INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.N.CHARY, JUDICIAL MEMBER

ITA No. 4881 to 4883/Del/2016
(Assessment Year: 2010-11, 2012-13 and 2013-14)

Ram Niwas Gupta, 59/6, Tyagi Road, Dehradun PAN: ABIPG9411E	Vs.	DCIT, Central Circle, Dehradun
(Appellant)		(Respondent)

Assessee by :	Shri Kapil Goel, Adv
Revenue by:	Smt Sulekha Verma, CIT DR
Date of Hearing	05/12/2018
Date of pronouncement	06/2/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the three appeals filed by the assessee against the order of the ld CIT(A)-2, Agra (camp at Dehradun) dated 31.03.2016 for the Assessment Years 2010-11, 2012-13 and 2013-14.

Facts of AY 2010-11

2. For assessment year 2010 – 11, brief facts of the case are that assessee is an individual deriving income from salary, business, house property and other sources. Search was carried out at business and residential premises of the assessee on 26/4/2012 in group case of Ganga Realtors group of cases. Notice u/s 153A of the act, was issued on 03/06/2013 for assessment year 2010 – 11. The assessee furnished his return of income on 4/9/2013 declaring income of INR 572690/–. Assessment under section 153A, read with section 143 (3) was passed on 22/9/2014 determining total income of the assessee at INR 5711954/–. The assessee agitated the issue before the learned CIT – A, who passed an order dated 31/3/2016 partly allowing the appeal of the assessee. Therefore, now the assessee is aggrieved by the confirmation of an addition of INR 125240/– made on account of alleged unexplained jewelry under section 69B of the act and further addition of INR 1640,000/– on

account of undisclosed investment in purchase of a property. Therefore assessee is in appeal.

3. The assessee has raised the following grounds of appeal in ITA NO. 4881/Del/2016 for the Assessment Year 2010-11:-

> "*1. That on the facts and in the circumstances of the case and in law, learned Commissioner of Income-tax (Appeals) erred in not deleting the addition of Rs. 1,25,240/- made on account of alleged unexplained jwelery u/s 69B overlooking the fact that said jwelery is very well covered by CBDT instruction & is in accordance with social and marital status of assessee herein.*
>
> *2. That on the facts and in the circumstances of the case and in law, learned Commissioner of Income-tax (Appeals) erred in sustaining the addition on account of undisclosed investment of Rs. 16,40,000/- contrary to the consideration as mentioned in duly registered sale deed."*

4. Adverting to the first ground of addition of jewelry, facts shows that during the course of search documents at page number 62 – 75 of annexure A – 1, were found which were the invoices of the purchases of gold and diamond jewelry worth INR 1083958/- for financial year 2006 – 07 to financial year 2010 – 11. The assessee was asked to show the source of the investment in the jewelry as in the balance-sheet he disclosed jewelry worth INR 205000/– only. Assessee did not file wealth tax returns. Assessee explained that he purchased the above jewelry for relatives and friends on their behalf. The learned assessing officer rejected the explanation of the assessee as no documentary evidences were filed in support of the ownership of jewelry mentioned in the invoices. As the invoices have been found from possession of the assessee from his residence, learned AO held that jewelry belongs to the assessee and was purchased by him. As an amount of INR 125240/– of jewelry pertains to financial year 2009 – 10, the addition was made. On appeal before the learned CIT – A, the addition was confirmed. Ld CIT -A was of the view that the presumption on the basis of which the learned AO proceeded to make the addition remains that since purchase invoices of jewelry were found during the course of search , it was incumbent upon the appellant to prove that this did not relate to him. He further held that appellant has not carried his assertions with any documentary support to prove that the papers indicative of purchase of jewelry were not his but same belonged to his friends and relatives. According to him Assessee failed to substantiate it. Therefore he held that the

appellant cannot be absolved from the onus that weighs heavily upon him. Accordingly he confirmed the addition. The assessee has challenged it as per ground number one of the appeal.

5. The learned authorised representative vehemently stated that during the course of search 5 invoices of purchase of jewelry were found along with 27.967 gram of the jewelry and certain cards containing the details of jewelry. He submitted that invoices of the jewelry are pertaining from financial year 2007 – 08 till the date of search. It was further his submission that central board of direct taxes have issued a circular wherein if the jewelry is falling within the allowed limit per person of the family according to the status, then no addition should be made. He therefore submitted that the assessee deserves the grant of benefit of that circular at least. For this proposition he relied upon the decision of the honourable Gujarat High Court in 339 ITR 351.

6. The learned departmental representative vehemently stated that the orders of the lower authorities may be affirmed for the simple reason that assessee is found in possession of certain invoices of purchase of jewelry as well as the jewelry. She submitted that benefit of circular cannot be given where the invoices of purchase of jewelry were found and not the actual jewelry.

7. We have carefully considered the rival contentions and perused the orders of the lower authorities. Fact shows that during the course of search conducted at the residence of the assessee on 26/4/2012 certain documents were found which were the invoices of the purchase of gold and diamond jewellery worth INR 1083958 for period from financial year 2006 – 07 to financial year 2010 – 11. The assessee was asked the question about the source of funds for purchase of the jewelry. The assessee submitted that these are the purchases made by him for his relatives and friends on their behalf. This argument of the assessee was negated and the addition was made and confirmed by the learned lower authorities. The only plea before us of the learned authorised representative is that the assessee should be granted the benefit of the circular of the CBDT which has been considered by the honourable Gujarat High Court. The honourable Gujarat High Court in CIT V Rtanlal Vyaparilal Jain 339 ITR 351 has held with respect to the possession of the jewelry and the source of acquisition of the jewelry, qua circular issued by CBDT as under :-

"9. As can be seen from the impugned order of the Tribunal, the Tribunal has referred to the Central Board of Direct Taxes Circular No. 1916 and observed that in an earlier decision of the Tribunal, the Tribunal has accepted the applicability of the circular and has held that having regard to the circular and size of the family, the ornaments to the extent specified in the circular should be accepted as reasonable. The Tribunal, accordingly, found that the jewellery held by the assessee and his family members was well within the limit laid down under the Central Board of Direct Taxes circular and, accordingly, deleted the whole addition on the ground that the jewellery held by each of the family members was below the limits specified in the said circular.

10. Though it is true that the Central Board of Direct Taxes Circular No. 1916, dated May 11, 1994, lays down guidelines for seizure of jewellery and ornaments in the course of search, the same takes into account the quantity of jewellery which would generally be held by the family members of an assessee belonging to an ordinary Hindu household. The approach adopted by the Tribunal in following the said circular and giving benefit to the assessee, even for explaining the source in respect of the jewellery being held by the family is in consonance with the general practice in the Hindu families whereby jewellery is gifted by the relatives and friends at the time of social functions, viz., marriages, birthdays, marriage anniversary and other festivals. These gifts are customary and customs prevailing in a society cannot be ignored. Thus, although the circular had been issued for the purpose of non-seizure of jewellery during the course of search, the basis for the same recognizes customs prevailing in the Hindu society. In the circumstances, unless the Revenue shows anything to the contrary, it can safely be presumed that the source to the extent of the jewellery stated in the circular stands explained. Thus, the approach adopted by the Tribunal in considering the extent of jewellery specified under the said circular to be a reasonable quantity, cannot be faulted with. In the circumstances,

it is not possible to state that the Tribunal has committed any legal error so as to give rise to a question of law."

[underline supplied by us]

In the present case the bills of purchase of jewelry were found instead of jwellery itself and assessee has explained that the jwelery is purchased for the friends and relatives of the assessee. In the above decision of Hon Gujarat High court the purpose of the issue of the circular was accepted. When the jewelry itself is found but the bills are not found the addition is made u/s 69 of the act. Further when the bills are found but the jewellery is not available with the assessee during the course of search the addition is also required to be made u/s 69 of the act. Therefore we do not find any difference in the above those situations so far as the overall jewellery found during the course of search as well as the bills of such jewellery do not exceed the limits specified in the above instructions. In view of this facts, and respectfully following the decision of the honourable Gujarat High Court, we set aside this issue back to the file of the learned AO, with a direction to the assessee to identify the total grams of the jewelry contained in the purchase bills as well as the actual jewellery found along with the details of the family members staying with the assessee, thereafter the AO may examine the same and grant benefit of instruction number 1994 dated 11/05/1994 to the assessee. In view of this the issue on account of addition of jewelry of INR 1 25240/– is set aside to the file of the assessing officer with above direction. Gr. No 1 is decided accordingly.

8. The 2nd edition related to the addition of INR 1640,000 with respect to cash received over and above the amount of sale consideration mentioned in the sale deed treated as undisclosed income of the assessee. Assessee as a joint owner (50 %) purchased a property for Rs 24.20 lakhs and offered capita gain. Balance 50 % belonged to Shri Akshat Bansal. During the course of search, a copy of sale deed was found and seized as per annexure LP – 1 at page number 100 – 182 dated 07/01/2010 for INR 24.20 Lacs whose market value was found to be INR 7,865,000 for land situated at Khasra number 217 admeasuring 1210 sq meter at Muja Kargi Grant Dehradun between three different sellers and Sri Akshat Bansal, wherein the details of payment of 3 cheques of INR 800,000 each of the federal bank Dehradun and INR 20,000

cash was mentioned. Stamp duty of INR 629200/– was paid. Post search enquiries were conducted by issuing summons u/s 131 of the income tax act by The Assistant Director of Income Tax to the sellers and the statement was recorded on oath. One of the person in his statement stated that he along with his brothers has entered into an agreement dated 16/12/2009 with Sri Shamshad Hasan and MS Balodi where land area admeasuring 1.5 Bigha was agreed to be sold at the rate of INR 3,800,000/- per bigha . Accordingly, agreed sale consideration was INR 5,700,000 out of which the cheques of Rs 8,00,000 each was given to the 3 brothers and out of the balance of INR 3,300,000 receivable only INR 3,000,000 was received in cash and balance INR 300,000 was stated to be receivable. It was further stated that the deal was facilitated by one Sri Basant. Shri Prakash Chand, one of the sellers, confirmed the above transaction that he received INR 800,000 and INR 1,000,000 by cheque and cash respectively. The other person (3rd one) could not attend the office, but he filed a written letter wherein it was stated that he also received cheque of INR 800,000 and cash of INR 1,000,000. There are also certain cash deposits in these three bank accounts of the different persons. Therefore the learned assessing officer drew the conclusion that Shri Akshat Bansal and the assessee sold land for a consideration of INR 5,700,000 whereas the sale deed has been executed of Rs. 24.20 Lacs only. The circle rate of the property is INR 7,865,000. The assessee was confronted by issue of show cause notice. Assessee submitted that he and Akshat Bansal were not party to the agreement dated 16/12/2009 and as there was no approachable road to the land, it was purchased at a lesser rate. The learned AO rejected the explanation of the assessee holding that the sale deed was registered along with the 2 witnesses who signed the sale deed as well as the agreement to sale. He further held that bank account of father of one of the Buyer (Akshat bansal) shows that two cheques were issued which coincide with the agreement date of 16/12/2009. Accordingly, the learned assessing officer made an addition of INR 3280,000 holding that about cash was received Over and above the amount of sale consideration mentioned in the sale deed treating it as undisclosed income of the assessee and Shri Akshat Bansal, consequently addition of Rs 1640000/- at the rate of 50% was made in the hands of assessee.

9. The main contention of the learned authorised representative is that above addition cannot be made in the hands of the assessee for following reasons

   a. Above statement recorded by the assessing officer was not confronted to the assessee.

   b. The agreements were also not found from the assessee's search and therefore same cannot be included in the assessment u/s 153A of the income tax act. He further stated that that no incriminating material was unearthed from the assessee's own search u/s 132 of the income tax act but the statements were taken by the revenue authorities subsequently. He therefore submitted that only option available with the revenue was to initiate proceedings under section 148 of the income tax act.

   c. He further stated that the assessing officer was also requested for the cross-examination of these parties however same was denied. He therefore submitted that as held by the honourable Supreme Court in case of Anadaman Timbers [281 CTR 472] any addition made without granting an opportunity of cross-examination of the witnesses who statements have been used by the assessing officer for making an addition is invalid.

   He therefore submitted that this additions deserves to be deleted on all these counts.

10. The learned departmental representative vehemently supported the order of the lower authorities. She referred paragraph number 5 of the order of the learned AO and stated that during the course of search copy of sale deed was found and seized. Such sale deed shows that the market value of the property is INR 7,865,000 which is purchased at INR 24.20 Lacs. Therefore there is an incriminating material found during the course of search. On the basis of the incriminating material found during the course of search the learned assessing officer has made further enquiries. Therefore it cannot be said that no addition can be made on this count. On the issue of the cross-examination raised by the assessee she referred the decision of the coordinate bench in 59 taxmann.com 212. She submitted that when assessee was confronted by the questionnaire dated 18/6/2014 and show cause notice dated 24/7/2014 the assessee got reasonable opportunity of rebutting the statement made by those

parties. Therefore according to her there is no requirement of granting cross-examination to the assessee. She further submitted that merely because cross-examination has not given to the assessee of witnesses; addition cannot be deleted as there is no violation of principles of natural justice because assessee was put to the notice.

11. We have carefully considered the rival contentions and perused the orders of the lower authorities. The fact shows that sale deed was found during the course of search where the transaction value of the property was shown at INR 2,420,000 and market value of the property was INR 7,865,000. On the basis of this evidence revenue carried out post search enquiries with the sellers. The sellers in their statement on oath stated that along with the above sale deed another agreement was entered on 16/12/2009 with other parties where the sale consideration was stated to be of INR 5,700,000. The sellers also confirmed having received the cash amount and also deposited the same in their bank accounts. However agreement dated 16/12/2009 was executed by the sellers with 3rd parties and not with the assessee. The main contention of the assessee is that assessee was not a party to the agreement. Assessee further explained reason why there is a difference in the value of the property compared to market rate as there was no approachable road to the land. In the Consolidated reply filed by the assessee on 30/7/2014 to the assessing officer vide para number 2 of that letter, placed at page number 109 onwards in the paper book, clearly shows that assessee submitted that no opportunities was provided to cross examine any of the sellers or the persons who have signed the agreements with the sellers. Admittedly, there is no opportunity of the cross-examination granted to the assessee despite specific request made by the assessee before the assessing officer and therefore the moot question is that whether in suh a situation addition can be made without granting opportunity of cross examination to the assessee. Hon Supreme court in . 2015 (324) E.L.T. 641 (SC), 2017 (50) S.T.R. 93 (SC), 2016 (15) SCC 785 ANDAMAN TIMBER INDUSTRIES VERSUS COMMISSIONER OF CENTRAL EXCISE, KOLKATA-II it is held that :-

> *"6. According to us, <u>not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw</u>*

which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guesswork as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price-list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price-list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show-Cause Notice."

[Underline supplied by us]

12. The Honorable supreme court held that when additions are solely based on the statement of third parties, the additions are not sustainable unless their cross examination is granted. In the present case also the statement of the sellers were taken in post search inquiries and based on their statement where they have also submitted an MOU showing sales consideration of Rs 57 lakhs, Admittedly in the MOU assessee is neither a signatory nor witness. Therefore the addition is solely based on the statement of sellers. Assessee requested for cross examination of those sellers but same was not granted. Hence, without granting such an opportunity, addition is made. Therefore according to us the same is not in conformity with the decision of the Honourable Supreme Court in Anadaman Timbers case (supra) where it is held that such an action renders the addition a nullity.

13. Further the ld CIT DR has vehemently relied up on decision in case of 2015] 59 taxmann.com 212 (Delhi - Trib.) Nokia India (P.) Ltd.v.Deputy Director of Income-tax, Circle -2(1), International Taxation, New Delhi . That decision was on different facts where during the course of survey statement of employees of the assessee were recorded and assessee asked for cross examination. Further the adverse view against the assessee was also not on the solitary basis of statement of employees but many other materials. In that case the statements were recorded of the employees in survey proceedings u/s 133A of the act and those statements were stated by the ld AO himself as merely corroborating evidences and not the only evidence [para no 6.18]

6.18 As regards the proceedings before the Assessing Officer (AO), ld. Special Counsel pointed out that in Para 3.2 of the order under section 201 of the Act, concluding the discussion on the nature of the Transaction, the AO has held that from the Transfer Pricing documentation, Software Supply Agreement dated 01.01.2006 and R&O sub-contract agreement between M/s. Nokia Corporation, Finland and M/s.

Nokia India Ltd, emails and Statements that the payments for various intellectual property rights supplied by M/s. Nokia Corporation, Finland were being made regularly. Thus, Assessing Officer did not solely relied on the statements of employees only but used them to corroborate his findings. Ld. Special Counsel further submitted that at page 22 of his order, the AO has clearly stated that the statements without exception are relied upon not to establish the default, but to corroborate certain aspects such as the manufacturing process, the software downloads, the manual preparation of invoices, basis of preparation and that there was no material change in the whole process of doing so since inception. The AO at page (22) of his order has held that the contention of the assessee was not acceptable for reasons as under:

1. The individuals in whose case statements have been recorded are responsible and accountable employees of the company, who have recorded without any fear, coercion and influence;

2. The statements have been corroborated with the other enquiries and business activities of the enterprise before deriving any conclusions;

3. The statements are not made under any misconception of facts but to explain the facts; and

4. Statements are one of the best forms of evidence that an opposing party can rely upon and though not conclusive are decisive unless successfully withdrawn or proved erroneous. Reliance was be placed on *Narayan Bhagwantrao Gasavi Batajiwale* v. *Gopal* AIR 1960 SC 100 and *Pranav Construction Co.* v. *Asstt. CIT* [1998] 96 Taxman 323 (Mag.) (Mum.).

14. In that decision while considering another decision of the coordinate bench **GTC Industries Ltd. v. Asstt. CIT [1998] 65 ITD 380**, in [Para No 12.3 sub para 105] has held that if a witness has given a directly incriminating statement and addition in the assessment is based solely or mainly on the basis of such statement, in the eventuality it is incumbent up on assessing officer to allow cross examination . It was further elaborated that :-

> **"96.** The appellant's basic contention is that the statement of witnesses and materials which are relied upon by the Assessing Officer in the assessment order to reach the conclusions and findings which are adverse to the assessee should be disclosed to the appellant and the witnesses should be offered for cross-examination. Supreme Court in the case of *Suraj Mall Mohta & Co.* (*supra*) laid down :

"the assessee ordinarily has the fullest right to inspect the records and all documents and materials that are to be used against him. Under the provisions of section 37 of the Indian Income-tax Act the proceedings before the Income-tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at. In other words, the assessee would have a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal."

97. In the case of *K.T. Shaduli Grocery Dealer* (*supra*), it was held (at p. 1631) :

". . . the usual mode recognized by law for proving fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness of completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to cross-examine witnesses examined by the Sales-tax Officer. Here in the present case the return filed by the assessee appeared to the STO to be incorrect and incomplete because certain sales appearing in the books of Hazi Usmankutty and other wholesale dealers were not shown in the books of account of the assessee. The STO relied on the evidence furnished by the entries in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other wholesale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete the assessee was entitled to an opportunity to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and

exposing falsehood. Here, it was not disputed on behalf of the revenue that the assessee in both cases applied to the STO for summoning Hazi Usmankutty and other wholesale dealers for cross-examination but his application was turned down by the STO. This act of the STO in refusing to summon Hazi Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee."

98. It is pertinent to note that in the case of *M.K. Thomas* (*supra*), it was held that the decision in *K.T. Shaduli Grocery Dealer's* case (*supra*), cannot be understood as recognising a right of cross-examination as an invariable attribute of the requirements of reasonable opportunity. The Apex Court has stated the rule with sufficient elasticity and amplitude as to make the right depend on the terms of the statute, the nature of the proceedings or of the function exercised, the conduct of the party and the circumstances of the case.

99. "Whether in a particular case the particular party should have the right to cross-examine or not depends upon the facts and circumstances of a particular case. This is so, because the right to cross-examine is not necessarily a part of reasonable opportunity." This view was taken by the Calcutta High Court in the case of *Manindra Nath Chatterjee* (*supra*). Thus in a given case the rule of *audi alteram partem* may impost a requirement that witnesses whose statements are sought to be relied upon by the authority holding the enquiry should be permitted to be cross-examined by the party affected while in some other case it may not.

100. In the case of *Kishanchand Chellaram* (*supra*), the Apex Court was concerned with the evidence which was to be used against the assessee. This was in the form of letter from the Manger of a Bank through which money was remitted. This letter was not shown to the assessee. Therefore, evidence was held not to be admissible. It was held that opportunity to controvert should be given to the assessee.

101. In the case of *Dr. Rash Lal Yadav* (*supra*), it was held :

"The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (*i*) no one shall be a judge in his own cause, and (*ii*) no one shall be condemned unheard. With the passage of time a third element was introduced, namely of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage."

102. In the case of *Mahendra Electricals Ltd.* (*supra*), it was held that:

"The opportunity to cross-examine the witness who has made adverse report should not be denied, to the opposite party."

103. The concept and contents of natural justice go on changing. Natural justice is a living organism, advanced from time to time. Courts are giving new dimensions to the principles of natural justice. The principles embodied reflect the value of the society accepted for time being. The change is a fact of life. Every living thing takes new shape, new dimension with the flux of time. Hon'ble Supreme Court has observed in 44 STC 61 (*sic*) :

"It must be remembered that law is not a mausoleum. It is not an antique to be taken down, dusted, admired and put back on the shelf. It is rather like and old but vigorous tree, having its roots in history yet continuously taking new grafts and putting out new sprout and occasionally dropping dead words. It is essentially a social process, the end product of which is justice and hence, it must keep on growing and developing with changing social concepts and values. Otherwise, there will be estrangement between law and justice and law will cease to have legitimacy."

104. 'No riddle is more difficult to solve, none has more persistently engaged the attention of thoughtful mind', says Allen, than the problem of the natural sense of justice. We have carefully considered the profile of the subject in the light of the latest developments. Principles of justice prohibit, determination without hearing. [Terminer sans over] Similarly, hearing without determination [Over sans Terminer] is also interdicted by the finer norms of justice. That all is required is impartial and fair hearing, and determination of disputes with utmost promptitude. The question whether or not any rules of natural justice had been contravened, should be decided not under any preconceived notions but in the light of the statutory rules and provisions. The violation or otherwise of any rule of natural justice must be a matter of substance not of mere form. It is important to keep in mind the caveat issued by the Apex Court AIR 1977 SC 965 that unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating.

105. In our opinion right to cross-examine the witness who made adverse report, is not an invariable attribute of the requirement of the dictum, *'audi alteram partem'.* The principles of natural justice do not require formal cross-examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidence, and is the creation of Court. It is part of legal and statutory justice, and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the revenue cannot rely on any evidence which has not been subjected to cross-examination.

However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross-examination.

Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of Collateral Nature."

15. Therefore decision relied by the ld DR is also on the same line of reasoning as the decision cited by the ld AR. Therefore we do not have any hesitation is holding that when the addition is made solely on the basis of statement the third party and revenue does not have any other evidences, then without granting opportunity of cross examination , such addition cannot be made. In the result the assessee succeeds on the second issue. Gr. No 2 is allowed.

16. Accordingly appeal filed by the assessee for assessment year 2011 – 12 is allowed for statistical purposes.

AY 2012-13

17. The assessee has raised the following grounds of appeal in ITA NO. 4882/Del/2016 for the Assessment Year 2012-13:-

"1. That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in sustaining the addition of Rs. 18,09,000/- on account of cash recovered from the residence and bank locker during the course of search, totally regarding the explanation offered in this regard.

2. That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in sustaining the addition of Rs. 81,91,000/- solely on basis of uncorroborated statement purportedly recorded u/s 132(4) when there is no 'material' worth name to support it and said statement stood validly and timely retracted.

3. That on the facts and in the circumstances of the case and in law learned Commissioner of Income-tax (Appeals) made gross error in observing at Para 6.2 of impugned order while sustaining addition of Rs. 81,91,000/- that assessee could not prove his point to the hilt by perversely ignoring the consistent explanation of assessee."

18. For assessment year 2012 – 13 notice u/s 153A, was issued on 3/6/2013. The assessee filed his return of income on 16/9/2013 declaring income of INR 2080650/–. Assessment under section 153A, was made on 22/9/2014 determining total income of the assessee of INR 12080649/–. The addition of INR 1809000/– was made for the reason that during the course of search cash of INR 109000 was found from the residence of the assessee and INR 1,700,000 from his bank locker number 84 at federal bank. In his statement under section 132 (4), the assessee disclosed it to be part of his undisclosed income for assessment year 2011 – 12. In explanation before the assessing officer it is submitted that it represents the reported cash balance, as shown

in his statement of affairs by the assessee and his family members. This contention of the assessee was rejected as he has already declared in his statement recorded on oath that it was part of his undisclosed income. Therefore, the addition of INR 18,09,000/- was made as unexplained cash under section 69A of the income tax act. This addition was challenged by the assessee before the learned CIT – A, who confirmed the same.

19. The learned authorised representative referred to the fact that during the course of search an amount of INR 1809000/– has been found as cash in hand from the residence and bank locker of the assessee that the said amount represented the reported cash balance and his family members as per the statement of affairs filed with the Department. He referred to page number 83 of the paper book wherein he stated that as per statement of affairs of Shri Ram Niwas Gupta HUF the cash balances INR 1220243/–, Ram Niwas Gupta where the cash balance is INR 8 33530/– , Miss Swetha Gupta where the cash balances INR 1380180/– and Mrs Anurag Gupta where the cash in hand is INR 71033/–. He submitted that the total cash available on hand as on 31/3/2012 with the family members of the assessee is in all amounting to INR 3 504987/– whereas the amount of cash seized during the search operation was INR 1809000/–. He submitted that as the above cash balance as shown in the statement of affairs of the related family members of the assessee as per the return of income filed as on 31/3/2012 for respective assessment year is much higher than the cash found during search, such addition cannot be made. He submitted that both the lower authorities have rejected this contention of the assessee merely for the reason that assessee has already declared in his statement recorded on oath that it was part of his undisclosed income. He further stated that when the cash is available in the statement of affairs filed by the assessee along with the return of income for financial year ending on 31/3/2012 such cash balance should have been granted as credit against the total cash found during the search. He submitted that as the cash balance as per the statement of affairs is higher than the amount of cash found during the course of search, no addition on this account should be made. With respect to the statement, he stated that the retraction letter dated 9/7/2012 has already been filed before The Additional Director Of Income Tax (Investigation) by the appellant. Therefore such retracted statement cannot be

used as evidence against assessee. He otherwise submitted that merely because of the statement u/s 132 (4) of the income tax act, despite the fact that the assessee was having enough cash on hand which was not found to be spent against any other expenditure found during the course of search, assessee is entitled to the above cash on hand shown in the statement of affairs of the related parties. Hence it was submitted that addition should have been deleted by the lower authorities.

20. The learned departmental representative vehemently submitted that when the assessee has disclosed the above sum in his statement recorded u/s 132 (4) of the income tax act, he does not have any right to speak now to say that there was a statement of affairs in which the above cash on hand was shown. The learned CIT DR also stated that though the explanation of the statement of affairs given by the assessee before the lower authorities however such statement of affairs are not available before the ITAT or before the lower authorities and it is also not known whether such statement of affairs have already been filed before the lower authorities are not. In view of this she submitted that the addition cannot be deleted.

21. We have carefully considered the rival contentions and find that the assessee has made a statement under section 132 (4) of the income tax act on 26/4/2012 which was later on retracted by the assessee by filing a letter dated 9/7/2012. Further the disclosure has been made by the assessee in the answer to question number 11 of the statement recorded by the income tax department at the time of search. In the answer to question number 11 the assessee has disclosed stating that it is made for buying peace of mind and to cover up the discrepancies stated in the statement and to save himself from legal proceedings. Assessee declared income of Rs. 1 Crore for financial year 2011 – 12 and INR 7,500,000 declared or financial year 2012 – 13. On reading of the statement of the assessee dated 26/4/2012, prior to question number 11, there is no reference of any cash found and admitting that it is undisclosed income of the assessee. Therefore the lower authorities could not have linked the cash found with the disclosure made by the assessee. Further the assessee has stated concurrently before the lower authorities that the statement of affairs of the various related parties shows the cash on hand, which is much higher than the amount of cash found during the course of search. If the

above facts is proved to be correct, no addition on account of cash found during the course of search can be made. On reading of the statement of the assessee during the course of search it is also apparent that the statement of the various persons of the family of the assessee have also been obtained. However before The Assistant Director Of Income Tax (Investigation) the assessee was asked to file the copies of the return of income and the documents accompanying them along with the bank accounts statements of all individuals and family concerns run by the assessee and his family. In response to that , assessee submitted a letter dated 9/7/2012, in answer to question number 2 (iv) assessee has submitted the copies of the returns of income and the documents accompanying the return for all the individuals including the family concerns run by the family members of the assessee. Before us assessee has filed a copy of that letter but relevant annexure were not filed. Therfore it is not possible for us to verify that assessee has filed any statement of affairs or not along with the return of income. Before us assessee has not submitted the statement of affairs as stated before the lower authorities. However assessee has referred them in reply to the assessment proceedings vide letter dated 14/7/2014. Therefore in view of this the whole issue is set aside back to the file of the learned assessing officer with a direction to the assessee to show the statement of affairs of all these family concerns and individuals in whose account the assessee is saying that there is enough cash available on hand. The learned assessing officer may verify the same and if it is found that that such persons are having the cash balances in the statement of affairs , then after examination and proper verification, the learned assessing officer is directed to delete the addition of INR 1809000/– on account of cash found during the course of search. Accordingly ground number 1 of the appeal of the assessee is allowed for statistical purposes with above direction.

22. Coming to Ground No 2 and 3 of the appeal, A further addition of INR 8191000 was made on account of the voluntary disclosure made by the assessee in his statement recorded u/s 132 (4) of the income tax act on 26/4/2014 for as financial year 2011 – 12. As assessee has disclosed a sum of Rs 1 Crore for this year. Out of which the ld AO has made addition of Rs 1809000/- as unaccounted cash found, the balance addition of Rs 81,91,000/-

is made separately. The assessee did not submit the breakup of surrendered income and disclosing his return of income filed for the relevant assessment year. Therefore, as the cash found was also part of the disclosure. The amount of INR 7,500,000 was disclosed by the assessee in light of various discrepancies found in his accounts. Therefore, the balance amount of INR 8 191000/- that was added to the total income of the assessee. The assessee also challenges the above addition. Learned CIT – A confirmed the above addition. Therefore assessee is aggrieved with above additions preferred appeal before us.

23. The ld AR submitted that

a. Statement made by the assessee is retracted by the assessee by filing a letter dated 9/7/2012. The statement was recorded on 26/4/2012.
b. He stated that there is no evidence collected by the revenue during the search related to disclosure.
c. There is no evidence stated in the assessment order which is linked to the disclosure.
d. In the statement also there is no linkage of any material to the impugned disclosure.
e. He relied up on the decision of Hon Delhi high court in 397 ITR 82 and Andhra Pradesh high court in 370 ITR 671 and 369 ITR 171 and 379 ITR 367. He also referred to the circular of CBDT with respect to statement of disclosure to be linked with evidence.

24. Ld CIT DR also vehemently referred to several decision of Honourable High courts and submitted that when once the disclosure is made the addition is required to be made.

25. We have carefully considered the rival contentions and also perused the orders of the lower authorities. We have also perused the statement of assessee u/s 132 (4) of the act dated 26/4/2012 wherein he made the above disclosure. The letter dated 9/7/2012 stating that there is no undisclosed income earned by the assessee. He also stated that there is no evidence found during search. Along with the statement in search he also handed over 4 post dated cheques of tax payments of Rs 58.30 lakhs which were also not presented for payments by the revenue. No evidence were also referred by the ld AO while making the above addition or by the ld CIT (A) at the time of Confirming the same. Even

before us ld CIT DR also could not show the evidence on which the disclosure was made. The CBDT has issued a letter dated 18/12/2014 where in it has instructed its officers to not to obtain disclosure without gathering evidences supporting the disclosure. Further no coercive measures or pressure to be exerted for disclosure . The letter states as under :-

LETTER [F.NO.286/98/2013-IT (INV.II)], DATED 18-12-2014

Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T.Act,1961 and/or recording a disclosure of undisclosed income under undue pressure/ coercion shall be viewed by the Board adversely.

4. These guidelines may be brought to the notice of all concerned in your Region for strict compliance.

5. I have been further directed to request you to closely observe/oversee the actions of the officers functioning under you in this regard.

26. Further Hon Gujarat High court in case of . Kailashben Mangarlal Chokshi Vs CIT (2008) 174 Taxmann 466 (Guj.) / (2008) 14 DTR 257 (Guj.) has held that Merely on the basis admission, the assessee could not have been subjected to additions, unless and until some corroborative evidence was found in support of such admission In that decision also the statement was retracted by the assessee. Therfore based on the circular of CBDT as well as the decision of Honourable Gujarat High court, in absence of any material based on which disclosure is made, the addition cannot be sustained. In view of this Ground No 2 & 3 of the appeal is allowed.

27. Accoridngy appeal for AY 2012-13 is allowed.

For AY 2013-14

28. The assessee has raised the following grounds of appeal in ITA NO. 4883/Del/2016 for the Assessment Year 2013-14:-

"1. That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in sustaining the addition of Rs. 75,00,000/- solely on basis of uncorroborated statement purportedly recorded u/s 132(4) when there is no 'material' worth name to support it and said statement stood validly and timely retracted.

2. That on the facts and in the circumstances of the case and in law learned Commissioner of Income-tax (Appeals) made gross error in observing at Para 6.2 of impugned order while sustaining addition of Rs. 81,91,000/- that assessee could not prove his point to the hilt by perversely ignoring the consistent explanation of assessee."

3. That on the facts and in the circumstances of the case and in law, learned Commissioner of Income-tax (Appeals) erred in not deleting the addition of Rs. 3,32,040/- made on account of alleged unexplained jwelery u/s 69B overlooking the fact that said jwelery is very well covered by CBDT instruction and is in accordance with social and marital status of assessee herein."

29. For assessment year 2013 – 14 assessee was issued notice u/s 143 (2) on 11/11/2013. The assessee filed as return of income on 7/11/2013 declaring income of rupees 2122770/–. The assessment under section 143 (3) of the income tax act was passed on 22/9/2014 wherein an addition of INR 7,500,000 was made on account of the disclosure made in the statement recorded u/s 132 (4) of the act for the relevant financial year. This addition was made by the ld AO based on the statement made by assessee u/s 132 (4) of the

act. The addition was also confirmed by the ld CIT (A).Therefore same is challenged by assesee vide Ground no 1 and 2 of this appeal.

30. The Facts admitted by both the parties are that identical issue is in Ground of appeal of the assessee for AY 2012-13. This addition is also on the basis of the same statement. Therefore our decision while deciding the Ground no 2 & 3 for AY 2012-13 regarding addition of disclosure in the search statement for AY 2012-13 applies to it mutatis mutandis. Accordingly Ground no 1 & 2 of the appeal of the assessee is allowed.

31. The further, the addition of rupees 332040/– was also made on account of jewelry. During the search jewelry worth INR 728900/– was found from the assessee's residence and jewelry worth INR 599260 from his bank locker. The jewelry of INR 599260 was belonging to his wife as claimed by the assessee. However, the balance sheet showed the disclosure of only INR 2 05000 on account of jewelry. However the learned assessing officer made an addition of INR 332040 holding that 25% value of the total jewelry found of Rs. 1328160 u/s 69B of the act. The above addition was also confirmed in appeal by the learned CIT – A, and therefore the assessee is in appeal before us, raising above issue in Ground no. 3 of appeal.

32. Arguing parties confirmed that it is similar to Ground No 1 of the appeal of Ay 2010-11. That ground of appeal , we have set aside to the file of the ld AO in that year, therefore for the similar reasons, we also set aside this ground of appeal back to the file of the ld AO. Accordingly Ground no 3 is allowed with above direction.

33. In the result appeal of the assessee for AY 2013-14 is allowed for statistical purposes.

Order pronounced in the open court on 06/02/2019

-Sd/-	-Sd/-
(K.N.CHARY)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 06/02/2019
Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)

5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi