IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI
BEFORE SHRI R.P. TOLANI AND SHRI SHAMIM YAHYA

ITA Nos. 1891, 1892 & 1893/Del/2012
Asstt. Yrs. 2001-02, 2002-03 & 2003-04

Shri Chetan Gupta 118, Ansal Bhawan, Kasturba Gandhi Marg, New Delhi. PAN: AATPG 9580 E	Vs.	ACIT Central Circle-5, New Delhi.

AND

ITA No. 2757/Del/2012
Asstt. Yr 2002-03

ACIT Central Circle-5, New Delhi.	Vs.	Shri Chetan Gupta 118, Ansal Bhawan, Kasturba Gandhi Marg, New Delhi.
Appellant)		(Respondent)

Assessee by	:	Shri Ashwani Kumar CA
Revenue by	:	Dr. Sudha Kumari CIT DR

O R D E R

PER R.P. TOLANI, J.M::

1. This is a set of 4 appeals - three appeals by the assessee for A.Y. 2001-02, 2002-03 & 2003-04 and one appeal by the Revenue for A.Y. 2003-04, against CIT(A)-XXXI, New Delhi's respective orders dated 26-3-2012.

1.1. Summary of common grounds of appeals are as under:

A: Challenging validityof 148 proceedings for all the years:

1. The alleged Pen drive is not an admissible evidence, therefore the recording of reasons and consequent 148 proceedings based on the reasons of such unreliable evidence are bad in law.

Challenging validityof 148 proceedings For AY 2001-02

2. That the orders passed by the CIT(A) are against law and facts on the file in as much as CIT(A) was not justified to reject the contention of the appellant that since notices u/s 148 of the Income-tax Act, 1961 had been validly served on the appellant or his authorized representative for AY 2001-02, in accordance with the provisions of Section 282 of the Income tax Act, 1961,the reassessment proceedings are invalid, void and without jurisdiction.

3) That the orders passed by the CIT(A) are against law and facts on the file in as much as CIT(A) was not justified to reject the contention of the appellant that for AY's 2001-no notices u/s 143(2) of the Income-tax Act, 1961 have been served on the appellant within the statutory time period of twelve months, these assessment are thus null and void ab-initio.

B. On merits of additions for all years:-

(4) That the CIT(A) erred in law and on facts in holding that the alleged Pen Drive had evidentiary value in as much as the same was a illegal, fabricated and a product of false storey spun by the Punjab Police by ignoring that:

(i) Specific and clear cut findings of the Trial court that the Pen drive has no evidentiary value;

(ii) Contradictory and inconsistent statements and actions of the Vigilance Bureau before the judicial authorities;

(iii) Submissions made on behalf of the appellant denying the recovery of the pen drive and the

ownership of the said pen drive and the entries in the pint outs allegedly contained therein;

(iv) Fact that the provisions of the Indian Evidence Act, 1870 and the information Technology Act, 2000 had been grossly violated and the basic tenets of cyber forensics relating to collection, recovery and analysis of electronic evidence had not been fundamentally adhered to.

(v) Ignoring the contents of affidavit of Shri Rajiv Gupta and Shri Inder Sen Singla denying any knowledge about the pen drive allegedly recovered by the Vigilance Bureau of Punjab from the possession of Shri Chetan Gupta in respect of which an application under rule 46A of the Income Tax rules, 1962 had been filed.

(5) That the orders passed by the CIT(A) are against law and facts on the file in as much as CIT(A) was not justified to pass the order without adjudicating upon the admissibility of the additional evidence filed during the course of appellate proceedings and in respect of which an application under Rule 46A of the Income Tax Rules, 1962 was filed during the course of the appellate proceedings.

(6) That the orders passed by CIT(A) are against law and facts on the file in as much as he was not justified to uphold additions of Rs. 16,91,08,420/- (for A.Y. 2001-02); Rs. 8,55,31,130/- (for A.Y. 2002-03); and Rs. 8,08,26,298/- (for A.Y. 2003-04). Without prejudice to assessee objections about reassessments being bad in law and alleged pen drive having no evidentiary value, ld CIT(A) erred in facts and in law in rejecting the contentions that proper effect should be given to notings in the pen drive and additions, if any, from such contents were to be made by arriving at the peak credit after:-

(i) Working of the effect of peak by in a proper manner by considering opening balances, transfers and self withdrawals;

(ii) Giving allowance for cash received against the opening debit balances of cash in hand as well as in the accounts of various persons/ parties;

(iii) Considering the effect of cash withdrawn/ received and deposited/ advanced during the course of the year."

1.2. Asstt. Yr: 2002-03 (Ground no. 5):

"That the order dated 30-03-2012 passed u/s 250 of the Income-tax Act, 1961 by the Learned Commissioner of Income-tax (Appeals) XXXI, New Delhi is against law and facts on the file in as much as he was not justified in upholding the action of the Learned assessing officer in adding back a sum of Rs. 9,21,200/- (equivalent to US $ 20,000) on the ground that he appellant had allegedly made an unaccounted payment of US $ 20,000 to Mr. Park Young Tae of South Koreea by treating the same a alleged unexplained expenditure.

1.3. Revenue's appeal in A.Y. 2002-03 raises following sole effective ground:

"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 25,35,220/- made by the Assessing officer on account of difference in amount of sale consideration of the property sold by the assessee and valuation report."

2. Brief facts leading to the controversy and about recovery of alleged pen drive by Punjab Police; passing on of that information to Income Tax Department and consequent proceedings are mentioned in the reasons recorded for reopening and other facts mentioned in assessment order for A.Y. 2001-02 for the sake of brevity and clarity they are reproduced hereunder:

"Sh, Cheten.Gupte S/o Late Sh. Ram Lal C/o Jagat Theatre, Chandigarh filed return of income for the Asstt. Year 2001-02 with Income Tax Range-2, Chandigarh on return receipt number 008847 on 11 October 2001 at an income of Rs.6,47,425/-, which was processed u/s 143(1) on the same income vide OCR NO. 1498 dated 05.01.2002 No regular assessment u/s 143(3) has been made in this case.

Detailed information was received from ADI!, lnv. Unit VI(1), New. Delhi vide letter No. 204 dated 27.02.2008 whereby it is mentioned that Sh. Chetan Gupta was arrested on 17th May, 2007 57in FIR No.5 dated 23.03.2007, PS Vigilance Bureau, Ludhiana pertaining to Ludhiana City Centre Scam whereby a computer pen drive was recovered from him. Print outs of the pen drive received from the Punjab Vigilance Bureau by the ADIT were forwarded to the undersigned. A perusal of these. printouts reveals that there ere various entries in various names pertaining to financial year 2000-01, which was examined in detail. This information was tabulated by me and there are credits totaling to Rs. 40,49,77,905/- on which interest of Rs. 7,35,49, 141/- has also been paid and an amount of Rs. 84,86, 363/- has been shown as interest payable for this financial year.

A perusal of the return reveals that the assessee has shown salary income from M/s Trans Air and M/s R.L Travels and income from house property on account of half share of N-4, Janpath, New Delhi from M/s R.L Exports International and interest income from bank of Tikyo -Mitsubishi Ltd. and M/s Surya Kiran Textiles Pvt. Ltd. No balance sheet has been enclosed with the return of income As such, the assessee has no proprietary business in his name whose income has been shown in the return of income filed. These credits appearing in the pen drive and all these activities of money lending, etc., appearing from the printouts of the pen drive have not been disclosed in income tax return filed for the Asstt. Year 2001-02: The assessee has, therefore, not disclosed fully and truly all-material facts necessary for his assessment for this Asstt. Year and income chargeable to tax has been under assessed.

Regarding .the statement of Sh. Chetan Gupta recorded on oath by ADIT(lnv.), Ludhiana dated 24.09.2007, whereby he has declined to have any knowledge about these names in pen drive, could not be substantiated by any supporting evidence by him in answer to question No. 10 and 13 whereby he failed to deny this fact that this pen drive among other items was found from his possession by the Vigilance Bureau team and a recovery memo was also drawn by them. It is an established law that any books of account, other documents or other valuable articles or things found in the possession or control of any person, it may be presumed that such books of account, other document or other valuable article or things belong to such person and that the contents of such books of account, other documents are true. The primary onus to establish the identity, genuineness and creditworthiness of the above said creditors is upon the assessee.

In view of the aforesaid reasons, I have reason to believe that a sum of Rs. 40,49,77,905/- on account of credits, Rs. 7,35,49,141/- on account of interest paid and R.s. 84,86,363/- on. account of interest payable has been under assessed i.e. escaped assessment within the mean of section 147(b) of the Income Tax Act, 1961."

Subsequently, the jurisdiction over the assessee was transferred to ACIT, Central Circle-5, New Delhi u/s 127 vide order F.No.CIT-I/CHD/2008-09/1572 by CIT-I, Chandigarh. On 28.11.2008 letter was issued to assessee for furnishing of return. However none attended. On 12.12.2008 a letter was received in dak in which assessee contested the issue of notice u/s 148.

Subsequently, assessee was given a show cause vide letter dated .12.12.2008 which is reproduced as:

"Your case was reopened on the basis of information from ADIT, Inv. VI (1), *New Delhi vide letter No. 204 dated 27.02.2008 by ACIT circle* 3(1), *Chandigarh. ACIT Circle 3(1), Chandigarh tabulated the data of the pen-derive and come to*

conclusion that there credits totalling to Rs.40,49,77,905/-, Rs. 7,35,49,141/- on account of interest paid Rs. 84, 86, *363/- on account of interest payable.*

The notice u/s 148 had been issued by ACIT Circle 3(1), Chandigarh for which no compliance had been made. Vide letter dated 28. 11.2008 assessee was again accorded an opportunity. However, no compliance was made.

On 12th December, 2008, a letter has been received in dak wherein you have contested the issue of notice u/s 148 (copy of the notice along with reasons for reopening the case are enclosed for your reference). I have been informed by the ACIT, Circle 3(1), Chandigarh that notice has been validly served on Shri Ved Prakash, accountant of Kiran Cinema (who also receives other notices of the concerned group concerns).

