

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH

**Before: Shri G. D. Agrawal, Vice President
and Shri Rajpal Yadav, Judicial Member**

**ITA No. 489/Ahd/2005
Assessment Year 1995-96**

Shri Ashokkumar Bhailal Chokshi, C/o M/s. Bhailal Dhyabhai Chokshi & Co., 2341/1, Manek Chock, Ahmedabad PAN: 31005PV4880 (Appellant)	Vs	Income Tax Officer, Ward-3(2), Ahmedabad (Respondent)
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**ITA Nos. 562 & 591/Ahd/2005
Assessment Year 1995-96 & 96-97**

M/s. Chokshi Bhailal Dahyabhai & Co., 2342/1, Manek Chock, Ahmedabad (Appellant)	Vs	Income Tax Officer, Ward-3(2), Ahmedabad (Respondent)
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**ITA No. 512 /Ahd/2006
Assessment Year 1996-97**

M/s. Chokshi Bhailal Dahyabhai & Co., 2342/1, Manek Chock, Ahmedabad (Appellant)	Vs	Income Tax Officer, Ward-3(2), Ahmedabad (Respondent)
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Assessee by: Shri J.P. Shah, A.R.
Revenue by: Shri Roopchand, Sr. D.R.

Date of hearing : 24-04-2015
Date of pronouncement : 12-06-2015

आदेश/ORDER

PER : RAJPAL YADAV, JUDICIAL MEMBER:-

ITA No. 489/Ahd/2005 and ITA No. 591/Ahd/2005 are directed at the instance of Shri Ashokkumar bhailal Chokshi against the orders of Ld. Commissioner of Income Tax (Appeals) dated 29-10-2004 and 14-12-2004 passed for Assessment Year 1995-96 and 196-97. ITA Nos 562/Ahd/2005 and 512/Ahd/2006 are directed by M/s. Chokshi Bhailal Dahyabhai & Co., a firm, wherein Shri Ashokkumar bhailal Chokshi is a partner, against the orders of Ld. Commissioner of Income Tax (Appeals) dated 29-10-2004 and 21-01-2012 passed for Assessment Year 195-96 and 1996-97. ITA No. 512/Ahd/2006 originates from penalty proceedings u/s. 271(1)(c) of the Income Tax Act (hereinafter referred to as the 'Act'). The issues involved in three quantum appeals are common, therefore, we have heard all the appeals together and deem it appropriate to dispose of them by this common order.

2. First we take three quantum appeals i.e. ITA Nos. 489/Ahd/2005, 562/Ahd/2005 and 591/Ahd/2005. The grounds of appeal taken by the assessee are not in consonance with rule 8 of ITAT Rules, 1963, they are descriptive and argumentative in nature.

3. In brief, the grievance of the appellants revolves around two issues namely; (a) Id. Assessing Officer has erred in issuing notice u/s. 148 for reopening of the assessment (b) Id. Commissioner of Income Tax (Appeals) has erred in confirming the additions of Rs. 7,90,000/- in Assessment Year 1995-96 (ITA No. 489/Ahd/2005), Rs. 14,80,000, Assessment Year 1996-97 (ITA No. 591/Ahd/2005), and addition of Rs. 53,35,700/- in Assessment Year 1995-96 (ITA No. 562/Ahd/2005)

4. Before we embark upon an inquiry on the quality of evidence available on the record for construing, whether any addition can be confirmed in the hands of assessee, we think it appropriate to make reference to the basic dispute in brief, which is the sole dispute in all these appeals. According to the Assessing Officer, the FERA authorities have carried out the search upon LT Shroff Group of cases, wherein a diary containing ledger accounts of various parties showing entries of payment from the period 01-04-1994 to 25th May, 1995 was found. On the basis of this diary Id. Assessing Officer has calculated a payment by Shri Ashokbhailal of Rs. 61,25,700/-. This payment is between the dates 08-11-1994 up to 23rd March, 1995. He made an addition of this amount in Assessment Year 1995-96. In the case of the firm, Id. Assessing Officer made additions of Rs. 61,25,700/- in Assessment Year 1995-96 and 14,80,000/- in Assessment Year 1996-97 because three payments alleged to have been made on 24th, 27th April, 1995 and 3rd May aggregating to Rs. 14,80,000/-

