deduction under Sec. 80-IA. The CIT(A) held a conviction that as the benefit of deduction under Sec. 80-IA was attached to the 'undertaking' and not to its 'owner assessee', thus as long as the identity of the undertaking remained as such, the claim of deduction under the said statutory provision would be available for the residual term to the new owner i.e the successor entity. The CIT(A) while concluding as hereinabove, took support of CBDT letter F.No. 15/5/63 (A-1) which was issued in context of Sec. 84, which corresponded to the then Sec. 80J and the present Sec. 80-IA. Further, it was also observed by the CIT(A) that the embargo made available on the statute by sub-section (12A) of Sec. 80IA, which restricted w.e.f 01.04.2007 the entitlement of the successor company towards claim of deduction under the said statutory provision was applicable only in the case of an amalgamated/demerged company, and not in a case where a private limited company was converted into a LLP.

21. We have given a thoughtful consideration to the issue before us, and after necessary deliberations find ourselves as being in agreement with the view taken by the CIT(A) who has allowed the claim of deduction of the assessee under Sec. 80-IA of the Act. On a perusal of the ground of appeal raised by the revenue in context of the issue under consideration, we find that the order of the CIT(A) has been assailed before us only on the ground that he has erred in allowing the assesses claim of deduction under Sec. 80-IA, without appreciating that the assessee had failed to furnish 'Form 10CCB' during the course of the assessment proceedings. We are unable to persuade ourselves to accept the said contention of the revenue. On a perusal of the order of the CIT(A), it stands revealed that as the assessee was under a *bonafide* belief that it was eligible to 'set off the losses of the erstwhile private limited company and, therefore, as upon setting off of such losses its total income was Nil, thus for the said reason had not raised a claim of deduction under Sec. 80-IA in its 'return of income' for the year under consideration. However, when the issue as regards the entitlement of the assessee to 'carry forward' the losses of the erstwhile company was raised by the A.O, the assessee considering that its undertaking was eligible for claim of deduction under Sec. 80-IA, had thus raised the said claim before the A.O. On a perusal of the order of the CIT(A), it emerges that it was the contention of the assessee before him, that as the A.O had in the course of the assessment proceedings only raised two issues as far as its claim of deduction under Sec. 80-IA was concerned viz. (1) the applicability of sub-section (12A) of Sec. 80IA; and (ii). the

reason as to why no deduction was claimed in the 'return of income', therefore, the assessee which had replied to the said queries, thereafter remained under a *bonafide* belief that non-filing of the 'audit report' would not jeopardize its entitlement towards claim of deduction under Sec. 80-IA of the Act. Be that as it may, we find that the assessee had in the course of the appellate proceedings before the CIT(A) filed the audit report in 'Form 10CCB'.

22. We find that filing of an audit report is procedural and directory in nature, and the same could also be validly filed by an assessee at the appellate stage. Our aforesaid view stands fortified by the judgment of the Hon'ble High Court of Madhya Pradesh in the case of *CIT* v. *Medicaps Ltd.* [2010] 323 ITR 554 (MP), wherein the High Court while allowing the claim of deduction raised by the assessee under Sec. 80-IA(2), on the basis of the 'audit report' which was filed by the assessee for the first time during the course of the appellate proceedings, had observed as under :

> "10. On the issue of filing the audit report at the appellate stage, the Tribunal by placing reliance upon the various judgments, held that filing the audit report is procedural and directory in nature and the same can be filed at the appellate stage. It is also worth noting that before the Tribunal, the complete details were disclosed in respect of the production in second unit. As regards the claim under s. 80-IA(2) the statements have been found to be supported by the data and figures and the Tribunal has found that proper books of accounts were maintained and were audited and the audit reports in prescribed forms were filed."

A similar view that filing of an 'audit report' is procedural and directory in nature, and the same could also be validly filed by the assessee at the appellate stage, had been taken by the Hon'ble High court of Gujarat in *CIT* v. *Gujarat Oil and Allied Industries* [1993] 201 ITR 325 (Guj) and the Hon'ble High Court of Punjab & Haryana in *CIT* v. *Jaideep Industries* [1989] 180 ITR 81 (P&H). In so far, the admission of the 'additional evidence' by the CIT(A) is concerned, we find that the Hon'ble High Court of Bombay in the case of *Smt. Prabhavati S. Shah* v.*CIT* [1998]231 ITR 1 (Bom), has held that if a documentary evidence is necessary to decide the controversy, the CIT(A) should admit it or call for it pursuant to its powers under Sec. 250(4) of the Act. We find that in the case before us, the CIT(A) observed that as the assessee remained under a *bonafide* belief that it was eligible to 'carry forward' and 'set off the losses of the erstwhile company, was thus for the said reason prevented by sufficient cause from producing the 'audit report' before the A.O within the meaning of sub-clauses (b) & (c) of sub-rule (1) of Rule 46A of the Income-tax Rules, 1962. In the backdrop of the aforesaid facts, in our considered view the CIT(A) after calling for the objections of the A.O had fairly exercised his discretion and admitted the 'audit report' filed by the assessee in 'Form 10CCB' before him as an 'additional evidence'. We have further deliberated on the merits as regards the allowing of the claim of deduction under Sec. 80-IA by the CIT(A), and are persuaded to subscribe to the view taken by him. We thus being of the considered view that the CIT(A) has rightly admitted the 'audit report' filed by the assessee in 'Form 10CCB' during the course of the appellate proceedings, and therein allowed the claim of deduction raised by the assessee under Sec. 80-IA, thus uphold his order in context of the issue under consideration. The **Ground of appeal No. 3** raised by the revenue is dismissed.

23. That as the **Grounds of appeal No. 4 and 5** raised by the revenue are general and no contention in context of the same has been raised before us, therefore, the same are dismissed as not pressed.

24. The appeal of the revenue is dismissed and the cross-objections of the assessee are partly allowed.

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