The assessment is going to be barred by limitation on 31.12.2008. Therefore, you are hereby required to show cause why a sum of Rs.40,49, 77,905/- on account of credits, Rs. 7,35,49,141/- on account of interest paid and Rs.84,86,363/- on account of interest payable should not be added to your income as the above mentioned receipts are not declared in the return of AY 2001- 02 filed by you. Your reply may be reached before undersigned on or before 19.12.2008 at Room No. 361, ARA Centre, E-2, Jhandewalan Extension, New Delhi. In case of failure to avail the opportunity it may be assumed that you have nothing to say in this regard and case will be decided on merits"

Along with a letter was faxed to ACIT, Cir-3(1), Chandigarh regarding issue of notice u/s 148. ACIT, Cir-3(1), Chandigarh responded back through fax letter which is reproduced as:

"In this regard, you are informed that notice u/s 148 of the income tax act, 1961 in the name of Sh. Chetan Gupta was served at the only available address of the assessee i. e. C/o Kiran Cinema, Sector-22, Chandigarh. Sh. Ved Prakash who has been working as regular Accountant for the last five-six years received the notice on behalf of the assessee as the

assessee himself is rarely available at the given address. It may be pertinent to mention here that service of all the notices pertaining to the assessee group is effected at the address C/o Kiran Cineme, Sector-22, Chandigarh. Different employees of Kiran Cinema have been receiving these notices. Even in the case Smt. Vandana Gupta, assessee's daughter, service of notices has been effected at the address C/o Kiran Cinema, Sector-22, Chandigarh. And in this case else different employees have received the notices issued by this office and all the notices have properly been complied with and assessment made thereto has been accepted by the assessee. Even in other group case of M/s Jagtumal Kundan Lal, C/o Jagat Theatre, Sec. 17, Chandigarh service of notices has been effected at Kiran Cinema, Sector-22, Chandigarh. In this case also, different employees of Kiren Theatre have received the notices on behalf of assessee and proper compliance has been made by the assessee and assessment framed has been accepted by the assessee.

In view of the above fact, it is amply clear that notice u/s 148 of the income tax in respect of Sh.Chetan Gupta has been received by a responsible employee of Kiran Cinema and there is no ground for contesting the service of notice by the assessee.

Copy of notices received by different employees at Kiren Theatre enclosed for ready, reference. "

As is evident from the reply of ACIT, Cir3(1), Chandigarh that the notice u/s 148 was not only issued but also served on the assessee. On 19.12.2008 Shri VipinAggarwal, AR of the assessee attended and asked for copy of the information mentioned in the reasons recorded as received from ADIT (Inv.) Unit VI(1). Assessee also asked for the copy of the pen drive and its print outs as referred in the reasons recorded. Assessee also requested for the basis of credit totaling amounting to Rs. 404977905/- along with interest to be provided. In response, in light of principle of natural justice, relied upon documents were provided to the assessee vide letter 19-12-2008 and 22-12-2008.

2.1. In the wake of these observations AO proceeded to make the reassessments by holding:

(i) The reassessment proceedings were validly initiated by recording proper reasons; notices were properly issued u/s 148.

(ii) Reassessments were framed properly and 143(2) notices were properly issued.

(iii) The alleged Pen Drive and its print outs were valid and reliable evidence.

iv) Assessee was managing funds for others and serving as conduit for parking the moneys of big names.

(v) All the entries in the Pen Drive were held to be undisclosed income of the assessee rejecting the claims of the assessee to correct mistakes, reduce contra entries and work out proper peak credit amounts. The contentions of the assessee that the same funds were demonstratively used repeatedly and rolled over many times, appropriate adjustments of opening balances noted in the pen drive were summarily rejected.

2.2. The AO thus made huge additions, same were challenged by assessee in first appeal. CIT(A) by and large upheld the findings of AO on jurisdiction as well as on merits, except giving some part relief based on some calculation mistake and double additions in AY 2002-03 for which both parties are in appeal. Aggrieved parties are before us on respective grievances.

Asstt. Yr. 2001-02:

I. Non Service of notice u/s 148 in terms of sec 282(1):

3. Ld. Counsel for the assessee Shri Ashwani Kumar contends that only by a valid notice u/s 148 of the Income Tax Act, 1961, AO assumes the

jurisdiction for reassessment which is to be mandatorily served on the assessee in accordance with the statutory requirements as per section 282(1) of the Income Tax Act, 1961. It is a settled proposition of law that any illegality or infirmity in complying with the provisions of section 282 resulting in non-service of the notice divests the AO from jurisdiction to reassess. Such non compliance is fatal to the legality of the re-assessment and renders it invalid. Lower authorities reliance on section 292B claiming it to be curative for this defect has been held by the court to be untenable. In this connection the assessee derives judicial support from the following judgments:-

- CIT v Hotline International Pvt. Ltd 296 ITR 333 (Del).
- CIT vs Shital Prasad Kharag Prasad [(2006) 280 ITR 541 (All)];
- Laxmi Narain Anand Prakash vs. CST [(1980) 46 STC 71 (All) (FB); (1980) UPTC 125];
- Bhagwan Devi Saraogi v. ITO [(1979) 118 ITR 906 (Cal)];
- Madan Lal Agarwal v. CIT [(1983) 144 ITR 745 (All)];
- CIT vs Mintu Kalita [(2002) 253 ITR 334 (Gauhati)];
- Upadhyaya (R. K.) v. Shanabhai P. Patel [(1987)] 166 ITR 163 (SC)]

3.1. In assessees case for AY 2001-02, the notice u/s 148 is claimed to be issued by the A.O. on 28.03.2008, there is no evidence of its service on the assessee. Department claims that mere issue of notice u/s 148 in the name of assessee meets the requirement as contained in law. Mere issuance of notice u/s 148 cannot tantamount to service of notice on assessee .The AO did not assume proper jurisdiction to reopen the assessments consequently reassessments as framed are invalid and liable to be quashed, the facts emerge as under:

(i) It was revealed that 148 notice was sent by AO on a wrong address; the assessees address as given on his returns of the Income is "c/o M/s Jagat Theatre, Sector 17, Chandigarh" whereas the alleged

notice u/s 148 has been addressed as 'Sh**.** Chetan Gupta, C/o Kiran Cinema, Sector – 22, Chandigarh', a fact which has been admitted by the department.

(ii) The Department has accepted that the alleged 148 notice was served on Shri Ved Prakash The said Shree Ved Prakash is neither employee nor an authorized agent of the assessee. The admitted service of notice on said Shri Ved Prakash is neither legal nor tenable in terms of the requirements of the section 282(1) of Income Tax Act, 1961.

(iii) Though this fact is accepted by AO in his remand report, however it has been assumed by the A.O. that Shree Ved Prakash is a responsible employee of Kiran Cinema owned by assessees wife therefore it is deemed to be a valid service on the assessee. AO further supports his assumption on the ground that different employees of Kiran Cinema have received the notices on behalf of the group entities which have been complied, therefore, this service on Ved Prakash it amounts to a proper service of 148 notice on assessee. .

(iv) The mere fact that Shri Ved Prakash is an employee of Kiran Cinema does not automatically make him an employee or authorized agent of the assessee for the purpose of receiving 148 notices from the Income Tax Department.

(v) Thus it is admitted by the department that notice was issued on a wrong address and was served on said Ved Prakash claims it to valid service on assessee. The proposition of department is contrary to terms of sec. 282(1) and settled case laws..

3.2. This view has been held by the jurisdictional High Court i.e. the Delhi High Court in the case of CIT vs. Rajesh Kumar Sharma [(2009) 311 ITR

235 (Delhi)]: A similar view has been taken by the Delhi High Court in CIT vs. Hotline International Pvt. Ltd [(2008) 296 ITR 333 (Delhi)].

3.3. In view of these undisputed facts and legal position, it is clear that mandatory requirements for proper assumption of jurisdiction u/s 148 by a valid service of notice u/s 148 on the assessee has not been fulfilled by the AO. Consequently as per the mandates of Jurisdictional High Court the impugned reassessment is illegal; without jurisdiction and liable to be cancelled.

II. Non Service of notice u/s 143(2):

3.4. It is further pleaded that the impugned reassessment has been made by the A.O. even without serving notice u/s 143(2) of the Act also which again is a mandatory requirement before making any assessment u/s 143(3)/147 of the Act. In the present case the assessing officer proceeded to complete the reassessment, after rejecting repeated and persistent objections of the assessee about non service of notices u/s 148 & 143(2). It is trite law that the A.O. is under mandatory legal obligation to issue notice u/s 143(2) of the Act within 12 Months from the date of filing of the return and thereafter proceed with the inquiries for completion of assessment. Non issue of 143(2) notice within the stipulated period would make the consequent assessment invalid. Reliance is placed on:

- CIT Vs. Hotline International Pvt. Ltd 296 ITR 333 (Del)
- CIT vs M. Chellappan [(2006) 281 ITR 444 (Mad)]
- Vipan Khanna vs CIT [(2002) 255 ITR 220 (P&H)];
- Hotel Blue Moon 321 ITR 362 (SC).
- Smt. Bandana Gogoi vs CIT [(2007) 289 ITR 28 (Gauhati)];
- Smt. Tulika Mishra vs Joint CIT \E\ Bench, ITAT Delhi in IT (SS) No. 81/D/03 vide order dated March 21, 2007;
- Gangaour Foods P. Ltd. vs DCIT " C" Bench, ITAT Delhi in IT (SS) No. 11/D/02 vide order dated June 15, 2007;
- CIT vs. Lunar Diamonds Ltd [(2006) 281 ITR 1 (Delhi)]

- CIT vs. Shanker Lal Ved Prakash [(2008) 300 ITR 243 (Del)].
- Raj Kumar Chawla vs ITO [(2005) 277 ITR 225 (Delhi)];
- Iqbal Singh Atwal vs CIT [(1984) 147 ITR 599 (Cal)].
- CIT.V.Deep Baruah [(2010) 329 ITR 362 (Gauhati)];
- CIT .v Salman Khan 2009-TIOL-731-HC-MUM –IT;
- CWT v HUF of H.H Late JM Scindia [(2008) 300 ITR 193 (Bom)];

3.5. It is pleaded that the reassessment for A.Y. 2001-02 being invalid for non-service of notices u/s 148 and 143(2) as prescribed by the law, the reassessment is liable to be quashed.

III. <u>On reasons for reopening on unreliable material and non existence of live link on unreliable material following is pleaded</u>:

a. Apropos the Evidentiary Value of alleged pen drive - ld. Counsel contends that the entire action of the Punjab Police (VB) is motivated by malafide intentions and the alleged pen drive, which is false and fabricated, has been illegally attributed the assessee. The conduct of VB is vitiated by contradictory and inconsistent statements before the judicial authorities. On the one hand the police filed an application before the trial court asking permission to make copies of the data of the Pen Drive and on the other hand the VB has itself admitted on oath before the Hon'ble Supreme Court in SLP No. 3477 of 2007 in case titled State vs. Capt. Amarinder Singh, that they have already accessed the data on the alleged Pen Drive, examined the same & prepared the notes on the data therein. Even the Assessment Order reads that the ADIT had received the print outs of the alleged Pen Drive from the VB. The retrieval of contents and printouts of the pen drive being taken by illegal and unsafe process, without prescribed cyber forensic procedure make the evidence illegal, unreliable and having no evidentiary value. The reasons recorded for reopening on

this basis of such pen drive and print out are not proper, therefore the reasons be quashed.