5. On appeal, Id. Commissioner of Income Tax (Appeals) has confirmed additions of Rs. 7,90,000/- in the hands of Ashok Bhailal (individual) and Rs. 53,35,700/- in the hand of firm, on the ground that

source of fund is from the firm. In Assessment Year 1996-97, Id. Commissioner of Income Tax (Appeals) has confirmed Rs. 14,90,000/- in the hands of firm. All these three additions are being impugned in respective appeals. The facts on all vital point are common, therefore, for the facility of reference we are taking up facts mainly from ITA No. 489/Ahd/2005 in the case of Shri Ashokbhailal Chokshi. If we notice any new fact in any other appeal which has a significance, then, we will make a reference to that aspect also at the relevant stage.

6. The brief facts of the case are that Shri Ashokbhailal Chokshi is an individual. He drew income at the relevant time from dividend on investment in shares, income from purchase and sale of shares and business income. He was running proprietary concern in the name of Ashoka Bullion Traders and also trading in silver and gold ornaments. He was partner in the firm of Chokshi Bhailal Dahyabhai and Co. who was engaged in the trade of gold and silver. He filed his return of income for Assessment Year 1995-96 on 10th of January, 1996 declaring total income of Rs. 72,630/-. This return was processed u/s. 143(1)(a) of the income tax act, 1961 on 28th February, 1996. On first of July, 1995, FERA Authorities (Foreign Exchange Regulation Authorities) had carried a search at LT Shroff of Group at Suthar Chal, Javeri Bazar, Mumbai. Subsequently, a search u/s. 132 of the income tax act was also carried out at various business/residential premises of the LT Shroff Group by the income tax department. Statement of Shri Kalpesh Thakkar who was managing business by LT Shroff was recorded u/s. 132(4) on 2nd August, 1996. During the search of FERA authorities, a diary containing entries of cash receipts and payments to various parties for the period 01-11-94 to 28th May, 1995 on day to day basis was found and seized. The LT Shroff

Group was found carrying out the business of accepting deposits in cash on interest and advance loans in cash by charging interest on large scale from the four different branches situated at Modasa, Manek Chawk, Ahmedabad, Manhaton Building, Mithakali, Ahmedabad and Zaveri Bazar, Mumbai. Apart from doing this, business of taking money on interest and giving advances on interest in cash, the group was also providing services of courier of cash to various clients by charging nominal sum. Such cash used to be transferred by the group on behalf of the clients between any of its branch situated at Modesha, Ahmedabad and Mumbai. The statements of various persons in this group were recorded at different places and at different times. Lots of documents were seized from different places. According to the Assessing Officer, DCIT, Central Circle 2(1) vide letter dated 05-09-1999 has forwarded the extract of transactions recorded in the name of B D Ahoskbhai, on various dates, with extract of ledger prepared on the basis of this diary for the period starting from First November, 1994, to 28th May, 1995 was supplied to the Assessing Officer having jurisdiction over the assessee. The Id. Assessing Officer has recorded reasons and issued notice u/s. 148 of the income tax act which was duly served upon the assessee on 23rd January, 2001. The Assessing Officer thereafter issued a notice u/s. 143(2)/142(1).

7. The first fold of the grievance of the assessee is that Id. Assessing Officer has erred in reopening the assessment by issuance of a notice u/s. 148 of the income tax act. With the assistance of Id. counsel for the assessee, we have gone through the record carefully. Section 147 of the income tax act contemplates that if the Assessing Officer has reasons to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148 to 153,

assess or re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceeding under this section, or re-compute the loss or the depreciation, allowance or any other allowance as the case may be for the assessment year concerned. The emphasis of the appellant is that Assessing Officer which was not possessing any concrete information which has a direct nexus with the escapement of income in the case of the assessee. The material possessed by the Assessing Officer is of such a nature, which can only give rise to suspicion and, therefore, he was not justified to reopen the assessment. On the other hand, Id. Departmental Representative relied upon the orders of revenue authorities below.

8. On due consideration of the facts and circumstances, we find that information in the shape of communication made by DCIT, Central Circle 2(1) is specific and clear demonstrating the modus operandi of L.T. Shroff and Group. The name of B D Ashokbhai is available in the list resemble with the assessee and, therefore, Assessing Officer can reasonably harbour a belief that income belonging to the assessee has escaped from taxation. Therefore, he has rightly reopened the assessment and issued notice to both the assessee u/s. 148 of the income tax act. We do not find any merit in this fold of contention.

9. In the next fold of grievance, the appellants are impugning addition of Rs. 7,90,000/- in the case of Ashokbhailal Chokshi, Assessment Year 1995-96, and Rs. 53,35,700/- and Rs. 1,48,000/- in the case of M/s. Chokshi Bhailal Dahyabhai and Co. for Assessment Year 1995-96 and 1996-97.

10. As observed earlier, the FERA authorities have seized a cash book from Mumbai office of LT Shroff Group. This diary was written in the form of cash book in which all the transactions (including courier etc) for the period between 1-11-1995 to 23-05-1995 were recorded. As per the system of maintaining accounts of unaccounted business by LT Shroff group, the transactions with various clients used to be ledgered in the accounts of such clients only, while as far as the courier transactions were concerned, if the cash was received at Mumbai office for any clients to be transferred to Manek Chowk Office then, against the debiting the cash book, the account of Manek Chawk office used to be credited instead of crediting the party. On perusal of seized material, Ld. Assessing Officer formed an opinion that in the financial year 1994-95 relevant to 1995-96, the assessee has deposited a sum of Rs. 61,25,700/- on different dates from 08-11-1994 to 21-03-1995. He confronted the assessee to explain the source of these deposits with LT Shroff Group. The assessee filed reply vide letter dated 18-03-2002. He contended that he has never done any business with LT Shroff Group. Statement of Ashokbhai was recorded by the Assessing Officer on 28th March, 2002. The assessee has specifically denied when suggestion put by the Assessing Officer in connection with any transaction carried out with Lt Shroff Group. The assessee has specifically asked for supply of the copy of the diary as well as cross-examination of the author of the diary. It appears that pages of the diary were given to the assessee but he was not apprised the author of the diary and he was not allowed to cross examine the author. The Id. Assessing Officer concluded that sufficient evidence was found by the search party demonstrating that LT. Shroff was carrying out this activity in an organized manner. The name of the assessee reflects in the list of

persons at serial no. 19. The Id. Assessing Officer has reproduced the statement of Shri Kallpesh Takkar recorded by the income tax authorities u/s. 132. He ultimately made an addition of Rs. 61,25,700/- in Assessment Year 1995-96. The entries relevant for Assessment Year 1996-97 were added in the hands of firm in that assessment year. Similar addition has been made in Assessment Year 1995-96 in the hands of the firm on the ground that these deposits might have been made by the firm.

11. On appeal, Ld. First Appellate Authority has confirmed the addition of Rs. 7,90,000/- in the hands of Shri Ashokbhai. However, in the case of the firm Ld. First Appellate Authority has observed that the firm had made a payment of Rs. 53,35,700/- and therefore, to this extent it is to be confirmed in the firm. The relevant finding of the Commissioner of Income Tax (Appeals) in the case of Shri Ashokbhai Chokshi Assessment Year 1995-96 is worth to note.

“9. The submissions of the appellant and contentions of the A.O. have been considered along with the facts and circumstances of the case. It is true that the A.O. has utilized the evidences gathered from the premises of L.T. Thakker Group by the FERA Authorities and also by I.T. Authorities. It is also a fact that cross examination of the persons who wrote the account books and the said diaries of L.T. Thakker Group was not allowed. It may however, be observed that the facts and circumstances brought on record by carrying out search action were extraordinary. The L.T. Shroff Group was engaged in financing business at large scale and the materials brought to light showed that several persons of Ahmedabad deposited unaccounted money with them. The A.O. has stated that Shri Kalpesh Thakker had identified some parties on the basis of the notings in the said diary and some of them disclosed the amounts as their income under VDIS.

10. It may also be necessary to mention here that after the search action the L.T. Thakker Group claimed to have closed down their business and the present A.O. having jurisdiction over the Thakker

Group has informed that Shri Kalpesh Thakker is not traceable. The Commissioner of Income Tax, Ahmedabad I, Ahmedabad has informed that he has requested Shri Balkrishna T. Thakker CA., who represented Shri Kalpesh Thakker during Block Assessments, to give the whereabouts of Shri Kalpesh Thakker. From the facts and circumstances, it may appear that Shri Kalpesh Thakker has not been available on the addressed known to the Department.

11. Before coming to a conclusion, it may be necessary to note that the circumstances in the present case are unique and extraordinary. The appellant has primarily raised only technical objections. On the other hand, the person who was a party to the transactions and whose evidence is very important to the issue involved has become untraceable. The Courts including the Apex Court have held that taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by apply the test of human probabilities. [Sumati Dayal vs. CIT, 214 ITR 801 at page No. 805].

12. From careful perusal of the chart given by the A.O. in the order it is seen that Rs.61,25,700/- was deposited in cash on various dates with L.T. Thakker Group. Statement of Shri Kalpesh Thakker was recorded on oath and the A.O. has quoted from the said statement in the body of the order. It may be observed that an amount of Rs.61,25,700/- was received by L.T Thakker Group in cash from B.D. Ashokbhai or B.D. or Ashokbhai on different dates. B.D apparently stands for Bhailal Dahyabhai i.e. the appellant firm. On three dates which are 8.11.1994, 25.11.1994 and 08.12.1994 total amount of Rs.7,90,000/- was paid to L.T. Thakker by Shri Ashokbhai and not by B.D. or B.D. Ashokbhai. In the circumstances, the argument of the appellant that the payments, if any, were made by B.D. and not by him, is not fully acceptable. Name of the appellant is clearly appearing in respect of payments of Rs.1,50,000/-, Rs.1,40,000/- and Rs.5,00,000/- on 08.11.1994, 25.11.1994 and 08.12.1994 respectively. Thus, it may be inferred that only payment of the sum of Rs.7,90,000/- was made by the appellant and the payment of other amounts was not made by him but by M/s. Bhailal Dahyabhai Chokshi & Co., the partnership firm in which the appellant was one of the partners. On consideration of the entire facts and circumstances, out of the total addition of Rs.61,25,700/-, addition to the extent of Rs.7,90,000/- is sustained. Addition to the extent of Rs.53,35,700/- is deleted."

12. With the assistance of Ld. representatives, we have gone through the record carefully. The sole question for our adjudication is, whether department was able to lay its hands on a conclusive evidence demonstrating the fact the assessee, Ashokbhai/the firm made deposits with L.T. Shroff group which would have given interest income. Before we evaluate the evidence and its reliability according to the Evidence Act, we deem it appropriate to have a look on the quality of evidence. According to the Assessing Officer, the statement of Shri Kalpesh Thakkar of L T Shroff Group was recorded during the course of survey u/s. 132(4) of the Act. In his statement, he explained the modus operandi and also explained the names, addresses, noticed in the abbreviated form in the diary. The photocopy of the diary relevant, assessee has been placed on page 79 of the paper book. Apart from, entries starting 08-11-94 to 3rd May, 1995, consolidating read as under:-

B.D. Ashokbhai		Sr. No. 79
Transfer Credits		Rs.
08-11-1994		150,000/-
09-11-1994		350000/-
19-11-1994		499700/-
23-11-1994		200000/-
25-11-1994		140,000/-
26-11-1994		200000/-
08-12-1994		500000/-
10-12-1994		325000/-
16-12-1994		375000/-
09-01-1995		800000/-
20-01-1995		240000/-
21-01-1995		270000/-
27-01-1995		300000/-

02-02-1995	300000/-
16-02-1995	220000/-
08-03-1995	500000/-
20-03-1995	266000/-
21-03-1995	290000/-
21-03-1995	200000/-
24-04-1995	280000/-
27-04-1995	500000/-
03-05-1995	700000/-

13. This entry was explained by the representative of L.T. Shroff. The letter written by Shri Kalpesh C Takkar in the block assessment proceeding of L. T. Shroff group dated 18-09-997 is available on page 80. Along with this letter, he has annexed an annexure explaining the entries in the diary as well as name and address of the persons. With regard to the assessee, following details are being alleged.:

N.K. Oil	Popular House, Ashram Road,	(O) 6423405
Nimeshbhai	Ahmedabad	6561884
		(R) 400719
		6561942
Labh Construction	Shantnu Nr. Hotel	(O) 6421122
Harshadbhai	Classic Gold, Navrangpura,	(R) 6423837
	Ahmedabad	
P.D. (Abhokbhia, Bhailal Manekchowk		
Duhjabhai	Ahmedabad	
Subhashbhai Shah	7 th Floor, Hemkut Building	(O) 6584546
(Multiple Cap Stock)	Nr. Ghandigram Railway	6580228
	Station, Ahmedabad	(R) 6620269
		417001
Chimanbhai Agrawal	Blue Star Building,	(O) 46698

High Cort Crossing,
erd Floor
Ahmedabad

14. When assessee was confronted with this evidence then he filed a letter dated 21st March, 2002 which is available on the page 60 of the paper book. It is pertinent to take note of this letter.:

Ashokkumar Bhailalbhai Chokshi,

21st March, 2002

*To,
The Income-tax Officer,
Ward-3(2), Ahmedabad*

Sir,

Sub: Clarification of certain issues-

In compliance of your notices and summons u/s. 131, I have attended your honour's office on 20-03-2002 and my statement was recorded on oath on the basis of alleged materials available on your record which was shown to me at the time of recording statement.

On seeing, it is seen that there is neither any signature on the copy of transactions as alleged by your honour in my name and further your honour have also shown me various papers from the records of the L.T. Shroff Group which are also not signed by anybody and therefore there is no authenticity of the said papers and therefore no cognizance can be taken under the provisions of the Indian Income tax Act and therefore my statement recorded on the basis of the unauthenticated information deserves to be ignored and no assessment against me may please be made. Further, I have also filed a copy of Affidavit dated 18-03-2002 along with the letter of even date.

In the aforesaid letter I have also emphatically requested your honour to kindly grant me an opportunity to examine the party who is your witness and without giving me any opportunity for cross

*examination of your witness, no assessment may please be made against me as I have not done any transaction with the L.T. Group.
 Thanking you,*

*Yours Faithfully,
 Sd/-
 (Ashokkumar Bhailal Chokshi)*

15. Similarly, he wrote a letter dated 18th March, 2002. The relevant part of this letter is also worth to note:

*From:
 Ashokkumar Bhailalbhai Chokshi
 2342/1 Manek Chowk,
 Ahmedabad
 18-03-2002*

*To
 The Income Tax-officer,
 Ward 3(2)
 Ahmedabad*

Dear Sir,

*Reg: Compliance of notices u/s. 143(2), 142(1) and
 Show-cause notices dated 08-03-2002*

*X X X X X
 X X X X X*

On perusal of your above show cause notice, it is alleged that diary was seized and transactions are noted in the said diary and amount stated in the aforesaid notice are also reflected in the said diary for which I have to request your honour to kindly grant copy of relevant pages of the said diary and to produce the person who has written the diary and the person who is the owner of the diary and the party in whose custody the diary was found out.

*X X X X X X
 X X X X X X*

Before making any assessment in my hand the party which is your witness be called upon so as to cross examine the said witness of the department.

X	X	X	X	X	X
X	X	X	X	X	X

Thanking you,

Yours faithfully

Sd/-

(Ashokkumar Bhailalbhai Chokshi)

Encl: As above"

16. On a perusal, the above evidence vis-à-vis the stand of assessee, we are of the view that Hon^{ble} Supreme Court way back 1980 in the case of Kishanchand Chellaram vs. Commissioner of Income Tax reported in 125 ITR 713 dealing with an assessment year 1947-48 has observed that, if the opportunity to cross-examine the witness upon whose statement reliance is being placed was not granted, then, that statement recorded behind the back of assessee cannot be used in evidence. Similar is the exposition by the Hon^{ble} Supreme Court in the case of State of Kerala vs. K.T. Sadala Yusuf 39 ITC 478. According to the department, it is possessing a diary which contains names of different individual/office/firms who had either deposited the money with LT Shroff or availed loan facility. Now, the evidence which we have extracted above nowhere gave a pointer towards the assessee in clinching way. We have reproduced the explanation of Kalpesh Takkar given in his assessment proceedings. We find that as far as assessee is concerned, it only say B.D. Abdullal Dhujibhai Manek Chowk. Against all the other concerns, their office telephone no. residence phone no. were being mentioned. There is no corroborative evidence apart from this explanation of L.T. Shroff. This is a diary written by a third person found at the premises of the third person. It was not written by assessee. The assessee repeatedly asked to bring the

author and give him an opportunity to cross-examine. If that man is not traceable, then it does not mean that assessee would be deprived of his right to verify how his name has been mentioned in the alleged diary. When he has no alleged connection with L.T Shroff, the department ought to have collected some other corroborative evidences which can establish the nexus or link between the assessee and L. T Shroff. The evidence collected by the department is not worthy of credence, more particularly in view of the judgment of Hon^{ble} Supreme Court in the case of CBI vs. V.C. Shukla & others reported in 1998 35 SSC page 410. There is no independent evidence on the record, therefore, we are of the view that addition with the help of this much information can not be made. We allow all the three appeals and delete the additions.

17. As far as ITA No. 512/Ahd/2006 is concerned, in this appeal, the grievance of the assessee is that Ld. Commissioner of Income Tax(A) has erred in confirming the penalty imposed u/s. 271(1)(c) of the income tax act.

18. With the assistance of Ld. Representatives, we have gone through the record carefully. Section 271(1)(c) of the Act has a direct bearing on the controversy and, therefore, it is salutary upon us to take note of the relevant provisions of section 271(1)(c) along with Explanation 1 which read as under:

"271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) The Assessing Officer or the Commissioner (Appeals) or the CIT in the of course of any proceedings under this Act, is satisfied that any person

(a) and (b)**

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(c) has concealed the particulars of his income or furnished inaccurate particulars of such income.

He may direct that such person shall pay by way of penalty.

(i)and (Income-tax Officer,)** **

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(iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:

Explanation 1- Where in respect of any facts material to the computation of the total income of any person under this Act,

(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the CIT to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income or such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.ò

19. Perusal of sub-clause III would indicate that in case it is proved that assessee has concealed particulars of income or furnished inaccurate particulars then, in addition to taxes, if any, payable by him, a sum which

shall not be less than but which shall not exceed the three times of the amount of taxes sought to be evaded by reason of concealment of particulars of income will be payable by the assessee. In the present case, we have deleted the quantum addition, therefore, the charge against the assessee of evading the taxes on the addition no more survive. There cannot be any penalty which can be computed in the present case. As a result, this appeal is also allowed and penalty is deleted.

Order pronounced in the open court on 12-06-2015

Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT

Ahmedabad : Dated 12/06/2015

ak

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

आदेश कक्षा तालम अपेक्षित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलार्थ अधिकरण,
अहमदाबाद