IV. Merits of the additions:

a. Evidentiary value of Pen Drive and it's print outs:

(i) The evidentiary value of alleged Pen Drive has been further has been turned down by the court of Special Judge, Ludhiana vide order dated 12.06.2007 (placed on pages 354 to 360 of paper book) wherein while releasing the assessee on bail the Hon'ble. Court categorically held that **"**the entries of Pen Drive are without any basis and has no legal value**".** The evidentiary value of alleged Pen Drive has been negated by the Ld. Court observing that *"the data revealed from the Pen Drive is not corroborated by any other evidence"***.**

(ii) The impugned assessment orders have been made by the learned AO only on the basis of this pen drive without corroboration and various other binding legal considerations. The learned AO has not carried out any independent investigation to verify such entries from third parties or independent sources. The exercise to make the huge and unjustified additions in all these years without cross verification, examining the contentions of assessee and only believing on police version and their fabricated evidence is highly arbitrary and unsustainable. Thus AO failed to exercise his quasi judicial statutory jurisdiction to impartially enquire into the matter and form his opinion on the basis of independent inquiries and verifications.

(iii) The submissions made by the assessee denying the recovery of any pen drive, ownership and entries thereof have been summarily ignored by the learned AO treating the Police version as gospel truth and binding on him. It is strongly urged that the impugned order of the

AO is vitiated by various infirmities of investigation, application of mind, settled case laws and propositions and cannot stand the test of legal scrutiny.

(iv) The Income-tax Act authorities exercise their statutory and investigative jurisdiction as per set prescribed norms based on principles of natural justice. As held by the Division Bench of Madras High court in V. Datchinamurthy v. Asst. Director of Inspection (Intelligence), I.T. Dept. [(1984) 149 ITR 341 (Mad)], the Income-tax Officer is within the limits assigned to him under the Act as an authority of exclusive jurisdiction for the purpose of assessment and are non adversarial in nature. Any proceedings or adjudication on same issue undertaken under other civil or criminal litigation is not ipso-facto binding on assessment in income tax. The Hon'ble Court for holding so has relied on the decision of the Supreme Court in Chhatrasinhji Kesarisinhji Thakore vs CIT (1966) 59 ITR 562 (SC). The Hon'ble Supreme Court has examined the powers and jurisdiction of the Income-tax Officer in relation to the assessment as compared with other statutory adjudications.

(v) Where an assessee before the Income-tax Officer or other authorities under the Act denies the ownership of any document allegedly recovered from his possession by Police Authorities, it is not obligatory on such authorities to accept the police version without independent enquiry and verification. The income-tax authorities are bound to independently decided the issue of ownership, belonging and contents of incriminating documents as per the settled cannons of income tax jurisprudence in an independent manner and are not obliged to summarily follow the Police authorities stand, the law

rather cautions against the blind use of police forwarded evidence or statements.

(vi). Reliance is further placed in this behalf on the following decisions:-

- Income-tax Officer v. Jayaraman [(1987) 168 ITR 757 (Mad)];
- Keshavlal Punjaram v. Commissioner of Income-tax [(1983) 141 ITR 466 (Guj)];
- Commissioner of Income-tax Vs Thobhandas Jivanlal Gajjar [(1977) 109 ITR 296 (Guj)].

3.6. The alleged recovery of the pen drive from the assessee is a false story fabricated by the police to frame the assessee. A bare reference to the panchnama dated 20.5.2007 (placed on 297 to 303 of paper book), prepared at the residential house of the assessee at 21, Maharani Bagh, New Delhi and at office 118, Ansal Bhavan 16, K.G. Marg, New Delhi would reveal that the same two witnesses have been used by the police to set up the façade of recovery at two distant places namely Maharani Bagh and K .G Marg in Delhi. Besides, they are not independent witnesses of the respective locality by V.B. The seizure memo of the pen drive by V.B. shows that the date of execution as 20.5.2007 whereas the statements of the two witnesses namely Shri Rakesh Kumar and Shri Gurcharan Singh ,DSP narrating the alleged story of seizure is dated 19.5.2007.i.e. one day in advance of the alleged search and seizure of pen drive. Thus the police search & recovery of pen drive itself suffers from fundamental defects which make the pen drive as not reliable evidence against assessee.

3.7. VB Ludhiana have recorded the purported statements of Shri Rajeev Gupta computer programmer and Shri Inder Sain Singla, to the effect that the alleged pen drive has been recovered from the assessee containing

accounts of money dealing with Captain Amarinder Singh family and others. These statements are politically motivated and fabricated by the VB to implicate the assessee. Affidavits of the two persons namely Shri Rajeev Gupta and Shri Inder Sain Singla have been filed. It is submitted that the AO has hastily proceeded to complete the time barring assessment treating the alleged seizure of pen drive as conclusive. The AO confronted the assessee for the first time with the proposed addition of INR 40.49 crores on 12.12.2008 and handed over the alleged printouts on 19.12.2008 and immediately thereafter proceeded to pass the impugned order on 28.12.2008 making an addition of Rs. 30,59,91,360/-. In his anxiety to complete the time barring assessment, AO threw airay the principles of natural justice and denied proper opportunity to the assessee to properly defend his case and file evidence in his support.

V. Police statements given by assessee can not be relied as evidence:

3.8. As regards the statements of the assessee recorded by the police, same are not admissible evidence u/s 25 and 26 of the Indian Evidence Act. Regarding the alleged pen drive , without prejudice to the claim of the assessee that no such pen drive has been recovered from the possession of the assessee on 20.5.2007 and that the alleged recovery is a mere frame up, the record of the case FIR No 5 of 2007 itself speaks about the bungling committed by the Vigilance Bureau as it establishes that no safeguards were even shown to be provided to ensure that the data as stood stored in the alleged pen drive was not altered, deleted or tampered with during the police custody It has been admitted by the VB that data has been transferred to the CD by using the computer of the assessee. Such electronic record which has

been ostensibly tampered with can not constitute reliable evidence against the assessee in income tax proceedings.

3.9. Section 457 of the Cr.P.C lays down that whenever a police officer seizes any property, such officer has to seal the property and send the sealed property along with its report to the Magistrate having jurisdiction. Thereafter such seized property becomes the custodia legis of the court and the same cannot be transferred or appropriated except under the order of the court. In the instant case the VB had already tampered with alleged the pen drive and taken printouts before handing over the data to the court in blatant violation of principles of natural justice and section 457 of the Cr.PC. Therefore the alleged pen drive, its print outs have no sanctity or value as reliable evidence under income-tax Act.

VI. Violation of Information Technology Act, 2000 Indian Evidence Act, 1872:

3.10. Annexure II of the Information Technology Act, 2000 contains amendments made in the Indian Evidence Act, 1872 for legal recognition of electronic documentation as well as security thereof and access thereto. Sections 65A and 65B were inserted into the Indian Evidence Act, 1872 relating to admissibility of computer generated evidence. By virtue of the provisions of Section 65A, the contents of electronic records may be proved in evidence by the parties in accordance with the provisions of Section 65B. Sub-clause 1 of Section 65B stipulates that any information contained in electronic record shall be deemed to be a document and shall be admissible in evidence without further proof or production of the originals, if the conditions mentioned in the said Section are satisfied in relation to the information and computer in question.

3.11. The Apex Court in State vs Navjot Sandhu [(2005) 11 SCC 600], while examining the provisions of newly added Sections 65B, held that Section 65B enables secondary evidence of the contents of a document to be adduced if the requisite conditions as contained in section 63 are complied with and the electronic record in original satisfies the conditions of admissibility as contained in section 65B. A similar view has been taken by the Delhi High Court in M/s Societe Des Products Nestles & Anr. vs Essar Industries & Ors. (delivered on 4.9.2006) following the Supreme Court judgment cited above.

3.12. Applying the statutory provisions of the I.T. Act 2000 as well as Evidence Act including section 65B and the interpretation thereof by the apex court and Delhi High Court as above. It is submitted that the printouts supplied by the VB have no sanctity value as evidence. Section 65B of the Evidence Act lays down the presumptions regarding the integrity and authenticity of electronic record. In the present case these presumptions do not apply since electronic record is not "secure record" in terms of section 16 of the IT Act, 2000 read with section 2(1)(ze) thereof. Electronic record in the pen drive which in handled or reproduced without the presence of witnesses is secondary evidence which in the instant case does not satisfy the condition as per section 63 of the Indian Evidence Act. The printouts do not fulfil the conditions as per section 63, and 65 B of the Evidence Act. Since there exist demonstrative discrepancies in the seizure of pen drive and its reported by police one day prior date of seizure by said Rakesh Kumar and Gurcharan Singh, the evidence which is mired in admitted discrepancies cannot be used in income tax proceedings.

3.13. It was submitted that the VB has flouted the basic tenets of cyber forensics laws relating to collection, recovery and analysis of electronic

evidence. Basic code of rules on the legal admissibility of electronic records so as to preserve authenticity, integrity, identity, and reliability of electronic record has been grossly violated by the VB while preparing the CD from the pen drive thus accessing the electronic record in violation of section 16 and section29 of the I.T. Act, 2000 as well as section 65B of the Evidence Act. For creating a "bit image copy" of the suspect hard disk (pen drive in the instant case). It is essential that a hash code is created for the "original" being copied so that the original can be preserved and not tempered with. Clone can then be subjected to analysis. Hard Drive Duplication Technology has normally the facility that a report is generated along with the hash code which can be jointly authenticated by the system owner and the investigator to avoid any disputes .on the integrity of data transfer.

3.14. The procedure followed as per the own version of the VB in the present case is a total infringement of relevant laws, negation of accepted norms and code of practices as laid down in the Evidence Act and the I.T. Act, 2000.The so called printouts are therefore unreliable and do not constitute admissible evidence in the eyes of law .The assessment made by the AO on the foundation of such non est material is devoid of any merit on legal and factual perspective and deserves to be quashed. It is pleaded that addition in all these years on the mere basis of pen drive deserves to be deleted.

VII. <u>Merits of the additions based on contents of Print Outs(Without Prejudice):</u>

a. Without prejudice to ground about inadmissibility of pen drive as admissible evidence in income-tax proceedings, ld. Counsel contends that additions amount to double additions, suffer from various inconsistencies and arbitrary adoption of figures and denial of

opening credits, contra entries, arithmetical mistakes and consideration of correct nature of entries. In such cases in the worst scenario only the correct peak credit can be added and not all the credit entries.

b. The assessment orders passed by the Assessing Officer are full of serious contradictions and glaring inconsistencies which are manifest on the face of the orders. At page 5 of the order for A.Y. 2-001-02, the Assessing Officer states that "During examination of the pen drive it emerges that Shri Chetan Gupta was administering the income/wealth of merely 148 persons which was kept with him". Thus according to assessing officer assessee was managing the funds for others, the police charge sheet filed by the VB also contains similar allegations. It is obvious from these observations of the AO that the money credited in the various accounts mentioned in the pen drive is not owned by the assessee and that he acts only as caretaker or administer of the funds kept with him by the said 148 persons. Thus the assessee's role becomes akin to a fund manager and applying this line of findings and commercial realities does not become owner of the funds, he could earn not more than 1-2% as fund management fees.

3.15. Despite such clear factual findings, AO takes a complete somersault and finally computes the income of the assessee by treating all the credits in the aforesaid accounts as undisclosed income of the assessee in the guise of presumption u/s 292C which is not applicable. Thus, AO's conclusions are in complete contradiction to factual finding stating that assessee is a manager regarding "income/wealth of 148 persons" which has been "kept with him"

and "administered by him". The entire edifice of working of undisclosed income of the assessee is at complete variance with the observations and findings recorded by Assessing officer. If the money belongs to the other 148 persons and has been "kept with him" for management or administration, the credits cannot be treated as income of the assessee.

3.16. The Ld Assessing Officer for AY 2001-02 vide letter dated 22-12-2008 (pages 197 -200 of the Paper Book) provided the Appellant with a computation of the manner in which the figures of Rs. 43,69,45,655/-, which is simply a summation of the credit entries in the various accounts and no effort was made to arrive at the 'Peak Balance' to which the addition, if any, was to be limited in the interest of fair play, equity and justice. Similar letters were issued for other years.

3.17. In response, detailed replies were filed wherein serious flaws and discrepancies in the working of the proposed additions were pointed out (reliance is placed at Pages 201 – 213 of the Paper Book). A peak balance statement comprising day to day position with regard to debits and credits in the various ledger accounts was prepared which gives a day-wise position of the balances as a whole of all the accounts for the current year's transactions by ignoring the opening balances (pages 214 -245 of the Paper Book).

Specific merits of additions: AY- 2001-02:

3.18. With regard to the proposed addition of Rs 43,69,45,655/- for AY 2001-02, following item wise objections about mistakes and correct analysis of the without prejudice working was furnished with the Ld Assessing Officer as well CIT(A) which is placed on Page 213 of the Paper Book:

Alleged credit as per Notice	:	Rs. 43,69,45,655/-
Less: Mistake to be corrected		
Col-2 Credit opening balances taken	:	Rs. 8,98,632/-
Col-3 Double Balances taken	:	Rs. 9,40,15,750/-
Col-4 Transfer amount taken	:	Rs. 5,38,96,501/-
Col-5 Credit for debits not given	:	Rs. 27,44,40,888/-
Col-6 Credit for opening debit balance not given	:	Rs. 6,63,46,242/-
Total of (Col-2 to Col-6)	:	Rs. 48,95,98,013
Balance	:	Rs. (5,26,52,358/-)

(58,43,000/- details are furnished to assessing officer -29-1-2008 pages 214-245)

33.19. These items are explained in details as under:

(i) While taking the credit balance of each account, opening credit balances have also been taken in case of some accounts resulting in a inflation of the amount (Rs. 8.98,632/-) (pages 207 to 212 of Paper Book) The Learned A O has given credit for double entries only for Rs. 3,19,67,750/- whereas the correct amount for giving credit for double entries should be Rs. 9,40,15,750/- (pages 207 to 212 of Paper Book)

3.20. While computing the aggregate credit amounts, certain transfer entries on the credit side have also been considered as credit introduced. The said transfer entries are journal entries in which amounts have been transferred from one account to another account, by debiting one account and crediting the other for the same amount. They do not have any cash or monetary effect. Thus the said transfer entries are to be reduced from the credit amount as there is no introduction of funds but are just contra entries (Rs. 5,38,96,501/-) (Refer pages 207 to 212 of Paper Book)

3.21. In many accounts, there were debit entries also during the year which have also been reflected on the debit side in the said accounts. These debit amounts have been used either for funding the credit entries reflected in the respective accounts or for giving amounts to some other parties which also are reflected as credit in the said other accounts. As a simple accounting practice the said debit amounts are to be deducted from the credit entries, which has not been done by assessing officer in many accounts. The said amount has been derived by totalling the debit side of the respective accounts wherever reflected and not considered by the Ld Assessing Officer aggregates to Rs. 27,44,40,888/-. (pages 207 to 212 of Paper Book)

3.22. The pen drive is one single piece of evidence, if the same is to be treated as correct logically all the entries mentioned therein including debits and credits are to be considered correct and given due effect as they flow from the same evidence. An evidence cannot be held to be part true and part false, more so when the assessee is furnishing convincing reasons in support his contentions. In many of the accounts as per the details provided to the assessee, there are opening debit balances also, when any amount has been received out of the opening debit balances during the year, the same is to be considered as funds available with the assessee which can be used for the credit in other accounts. However, the same have been conveniently ignored by assessing officer by paying no heed to explanation. To determine the exact cash introduced during the year, such debit opening balances which are received during the year have to be reduced from the credit balances, which also has not been done by the Learned Assessing Officer leading to an unjustified inflation of the figure of addition. For calculating the said amount, only those opening debit balances have been taken, out of which

amount is received and which represents the amount of opening debit used for the credit during the year. This shall further reduce the AO's addition by Rs. 6,63,46,242/-. (pages 207 to 212 of Paper Book).

3.23. It is pleaded that in order to determine the quantum of undisclosed income, sundry accounts can not be seen in isolation; to come to a realistic assessment of quantum peak quantum is to be worked out by properly considering all the accounts tabulated on a global basis. By this methodology which is well accepted by estimations of peak workings by Income-tax authorities and courts, peak quantum of undisclosed income is to be worked out. This is so because once a person introduces money by financing a person and out of the same, if some part is received back and given to another person, the second introduction cannot be considered again as a fresh inflow of undisclosed income. In case of money in circulation only the initial credit can, if at all, be considered as unexplained money. Subsequent circulation/roll over of money cannot be again considered as the introduction of fresh undisclosed money as it is part of the earlier infusion. Each circulation or rollover cannot be repeatedly added and taxed as assessees undisclosed income. This statement has been prepared by assessee by posting day-wise, each and every entry reflected in the individual accounts mentioned in the alleged print outs and furnished with Ld AO and CIT(A).

3.24. On the basis of this corrected working of pen drive contents, the quantum of peak credits which may at all be held as undisclosed income for AY 2001-02 comes to Rs. 58,43,001/-. Complete details for such working has been furnished with authorities below and placed at page 214 to 245 of the Paper Book. Taking into account the opening debit balance of Rs.

6,63,46,242/- (page 210 of the Paper Book) and peak credit of Rs. 58,43,001 no addition on the basis of the peak credit is called for as would be clear from the following :

Peak Credit balance for AY 2001-02 : Rs. 58,43,001/-
(As on 11.09.2000)(Refer Page 229 of PB)
Less: Opening debit balances in the pen drive : Rs. 6,63,46,242/-

Balance (Refer paper 215 of Paper Book): (-):Rs (6,05,03,241/-)

Undisclosed income for AY 2001-02 : NIL

Ld AO or CIT(A) have not offered any adverse comments on such working furnished by the assessee.

3.25. From the perusal of above, it is evident that there is negative inflow and no fresh introduction of any undisclosed credit balance during the year in the print outs; rather the opening debit balances have been used for the role over. In the absence of any fresh introduction of cash or credit, no addition as undisclosed income is exigible to income tax in A.Y. 2001-02 in the given facts and circumstances of the case for any alleged introduction of undisclosed income.

3.26. On same facts, circumstances, methodology and contentions for A.Ys. 2002-03 and 2003-04 the correct working of peak shall be as under:

A.Y. 2002-03:-

3.27. In this year also AO added all the entries as undisclosed income at Rs. 42,01,86,595/-, it contained various mistakes.

(i) The credits alleged to be introduced in various accounts of print outs have been taken as unexplained income. However Debit amounts in the various accounts which represents the utilization thereof and debited in the respective accounts i.e. the payment made

has income back to the assessee and has been used to give it to some other persons and subsequently reflected as credit in their accounts respectively. Thereby, the said payments i.e. debit entries in the various accounts, during the year, are to be reduced from the credit entries. However, no credit /benefit of the said debits has been given in the computation as given to the Appellant. Without such working the assessing officer's aggregation of undisclosed income is arbitrary and distorted.

3.28. **Apropos Contra Entries** - There are many contra entries in which one account is credited and other account is debited with the same amount on the same date, whereby no fresh cash credit has been introduced and are to be ignored. These represent journal entries in nature, however, in the computation, they have been treated as fresh credit amounts been taken as unexplained income. Thus there is no application of mind at all to the real nature of the entries in the pen drive.

3.29. **Expenditure & Income**- There are entries in the nature of expenditure and income mostly in the shape of interest etc., which are either credited to interest account by debiting to the various parties' account or similarly, debited to interest account by crediting the parties with the same amount. Assessee being manager of funds the entries pertain to respective creditor or debitor, said entries do not pertain to assessee and there is no liability to receive interest to himself. Further, these are also contra entries by debiting one account and crediting the other account with the amount and thereby revenue neutral, there is no fresh introduction of any fund. There are also instances where the interest form various accounts is credited to various parties accounts and then it was further transferred from the said accounts to another consolidated interest by crediting the one account and

debiting the another. In view of that, thee entries are nothing but recording as a journal entries i.e. one original entry and the other just transfer to consolidated interest account. Thus, both the entries are contra and have no impact on calculation of undisclosed income. However, assessing officer has added such contra also as undisclosed income in the computation.

3.30. Profit and Loss – The expenditures have been transferred to P&L Account by crediting the respective expenditure head like interest and debiting the P&L Account. The said entries are in no way unexplained credits as there are against just transfer entries to P&L A/c.

3.31. Opening balance — in most of the accounts, opening credit balance has been ignored which being part and parcel of same seized material alleged pen drive and print outs are to necessarily considered in the previous and subsequent year as the case may be. However, in many instances, opening credit and debit balances also have been added in computation of undisclosed income and treated as credit entries for the year. The said opening balance has to be reduced for calculating peak credit as a solitary principle of accountancy and fair estimate.

3.32. It is pleaded that in order to determine the peak balances the pen drive and print out being one material no selective approach can be applied by picking single account and seeing it in isolation; all the accounts are to be tabulated and considered together on a global basis. Only after carrying out this realistic exercise the peak balance, if any, is to be considered as undisclosed income introduced outside the books of accounts. This is necessary as once a person introduces money by financing a person and out of the same, if some part is received back and given to another person, the second transaction by no stretch of imagination can be considered again as a fresh introduction. In case of circulating or rolling over money only the

initial credit can be considered as unexplained money and subsequent circulation/roll over being application of amount cannot be again considered as fresh money. The said details placed at pages 224 -268 of the paper Book have been prepared after posting on day to day basis reflecting each entry in the individual accounts as well as the related accounts. According to the above statement, the peak balance comes to Rs. 36,89,310/- worked out at page 224 of the Paper Book as on 09-04-2001 has not been adversely mentioned by lower authorities..

3.33. With regard to the proposed addition of Rs. 42,01,86,595/- by AO an item wise analysis of the various mistakes and correction about the contents of the pen drive were furnished to the Ld Assessing Officer and CIT(A) which is furnished at pages 201-206 of the paper book and is as follows:-

1. Alleged credit introduced as per working		42,03,25,775
Less: Mistakes to be corrected		
2. Debit entries in the various accounts	21,10,58,083	
3. Contra entries	6,95,48,314	
4. Expenditure & Income	18,88,97,945	
5. Profit & Loss Transfer	55,57,634	
6. Opening balance (25803475 + 7755958)	3,35,59,433	50,86,21,409
(Refer pages 220 -223 of the Paper Book)		**(8,82,95,634)**

3.34. On the basis of above corrected entries of Rs. 8,82,95,634 the peak credit came to Rs. 36,89,310/-. The detailed working of this peak credit for AY 2002-03 has been filed with AO and CIT(A) and is furnished at PB pages 224-275.

3.35. Coming to the undisclosed income relatable to AY 2002-03, the debit opening balance for which no credit has been given amounting of Rs. 5,07,53,587/- (Refer page 223 of the Paper Book) is to be reduced from the

peak credit balance. Accordingly no addition on the basis of the peak credit is called for as would be clear from the following:

Peak Credit balance : Rs 36,89,310/-
(As on 09.04.2001 covering letter 8-12-09)(Refer Page 224 of the Paper Book)
Less: Opening debit balances used for : (+) Rs 5,07,53,587/-
(Refer paper 223 of Paper Book)
Balance: (-) Rs (4,70,64,277/-)
Undisclosed income for AY 2002-03 Rs. NIL

Asstt. Year 2003-04:

3.36. With regard to the proposed addition of Rs. 8,08,26,928/- an item wise analysis of the various entries was furnished to the Ld Assessing Officer (pages 241-242 of the paper book) as follows:-

Alleged credits as per working			8,08,26,928
Less:	Mistakes to be corrected		
2.	Credit balance reutilize	2,13,67,355	
3.	Opening credit balance and reutilized	1,38,14,351	
4.	Opening Debit balance	1,10,495	
5.	Contra entries	10,00,000	3,62,92,201
	(Refer page 242 of the Paper Book)		**4,45,34,727**

3.37. On the same earlier pattern, the Credit introduced in various accounts has been taken as unexplained income. AO has given no credit for reutilization of funds; Opening Debit Balance; Contra entries etc. and the addition has been made at an arbitrary figure.

3.38. After taking into account the corrected entries at Rs 4,45,34,727/-, assessee furnished details about peak working of the undisclosed income at Rs. 46,16,387/- as on 28.8.2002. The details thereof were furnished before AO and CIT(A) and are placed at PB 243 to 279 (page255). Thus for AY

2003-04 the peak undisclosed income can be worked at Rs. 46,16,387/-. The undisclosed income from AY 2002-03 i.e. Rs. 36,89,310/- being also available with the assessee and part of the pen drive is to be reduced. Thus the resultant undisclosed income for AY 2003-04 will work out to (46,16,38 -36,89,310) Rs. 9,27,077/-.

3.39. It is submitted by the ld counsel that the without prejudice to legal submissions, alternatively the quantum additions be restricted to the working placed on record which has not been adversely commented by lower authorities. The assessees propositions are based on well settled principles on proper estimation of quantum from incriminating documents which are regularly followed by department in such type of assessments. They are further supported by various decisions rendered in the context of principles of Peak Credits and Telescoping. The acceptability of such propositions goes back to year 1956 judgment of Hon'ble AP High Court in the case of Lagadapati Subba Ramaiah v CIT 30 ITR 593, which has been approved by Hon'ble supreme court in

(i) Anantharam Veerasinghaiah & Co. V. CIT [123 ITR 457 (SC)]. Hon'ble Supreme court laid down following propositions in this behalf:

"There can be no escape from the proposition that the secret profits or undisclosed income of an assessee earned in an earlier assessment year may constitute a fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books. But it is quite another thing to say that any part of that fund must necessarily be regarded as the source of unexplained expenditure incurred or of cash credits recorded during a subsequent assessment year. The mere availability of such a fund cannot, in all cases, imply that the assessee has not earned further secret profits during the relevant assessment year.

Neither law nor human experience guarantees that an assessee who has been dishonest in one assessment year is bound to be honest in a subsequent assessment year. It is a matter for consideration by the taxing authority in each case whether the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or they are reasonably explained by reference to concealed income earned in that very year. In each case, the true nature of the cash deficit and the cash credit must be ascertained from an overall consideration of the particular facts and circumstances of the case. Evidence may exist to show that reliance cannot be placed completely on the availability of a previously earned undisclosed income. A number of circumstances of vital significance may point to the conclusion that the cash deficit or cash credit cannot reasonably be related to the amount covered by the intangible addition but must be regarded as pointing to the receipt of undisclosed income earned during the assessment year under consideration. It is open to the revenue to rely on all the circumstances pointing to that conclusion. What these several circumstances can be is difficult to enumerate and indeed, from the nature of the enquiry, it is almost impossible to do so. In the end, they must be such as can lead to the firm conclusion that the assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars. It is needless to reiterate that in a penalty proceeding the burden remains on the revenue of proving the existence of material leading to that conclusion"

(ii) CIT v. K. S. M. Guruswamy Nadar and Sons (1984) 149 ITR 127 (Mad.)

"But in this case in addition to the bogus cash credit there is an addition towards suppression of profit. In such a case as this, when there are two additions, it is always open to the assessee to explain that the suppressed profits during the year has been brought in as cash credits and, therefore, one has to be telescoped into the other and there can be only one addition."

(iii) CIT V. Singhal Industrial Corporation 303 ITR 225(Allahbad)

6. *We have perused the order of the Tribunal and the authorities below. Perusal of the order of the Commissioner of Income-tax (Appeals) shows that Commissioner of Income-tax (Appeals) has sustained the addition of Rs. 89,500 towards extra consumption of fuel injector and has deleted unexplained deposits on the ground that the same was covered by the addition on account of extra consumption. Present is not the case where the addition towards unexplained cash credit has been deleted on the ground that it was properly explained but on the ground that it is covered by the addition made towards extra consumption. Perusal of the order of the Tribunal shows that the view of the Commissioner of Income-tax (Appeals) that sale out of the books has been ploughed back in the form of deposits and the separate addition was the same could be deleted, has not been challenged by the revenue before the Tribunal. The effect of the finding of the Commissioner of Income-tax (Appeals) is that it has been accepted that the sale out of the books of account has been deposited in the form of cash credit, the addition in respect thereof at Rs. 89,500 has been sustained, therefore, the Commissioner of Income-tax (Appeals) and the Tribunal has not deleted the addition made by the Assessing Officer as an unexplained cash credit under section 68 of the Act, as it was explained, but it has been deleted on the ground that the deposits were out of sale made out of the books of account and the addition to that extent has been sustained. We do not find any error in the view of the Tribunal inasmuch as the revenue before the Tribunal has not challenged the view of the Tribunal.*

7. *In view of the foregoing discussions, both the questions referred to us are answered in the affirmative, i.e., in favour of the assessee and against the revenue.*

(iv) The Pune Bench of the Tribunal in the case of Kantilal & Bros V. ACIT 52 ITD 412 has observed as under:-

"It is a cardinal principle of law that no one should be harassed twice for the same cause. The assessee's main

argument was that the piece of paper impounded reflected only the borrowings of the assessee. These borrowings were utilised by the assessee for acquiring the assets found during the search. Unfortunately, most of the borrowings were not supported by proper confirmation. Apprehending the situation that the creditors would be reluctant to come forward, the assessee had made a declaration to that effect. The declaration made by the firm covered an amount of Rs. 18,00,416. Besides, the two partners had declared Rs. 6,50,000 on account of chit fund and unrecorded advances. After giving complete details of the borrowings and reconciling the same with reference to other assets, the assessee proposed that in the case of the firm, addition to the tune of Rs. 19,39,888 might be retained over and above the sum added in partners' cases as per their declarations in respect of their contribution in chit funds. It would be contrary to the canons of law to tax the same amount twice, i.e. *, as borrowings and as cost of assets. The borrowings were utilised to acquire the assets. Once the contention of the assessee, that the amount as reflected in the 'seized paper' represented borrowings of the assessee, was accepted, it would be proper to presume that such amount was utilised for the acquisition of assets found at the time of search*

(v) Sanjay Kumar Jain V. CIT 254 ITR 38 (Cal.)

"There is no dispute that the amount shown in GNP 15 pertains prior to 25th April, 1985 and the cash credits found in GNP 1, 2 and 3 relate to subsequent period. Therefore, prima facie assessee has a case that the amount of Rs.41,54,000 is found in GNP 15 that could have been introduced as cash credits in GNP 1, 2 and 3 which has been introduced as cash credits during the period from 29th April, 1995 to 4th Aug., 1995. The Tribunal has taken the view that no evidence has been laid to relate the amount of Rs.41,54,000 to the peak cash credit amount that is Rs.1,08,13,090, but what types of evidence is required to establish the nexus between the amount of Rs.41,54,000 and the peak cash credit of Rs.1,08,13,090, in these circumstances, that has not been spelt out. To find out the peak cash credit, out of so many bogus cash credit, taxable is only peak cash credit amount. On the same analogy why the undisclosed amount recorded in the loose paper sheets, prior to

the period of cash credit, should not be treated as in case of bogus cash credit entries."

(vi) CIT V. Ishwardass Mutha 270 ITR 597 (Raj.)

2. *In D.B. IT Ref No. 43/1998 it appears that the assessee Ishwardass Mutha filed a return in the year 1983 showing the total income of Rs. 13,410 representing share from M/s. Chogalal Bhimraj, a firm. This return was accepted under section 143(1) on 19th March, 1983, in a routine manner. On the basis of certain incriminating documents seized in the course of search, the assessing authority opined that there was an escapement of income. Accordingly, he issued a notice under section 148 and found that there was unexplained investment in the money-lending business during the period 24th May, 1980, to 1st Nov., 1980, aggregating to Rs. 78,000. Thus, an addition was made of Rs. 78,000 on account of alleged unexplained investment in the money-lending business. This was confirmed by the CIT(A). Before the Tribunal, it was contended that the Assessing Officer has committed error in taking the debit side only, he could take into account the peak credit. This contention was accepted and worked out the peak credit of Rs. 48,000 out of the addition of Rs. 78,000 made by the Assessing Officer. Thus, the Tribunal sustained the addition only to the extent of peak credit of Rs. 48,000.*

3. *In DB IT Ref. No. 1/1998 the Assessing Officer added a sum of Rs. 50,000 as income from undisclosed sources as interest income. It was found that a sum of Rs. 50,000 was advanced to one M/s. Ramrakh Poonamchand on 9th March, 1980, and 17th March, 1980, by the assessee. The addition was confirmed by the CIT(A). It is significant to notice at this stage that Dy. CIT(A) by order, dated 4th Nov., 1992, deleted the addition of Rs. 50,000 for the assessment year 1980-81. In view of this fact, the Tribunal deleted the addition of Rs. 6,720, the same being consequential to the main addition of Rs. 50,000.*

4. *Having considered the facts of both the cases, we are satisfied that no referable question arises from the order of the*

Tribunal. Both the reference applications being DB IT Ref. No. 43/1998 and DB IT Ref. No. 1/1998 are rejected.

3.40. Apropos addition of Rs. 9,21,200/- on account of payment of US $ 20,000 in South Korea, in AY 2007-08the ld. Counsel contends that:

(1) The Appellant is not aware of any transaction of USD 20,000/- and the basis of the said allegation and source and evidence of the said information. The Appellant has not done any payment or also is not aware of any transfer of USD 20,000/- to Mr Park Young Tae of South Korea as alleged in the reasons for reopening the case.

(2) No opportunity was provided to the Appellant to cross examine Mr Park Young Tae regarding his statement before the Enforcement Directorates for the transfer of USD 20,000 by the Appellant thereby violating the principal of natural justice.

(3) The action of the Learned Assessing Officer is based on information which has come into the possession of the Department on the basis of a statement made by somebody before an external agency viz. the Enforcement Directorate, the assessee is not a party to such proceedings. AO without giving the Appellant any opportunity to cross-examine the alleged Mr. Young who has made the alleged statement made the addition. Such a conclusion having a direct impact on the liability of Appellant and conflicting with his consistent stand has been drawn without proper and reasonable opportunity to examine the said evidence(s) and to cross –examine the witnesses making such accusations. It is accordingly in violation of the principles of natural justice, in particular those embodied in the legal maxim *"audi alteram partem*". The entire exercise, is in gross violation of the principles

of natural justice the addition cannot be sustained. This infirmity in the assessment order gets compounded by the absence of a speaking order in this behalf by the AO. Thus the order suffers from violation of the principles of natural justice, not availability of relevant facts and non speaking order. The Learned Assessing Officer has merely and mechanically relied on the report/documents received from an external agency without conducting any independent enquiries, verifications and allowing the examination of material and cross examination and relevant evidence.

3.41. Reliance in this behalf is placed on the following case laws:-

- Bagsu Devi Bafna Vs. CIT (1966) 62 ITR 506 (Cal).
- Kishinchand Chellaram Vs. CIT (1980) 125 ITR 714 (SC.

4. Ld CIT(DR) on the other hands vehemently contends that 148 proceedings in questions are validly initiated and the reopening of assessments and finalization thereof is perfectly justified.

(i) Apropos the admissibility of pen drive as evidence it is pleaded that there is deference between criminal and income tax proceedings. In criminal proceedings there may be any issue contested by the assessee, but in income tax proceedings the pen drive having been found from the possession of the assessee, it becomes an admissible evidence for investigation by AO. The fact that many entries tally with the business concerns of the assessee itself indicates that the pen drive belonged to the assessee. There is no issue of presumption u/s 292C as the contents of the pen drive have connection with the transactions of his concerns, bank accounts and financial dealings. Therefore the AO has properly recorded his satisfaction about income escaping assessment as the reasons recorded have live nexus with the contents

mentioned in the pen drive and its print outs. Therefore the reasons are valid and issue of notice u/s 148 thereon is perfectly justified.

(ii) Apropos the service of notice u/s 148 on the assessee for AY 2001-02 ld DR referred to the assessment record, remand report and letters received from the field about the service of notices u/s 148 and 143(2) which are as under:

During the course of the appellate proceedings assessee has raised various issues.

1. The assessee has raised the issue that the notice u/s 148 has not been served upon him. The issue raised by the assessee is completely wrong. Notice u/s 148 was issued on 28-03-2008 and was served on Sh. Ved Prakash (Accountant) Kiran Cinema. Sector-22. Chandigarh on the same date; ·,:It was the only available' address of the assessee i.e. C/o Kiran Cinema. Sector-22. Chandigarh. Sh. Ved Prakash who has been working as regular accountant for the last five-six years received the notice on behalf of the assessee as the assessee himself is rarely available at the given address. It may be pertinent to mention here that service of all the notices pertaining to the assessee group is effected at the address C/o Kiran Cinema, Sector-Zz, Chandigarh. Different employees of Kiran Cinema have been receiving these notices. Even in the case of Smt. Vandana Gupta. assessee's daughter. service of notices has been effected at the address C/o Kiran Cinema. Sector-22. Chandigarh. And in this case also different employees have received the notices issued by this office and all the notices have properly. been complied with and assessment made their to has been accepted by the assessee. Even in other group cases of M/s Jagtumal Kundan Lal, C/o Jagat Theatre. Sector-1? Chandigrah service of notices has been effected at Kiran Cinema. Sector-22. Chandigarh. In this case also different employees of Kiran Theatre have received-the notices on behalf of assessee and proper compliance has been made by the assessee and assessment framed has been accepted by the assessee. Copy of notices received by different employees at KiranTheatre is

enclosed for ready reference .

2. The assessee has raised the issue that notice u/s 143(2) was not issued and served at all. Assessee filed letter dated 12-12-2008 stating that original return filed may be treated as return u/s 148. On the same date notice u/s 143(2) was issued and was send-by speed post. A copy of the said notice alongwith speed post challan is enclosed for your kind perusal.

Furthermore section 29288 also, applies in the instant case. Section 2928B says "Where an assessee has appeared in any proceedings or co-operated in any inquiry relating to any assessment or reassessment, it shall be deemed that any notice under any provision of this Act. which is required to be served upon him. has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceedings or inquiry under this Act that the notice was -

(a) not served upon him: or

(b) not served upon him in time: or

(c) served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.

3. Assessee has raised the issue with regard to validity of the approval granted u/s 151 by the Addl. Commissioner of Income Tax. A copy of the approval letter is annexed alongwith a remand report for your kind perusal.

4. The assessee has made details submission that the addition has not been done correctly. The contention of the assessee was looked at in detail during the course of assessment proceedings also and very little merit was found in it. In the assessment order Ld. A.O. has discussed in detail the working of peak credit and has point vise rejected the contentions of the assessee. The detailed working of peak credit has already been

given in the assessment order and thus the addition heeds to be sustained on this account.

In this regard, in order to authenticate that Sh. Ved Prakash, Accountant is a regular employee of Kiran Cinema, Sector-22, Chandigarh. It is submitted that notice u/s 148 has been issued and served on the address of Smt. Vandana Gupta, Kiran Cinema, Sector-22, Chandigarh. Smt. Vandana Gupta is the wife of Sh. Chetan Gupta. AO Chandigarh already held that all notice pertaining to address C/o Jagat Theatre, Sctor-17, Chandigrh were served/ serving at Kiran Cinema Sector-22, Chandigarh as it pertains to Smt. Vandana Gupta wife of Sh. Chetan Gupta & Sh. Ved Prakash Accountant is their regular employee besides accepting notice u/s 148 dt. 28-03-2008 for AY 2001-02, he also received notice u/s 143(2) dated 31-10-2006 issued by ACIT Circle 3(1), Chandigarh ton smt. Vandana Gupta. As regard to address, the same has been found genuine as it related to Smt. Vandana Gutpa and Sh. Chetan Gupta has also filed its return for the AY 2006-07 & 2007-08 from the same address."

4.1. The other letters dated. 18-12-08 and 18-1-13 received from the field are to the same effect.

4.2. Ld DR contends that the assessee has adopted a hyper technical way to seek quashing of the proceedings. Shri Ved Prakash and other employees have been receiving assessment notices on behalf of the assessee who has attended and cooperated in the assessment proceedings. Therefore, it cannot be said that assessee had no knowledge of proceedings or he was not given opportunity of hearing. In subsequent AYs 2006-07& 07-08 assessee himself has given the address of Kiran Cinema and not Jagat Cinema, consequently there is no merit in the objection of assessee that notices u/s 148 or 143(2) were not served on the assessee and the reassessment proceedings are bad in law.

4.3. Apropos the alternate pleas on merit, Ld CIT(DR) contends that the benefit of telescoping , setoff and working peak credit is essentially a matter of fact and it depend on case to case. In assessees case there is no scope to extend such adjustments and benefits as facts are peculiar in this case. Wherever justified such benefits have been given to the assessee. Reference is made to some relevant findings of the AO

> *"It has not been brought out for what purpose the amount was withdrawn and redeposited. Unless such purpose brought in form of evidence, this credit of redeposited out of withdrawal previously cannot be granted. It is not known with certainty that the same money which was withdrawn had been redeposited. The utilization of the money withdrawn has not been established beyond doubt. It is a common knowledge that withdrawal takes places with certain purposes and therefore, purpose is a vital ingredient to establish the claim of the appellant. In view of this benefit of peak and self withdrawal cannot be given.*
>
> *Concerning cash receipts against opening debit balance the assertion of the appellant is not accepted as the appellant has not furnished any linking evidence that the amount shown as credit in the accounts was received out of debit opening balances in the respective accounts in various persons/ parties account. The appellant had denied maintaining other persons account therefore the benefit of opening debit balances cannot be given unless it owned up the contents as true.*

CIT (A)'s findings:

> *"Page 7 (d) The contention of the assessee to give credit for credit debit, could not be accepted since the assessee had denied from the beginning that he was maintaining the accounts of other persons and so the benefit of peak credit could not be given to the assessee. Assessee has not produced the*

confirmation from the persons that their accounts were maintained by assessee and that corresponding payments and receipts were made out of these accounts. Also relevant details/ confirmation of parties had not been filed.

4.4. Similar findings are there in the orders for AY 2002-03 and 03-04.

4.5. Ld CIT(DR) pleads that the burden to claim the benefit of such telescoping and peak credits is on the assessee. CIT(A) has given proper findings of fact about the non discharge of burden in this behalf by the assessee. Therefore the additions as made by AO deserve to be sustained.

5. Ld counsel for the assessee in rejoinder contends that section 292BB as amended by the Finance Act, 2008 would not validate service of a notice in the instant case of present assessee in view of the following contentions:-

5.1. Assessee has raised valid objections before the AO about non service and validity of the notice u/s 148 on the ground that proper service of notice u/s 148 & 143(2) had not been made in accordance with the legal requirements as contained in section 282(1) of the Act.

5.2. Without prejudice, section 292BB introduced in Income-tax Act w.e.f. 1-4-2008 does not have retrospective operation and has to be applied prospectively to the assessment year 2008-09 and subsequent years.

5.3. Apropos the discharge of burden to prove the eligibility for peak credit benefits, ld. Counsel vehemently argues that assessee has accepted the pen drive on without prejudice basis. It is a legal right of the assessee to raise alternate submissions, for which assessee has given each and every detail in respect of entries in the pen drive. They are on day to day basis; entry to entry basis; and are part of the paper book. Authorities below have not examined even a single entry and a sweeping finding has been summarily given that assessee has not discharged his burden. The question

which arises is when no query about any entry is called for, by the AO or CIT(A), how can it be held that assessee has not discharged his burden for peak credit benefits.. Having provided every detail there is no doubt that assessee on his part has discharged burden and it is the department who has not rebutted the burden in any effective manner.

6. We have heard the rival contentions and perused the material available on record. The questions posed before us by these appeals are:

(i) Whether there exist live nexus between the materials and reasons to come to a reasonable belief that income has escaped assessment in all the impugned years.

(ii) Whether service of notice u/s 148 is a mandatory condition for assumption of jurisdiction by AO u/s 147 read with sec 148 to frame a valid reassessment for A.Y. 2001-02.

(iii) Whether there is a proper service of notice u/s 148 in terms of sec 288(1) on the assessee for AY 2001-02 and if not so the effect thereof on the reassessment proceedings. Whether sec 292B cures such non service.

(iv) Whether there is non service of notice u/s 143(2) also on the assessee for AY 2001-02 and the effect thereof.

(v) Whether the alleged pen drive and its printouts are admissible evidence in income tax proceedings and can be used to make appropriate additions on the assessee.

(vi) Whether the benefits of peak credit, set off or telescoping and the extent to which it can be given to the assessee in the facts and circumstances of the case.

(vii) The above issues are to be examined on the basis of facts, circumstances and judicial precedents.

6.1. Coming to the first question set out by us above, it is apparent that many of the transactions recorded in the alleged pen drive belong to various concerns and bank accounts of the assessee. Thus prima facie the pen drive and its contents have a relationship with the assessee, the burden to disprove the same is on him. Assessee has raised various objections about the intentions and irregularities committed by Punjab Police while carrying out the search and seizure of the alleged pen drive and taking out printouts as per the Cr. P.C., IPC , Indian evidence Act and Cyber Laws, which in our view have no effect on recordings of reasons for forming a belief about escapement..

6.2. Income Tax proceedings are non adversarial in nature and the entire exercise is directed to ensure a fair and proper assessment on the assessee. It is trite law that technical rules of Evidence Act and Cr. P. C. are not applicable to these proceedings. An evidence which indicates the income of the assessee is admissible in Income Tax proceedings. From the record it emerges that many of the entries mentioned in the pen drive belonged to various business concerns of the assessee in which he is associated in the capacities of director or partner. Similarly many entries pertained to his bank accounts and other persons. They are explained by the assessee though on prejudice basis, but the fact remains that the entries have correlation with assessees activities. In this view of the matter the contents of the pen drive become admissible evidence in Income Tax proceedings and form a basis for investigations and additions. Consequently we hold that pen drive and print outs thereof constitute admissible evidence in these proceedings. The

reasons for reopening were recorded on the basis of these contents. In view of the fore goings the reasons recorded for escapement of income and the material available on record with AO have a live link with each other. Thus, we hold that the reasons for reopening the assessments were properly recorded by AO. This question is answered against the assessee.

6.3. Coming to the next question which is raised in only AY 2001-02, it is by now settled by various courts including jurisdictional high court and apex court that for proper assumption of jurisdiction by AO, a valid service of notice in terms of sec 282(1) is a mandatory legal requirement. Hon'ble Delhi High Court in the case of Hotline International (supra) held the service of notice to be mandatory as under:

> ***22.*** *As per order V, rule 12 of the Code of Civil Procedure referred to above, wherever it is practicable, the service has to be effected on defendant in person or on his agent. Admittedly, in the present case, notice under section 148 of the Act was not tendered to the assessee nor the same was refused at all by the assessee. It is an admitted case of the revenue that when the officials of the Income-tax Department went to serve the notice under section 148 for the assessment year 1995-96, the security guard informed them that the company was closed for Holi festival holidays. The security guard by no stretch of imagination can be said to be the agent of the assessee and admittedly no notice was tendered either to the assessee or his agent nor the same was refused either by the assessee or his agent.*
>
> ***23.*** *Under order V, rule 17 of the Code of Civil Procedure, the affixation can be done only when the assessee or his agent refuses to sign the acknowledgement or could not be found. Here, in the present case, no effort was made by the Income-tax Department to serve the notice upon the assessee, since the company of the assessee was closed due to Holi festival holidays, and admittedly no effort was made by the Serving Officer to locate the assessee.*

24. *Even otherwise, as per order V, rule 19A of the Code of Civil Procedure, the notice sent by registered post ought to have been sent along with acknowledgement due but admittedly it was not sent along with acknow-ledgement due.*

25. *So, from the entire material available on record we have no hesitation in holiding that there has been no valid service of notice under section 148 of the Act upon the assessee as the same was neither tendered to the assessee or his agent, nor the same was refused by either of them.*

26. *Since there has been no proper service of notice on the assessee, we hold that the reassessment proceedings, resulting in the order dated 30-1-2003, are bad in law.*

27. *The above being the position, no fault can be found with the view taken by the Tribunal. Thus, the order of the Tribunal does not give rise to a question of law, much less a substantial question of law, to fall within the limited purview of section 260A of the Act, which is confined to entertaining only such appeals against the order which involves a substantial question of law.*

28. *Accordingly, we find no reason to differ with the finding given by the Tribunal which is a finding of fact and as such there is no force in the present appeal.*

29. *Accordingly, the present appeal filed by the revenue is, hereby, dismissed."*

6.4. Hon'ble Supreme Court also has echoed the same view in the case of Hotel Bluemoon (supra) by following observations:

*Section 158BC(*b*) provides for an enquiry and assessment. The said provision reads "the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of sections 143, 144 and 145 shall, so far as may be, apply". An analysis of this sub-section indicates that after the return is filed, this clause enables the Assessing Officer to complete the assessment by following the procedures like issue of notice under section 143(2)/142 and complete the assessment under section 143(3).*

*This section does not provide for accepting the return as provided under section 143(1)(*a*). The Assessing Officer has to complete the assessment under section 143(3) only. In case of default in not filing the return or not complying with the notice under section 143(2)/142, the Assessing Officer is authorized to complete the assessment* ex parte *under section 144. Clause (*b*) of section 158BC, by referring to sections 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded but section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason why the authorities should issue a notice under section 143(2). However, if an assessment is to be completed under section 143(3), read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of a notice under section 143(2) cannot be dispensed with. The other important feature that is required to be noticed is that the section 158BC(*b *) specifically refers to some of the provisions of the Act which are required to be followed by the Assessing Officer while completing the block assessment under Chapter XIV-B. This legislation is by incorporation. This section even speaks of sub-sections which are to be followed by the Assessing Officer. Had the intention of the Legislature been to exclude the provisions of Chapter XIV, the Legislature would have or could have indicated that also. A reading of the provision would clearly indicate that if the Assessing Officer, for any reason repudiates the return filed by the assessee in response to notice under section 158BC(*a*), he must necessarily issue notice under section 143(2) within the time prescribed in the proviso to section 143(2). Where the Legislature intended to exclude certain provisions from the ambit of section 158BC(*b*), it has done so specifically. Thus, when section 158BC(*b*) specifically refers to applicability of the provision, proviso thereto cannot be excluded. The clarification given by the CBDT in its circular No. 717, dated 14-8-1995, has a binding effect on the department, but not on the Court. This circular clarifies the requirement of law in respect of*

service of notice under sub-section (2) of section 143. Accordingly, even for the purpose of Chapter XIV-B, for the determination of undisclosed income for a block period under the provisions of section 158BC, the provisions of section 142 and sub-sections (2) and (3) of section 143 are applicable and no assessment can be made without issuing a notice under section 143(2). [Para 15

6.5. It may be mentioned that provisions about service of notice u/s 158BC and 148 are in pari materia and refer to sec 282(1). Assessee has relied on a catena of judgment. Since this issue is squarely covered by recently decided judgments by Hon'ble Delhi High court and Apex court we feel no necessity to go to other earlier judgments for the sake of brevity. In view of the above we hold that for valid assumption of jurisdiction to frame a reassessment, a proper and valid service of notice u/s 148 on assessee is mandatory requirement violation thereof will result in quashing of the reassessment proceedings.

6.6. Coming now to the question as to whether there is proper service of 148 notice on the assessee in AY 2001-02. Assessee has demonstrated that the notice was issued/sent at an address different than the one mentioned in his return of income. Department also admits that the notice was served not on assessee but on one Shri Ved Prakash who according to assessing officer is a responsible person working for the group entities of assessees family and this amounts to a proper service on assessee. These facts are admitted by the department which are evidenced by the remand report and field correspondence mentioned above.

6.7. Assessee's contention that Said Ved Prakash is neither his employee nor his authorized agent, remains uncontroverted. Merely because he appeared in some other group entities will not detract the fact that notice was not served on assessee. During the course of reassessment AO was intimated

about non service of notices u/s 148 and 143(2) but AO failed to take cognizance of assessee's intimation and objections. From the assessment record, remand reports, field correspondence and oral contentions, department could not demonstrate before us that notice u/s 148 was served on the assessee for A.Y. 2001-02. In view of these facts and circumstances and keeping in view the binding decisions of Hon'ble Delhi High Court in Hotline International and Hon'ble Supreme Court in the case of Hotel Blue Moon (supra) we are left with no choice but to respectfully follow them and hold that in the absence of a valid service of notice u/s 148 on the assessee the reassessment proceedings for AY2001-02 are bad in law, consequently they are quashed.

6.8. Since we have quashed the reassessment proceedings for AY 2001-02, we see no necessity to go into the other issues about service of notice u/s 143(2) and merits of additions for AY 2001-02.

AYs 2002-03 & 03-04

6.9. In these two assessment years the only challenge to jurisdiction to reassessment on the only ground about there being no live nexus between the reasons recorded and material available on record has been already dismissed by us. Consequently we proceed to decide the merits of the additions.

6.10. Reverting to the merits of the addition, department has consistently held that assessee manages wealth for other 148 persons. In this behalf some names of parties are here and there in the assessment order. However no enquiry from such parties have been solicited and findings are given in the order. Thus from the conspectus of facts made available by the department

in this behalf the asessees role by and large emerges to be of a money manager for others apart from the dealings of his associate concerns.

6.11. Apropos the peak credit working, set off of opening balances, contra entries, roll over utilization of funds which has been explained in details above; assessee vehemently claims to have fully reconciled the details about each and every entry. The details working thereof were filed before AO and thereafter before ld CIT(A), who called for w remand reports also. These details are placed before us also on the various paper books. Some of the relevant pages thereof are mentioned above.

6.12. AO and CIT(A) have given some rebates or set off of interest receipts and payments. Assessee claims that his reconciliation of entities is supported by facts and material on record and is backed by the legally established propositions of peak credit working, telescoping and set off, which have not been given to assessee despite the remand reports. It is agitated that assessee's valid contentions have not been considered at all. On one hand assessee is considered as money manager for others, thus his ostensible role will be to hold such funds in trust for others, receive or pay them on the instructions of principals and to earn some managerial remuneration thereon. On the other hand in the guise of a fiction of presumption u/s 292C all the funds are being treated as owned by the assessee and on top of that proper adjustments of peak credit emerging from the pen drive is being refused to be worked by the department. That apart the other logical claims of set off, role over, correction of mistakes and credit of opening balances which are emerging from the same contents i.e. print outs of pen drive is not being allowed to assessee. The assessment of undisclosed income is thus arbitrary and patently against the settled judicial propositions

and departments own way of working in other survey, search or reassessment cases in which such principles are routinely applied.

6.13. We have heard both the parties on these issues at length most of the arguments are contained in the written submissions filed before lower authorities, which are mentioned above in brief. From AO's remand reports and observations contained in the orders ld. AO and CIT(A), the details furnished by assessee are as under:

(i) Assessee filed details about each and every entry on day to day basis, these details are placed on paper book of respective year.

(ii) From the details a summary of mistakes, opening balances (debit or credit as the case may be), contra entries etc is furnished to work out the correct amount of credits emerging from the print outs.

(iii) These details are further supported by working of peak credit for each year from, which are filed by assessee.

6.14. Assessee claims to have submitted all these details before AO, who though gave some cursory interest adjustments but did not look into all other details refusing the assessee claims summarily. They wee filed before CIT(A) again who called for remand report, however CIT(A) also did not deal with the core issue and gave some adjustments here and there. Thus assessment has not been framed in a reasonable and proper manner. To ensure high pitched assessments the huge additions have been made one way or other in a capricious manner.

6.15. Ld counsel took us through the relevant entries to demonstrate how the funds have been reutilized from one a/c to other, the effect of contra entries and mistakes committed by lower authorities. While working out the printouts it will be disastrous to add each and every entry without

appreciating that same moneys have been reused. Such an arbitrary practice will lead to disastrous result and unthinkable additions which are neither justified nor warranted by the material on record. It has been pleaded that assessee has discharged its burden in explaining each and every aspect necessary for arriving at a fair and reasonable assessment. Lower authorities have failed to rebut the discharge of burden by the assessee in reconciling his peak credit working. Therefore the peak working as offered by the assessee deserves to be accepted.

6.16. After careful consideration of facts, circumstances and material available on record, case laws and rival contentions it will be desirable to dwell on the aspects of peak credit; telescoping, set off of entries, availability of opening balance and its effect in such print out; this is necessary for arriving at a fair estimate of the deemed income of the assessee for AY 2002-03 and 2003-04.

6.17. Such concepts are well known in the law with a rider of caution that they are question of facts and depend on case to case. Hon'ble Supreme court and various other High Courts have laid down the propositions that such adjustments can be applied while making the assessments in the cases of working out of seized and incriminating documents in case of repetitive transactions.

6.18. We shall start with the theory of the department that assessee is acting as a manager or administrator of funds for 148 other persons. Though some names are given however no inference are drawn by authorities below. Therefore, we leave this issue here. More so they become third parties to the proceedings and any observations are undesirable and may impinge on principles of natural justice. The departmental theory of assessee being a

fund manager for others is supported by the fact that assessee filed complete day to day details and entry by entry details of contents of print outs available with the department. They all are part of the paper books. They were submitted before Assessing officer and CIT(A). Remand report was submitted by AO on CIT(A)'s initiative.

6.19. From the explanation of the entries and departmental theory, it emerges that assessee was working as the fund manger or administrator for others. While dealing with the issue this fact is to be kept in reckoning.

6.20. Presumption u/s 292C will not be applicable in this case as admittedly there was no search proceedings under income tax act on the assessee. A statutory presumption can be raised against assessee when the prescription of law warrants it. In the absence of enabling statutory provision such presumption can not be propped up against assessee. Since there was no search on assessee u/s 132 under income tax act, presumption u/s 292C can be applied to him. However the assessee case comes in the ken of sec 68 about giving reasonable explanation of cash credits found from his record.

6.21. This scenario does not alter the situation materially in as much as assessee has to discharged the burden cast by deeming fiction of sec. 68. The burden is by and large similar to sec 292C.

6.22. The department proceeds on premise that assessee manages funds for 148 person or so and keeps a record thereof. Assessee filed every detail in date wise and entry wise manner. AO does not consider it objectively and allows some cosmetic reduction of interest. Issue is carried in appeal, all the documents are filed again before CIT(A) who calls for a remand report from AO. The course of events reveals that assessees details are again not

considered objectively and some prima facie adjustments are reduced by CIT(A).

6.23. The peak credit theory and the benefit of telescoping is generally accepted as it is logical and acceptable provided there is reasonable material to show that withdrawals or repayments could have been available on the date of subsequent credit or repayment, more so, in the accounts of different persons. The fact that assessee has been held to be a fund manager for 148 persons for which the moneys are frequently withdrawn or deposited as per these case laws and facts and circumstances of this case assessee will be entitled to work out a peak credit and avail the benefits of telescoping. We may hasten to add that it is not a proposition of law but the exercise is to be undertaken on the inferences based on normal preponderance of probabilities and based on normal human conduct. The department is entitled to displace such propositions advanced by the assessee on cogent reasons and not by summary rejection of the explanation. In the next para we will be dealing with various case laws right upto Hon'ble Supreme Court where this factual preposition has been upheld subject to certain conditions.

6.24. The important question which arises is whether the assessee has discharged it's in explaining the entries contained in the pen drive and its print outs in terms of sec 68 or any other presumption statutory or otherwise which may be raised in the context of the facts of this case. In our considered view assessee has discharged it's onus in explaining these entries by filing the details before AO, CIT(A) and in remand proceedings. Assessee has pushed the ball in the court of department by demonstrating from the details of entries that he manages the funds for others. In the course thereof he requests for necessary working of peak credit, correction of

mistakes, contra entries and considering the claims of available opening balances. The claim of opening balances is made as the data recovered pertains to three years and assessees fund managing activities span to three years. Despite assessees diligence in filing all the details the authorities below fail to consider the assessee's objections and workings. In our considered view the facts and circumstances of the case and departmental theory warrant application of peak theory, telescoping, correction of mistakes and taking cognizance of journal/contra entries. In our view ratio of decisions in the cases of – Anantharam Veerasinghaiah & Co. (supra); K.S.M. Guruswamy Nadar & Sons (supra); Singhal Industrial Corpn. (supra); Kantilal & Bros. (supra); Sanjay Kumar Jain (supra); & Ishwardass Mutha (supra), support the assessee's case for peak credit and telescoping benefits.

6.25. In consideration of foregoings we have no hesitation to hold that assessee has discharged his primary burden in explaining the entries in terms of sec. 68 or any other presumption which may be raised in behalf of the entries in the print outs. Department in effective and convincing terms has failed to rebut the same except giving some general observations that the claims can not be considered. In our view we have to estimate the undisclosed income of the assessee for AYs2002-03 & 03-04 keeping in mind our observations and conclusions in this behalf.

6.26. In the wake of these observation we proceed to decide the quantum of undisclosed income of the assessee as under:

(i) The reassessment for AY 2001-02 is quashed.

(ii) For AY 2002-03 the credit for opening balance is not given as we have quashed the reassessment for AY 2001-02, therefore, the opening figure flowing from the quashed reassessment cannot be verified. Subject to these observations the peak credit as worked out by the assessee at Rs. 36,89,310/- is held as undisclosed income for this year.

(iii) For A.Y. 2003-04: On the same methodology the peak credit worked out by the assessee at Rs. 46,16,387/- is held to be the peak credit for this year. However, this peak credit is to be telescoped with the income of AY 2002-03 as the same was available with the assessee for utilization. Consequently, the taxable income for A.Y. 2003-04 is worked out as under:

(i)	Peak credit for A.Y. 2003-04	Rs. 46,16,387/-
(ii)	Less: Peak credit for AY 2002-03	Rs. 36,89,310/-
	Taxable income for AY 2003-04	Rs. 9,27,077/-

7. Thus, the undisclosed income to be included in the assessee's income is determined at Rs. 36,89,310/- for A.Y. 2002-03 and Rs. 9,27,077/- for A.Y. 2003-04. These grounds are accordingly partly allowed.

8. Apropos the remaining ground for AY 2002-03 in respect of addition of Rs. 9,21.200/- being alleged unaccounted payment of US $ 20,000 transferred to Park Young Tae, it is pleaded that his statement before Enforcement Directorate was taken behind his back. Assessee was neither a party to ED proceedings nor the statement was taken in his presence. Only on the basis of a third party statement before some other agency Assessing officer has made the addition without giving opportunity to cross examine

Mr. Young. This clearly violates the principles of natural justice embodied in the maxim "audi alteram partem". We find merit in the argument of ld. Counsel. The impugned addition cannot be made in the hands of the assessee unless proper opportunity to defend himself against the allegation including the cross-examination of Mr. Young and the result of proceedings before the E.D. authorities are to be considered. This ground is set side restored back to the file of assessing officer to decide the same afresh in accordance with law.

9. Apropos the revenue's appeal for A.Y. 2002-03, regarding the properties sold by the assessee, the sale consideration has been received by the assessee through a registered sale deed. There is no allegation about violation of any circle rate or comparative sale instance. The purchaser of the property has not been examined so as to raise any doubt about any on money received by the assessee. In our view when a property is sold by a registered document, the addition cannot be made purely on the basis of a valuation report which is only in the nature of an opinion. CIT(A) while deleting the addition, has rightly relied on the Hon'ble Delhi High Court judgment in the case of CIT In view thereof we do not find any infirmity in the order of CIT(A), which is upheld.

9.1. Since we have disposed of the assessee's appeals in above manner, there is no need to deal with the assessee's ground about additional evidence.

10. In the result, revenue's appeal is dismissed.

11. In the result, assessee's appeal for A.Y. 2001-02 is allowed; for A.Y. 2002-03 & 2003-04 are partly allowed. Revenue's appeal for AY 2002-03 is dismissed.

Order pronounced in open court on 21-06-2013.

Sd/-	Sd/-
(SHAMIM YAHYA)	(R.P. TOLANI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 21-06-2013.

MP

Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR