आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCH 'A', JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
Before : Shri Vijay Pal Rao, JM & Shri Vikram Singh Yadav, AM

आयकर अपील सं./ITA No. 837/JP/2018
निर्धारण वर्ष/Assessment Year : 2012-13

The ACIT Central Circle-3 Jaipur	बनाम Vs.	Smt. Renu Sehgal 27, Onkar Nagar, Civil Lines Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEPPS 3048 M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 708 & 709 JP/2018
निर्धारण वर्ष/Assessment Year : 2012-13 & 2015-16

Mrs. Renu Sehgal 227-278, Nemisagar Colony Vaishali Nagar, Jaipur	बनाम Vs.	The DCIT Central Circle-3, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEPPS 3048 M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Shri Varinder Mehta, CIT-DR
निर्धारिती की ओर से/ Assessee by : Shri P.C. Parwal, CA

सुनवाई की तारीख/ Date of Hearing : 06/08/2019
घोषणा की तारीख/ Date of Pronouncement : 19/08/2019

आदेश/ ORDER

PER VIJAY PAL RAO, JM

There are cross appeals for the Assessment Year 2012-13 directed against the order dated 09-04-2013 of the ld. CIT(A)-4, Jaipur. The

assessee has also filed the appeal for the Assessment Year 2015-16 against the order dated 01-03-2018 of ld. CIT(A)-4, Jaipur.

2.1 For the Assessment Year 2012-13, the Department has raised the solitary ground as under:-

> ''Whether on the facts and in the circumsrtances of the case and in law, the ld. CIT(A) is justified in deleting the addition of Rs. 8.00 crores made by AO on account of unexplained receipt of u/s 68 of the I.T. Act, 1961.''

2.2 The assessee is an individual and filed her return of income for the year under consideration on 20-07-2012 declaring total income of Rs. 10,33,768/-. The assessment u/s 143 (3) of the Act was completed on 30-09-2014 accepting the return of income of the assessee. Thereafter a search and seizure operation was conducted on 17-12-2014 on various premises of Sehgal Group to which the assessee belongs. The assessee filed her return of income in response to notice u/s 153 of the Act on 5-08-2016 declaring total income as declared in the original return of income. During the course of search and seizure action, certain books of account, documents and agreement to sell dated 10-10-2011 were found and seized. As per said agreement, the assessee with her husband has agreed to sell their properties as under:-

Particulars	Area	
Plot No 1, Nemi Sagar Colony, Jaipur	332.50	Sq. Yards
Plot No. 272, Nemi Sagar Colony, Jaipur	385.00	Sq. Yards
Plot No. 273, Nemi Sagar Colony, Jaipur	385.00	Sq. Yards
Plot No. 276, Nemi Sagar Colony, Jaipur	400.00	Sq. Yards
Plot No. 277, Nemi Sagar Colony, Jaipur	400.00	Sq. Yards
Plot No. 278, Nemi Sagar Colony, Jaipur	400.00	Sq. Yards
Plot No. 279, Nemi Sagar Colony, Jaipur	400.00	Sq. Yards
Plot No. 280, Nemi Sagar Colony, Jaipur	331.66	Sq. Yards
Plot No. 282, Nemi Sagar Colony, Jaipur	376.38	Sq. Yards
Total area	3410.54	Sq. Yards

The AO doubted the genuineness of the transactions of sale of the properties in the agreement as well as receipt of advance of Rs. 8.00 crores which was claimed to have been forfeited by the assessee as the balance amount was not paid by the purchaser to M/s. Makesworth Projects & Developers Pvt. Ltd. The AO accordingly made an addition of Rs. 8.00 crores u/s 68 of the Act by holding the same as unexplained receipt.

2.3 On appeal before the ld. CIT(A), the assessee contended that there was no incriminating materials found during the course of search and seizure action disclosing any undisclosed income. Since the assessment was completed u/s 143(3) of the Act and it was not pending as on the

date of search, therefore, the addition made by the AO without any incriminating material in the proceedings u/s 153A of the Act is not sustainable. The assessee further contended that since this advance of Rs. 8.00 crores received by the assessee against the sale of properties in question and due to failure of the purchaser to make the payment of the balance amount as per terms of the agreement, the said amount was forfeited by the assessee. Therefore, forfeited amount is required to be reduced from the cost of acquisition at the time of subsequent sale of these properties. As per terms of Section 51 of the Act, the ld. CIT(A) accepted these conditions of the assessee and deleted the addition made by the AO by holding that the addition made by the AO is without any incriminating material found during the search and seizure action. Further, the ld. CIT(A) has also held that advance of Rs. 8.00 crores received for sale of properties under the agreement to sell was forfeited by the assessee and therefore, the same is required to be reduced from the cost of acquisition at the time of sale of properties and hence no addition can be made u/s 68 of the Act on this account.

2.4 Aggrieved by order of the ld. CIT(A), the Revenue has filed the present appeal.

2.5 Before us, the ld CIT -DR submitted that agreement found during the course of search and seizure action is an incriminating material as it has disclosed transactions of receipt of advance for sale of these properties and therefore, the ld. CIT(A) has committed an error in holding that there was no incriminating material found during the course of search disclosing any undisclosed income on account of receipt of Rs. 8.00 crores by the assessee. The ld. DR has further submitted that company M/s. Makesworth Projects & Developers Pvt. Ltd. is a paper company and indulge in providing bogus accommodation entries. The statement of Shri Pramod Kumar Sharma, Director of M/s. Makesworth Projects & Developers Pvt. Ltd was recorded by the Investigation Wing, Calcutta on 10-11-2012 in which he stated that he was doing business on behalf of Shri Praveen Agarwal and he was only a dummy director in many of his companies. He has further stated that all these companies were indulged in providing accommodation entries. Therefore, the transaction in question claimed through the alleged agreement is nothing but a bogus accommodation entry received by the assessee in the form of advance which is nothing but assessee's own unaccounted income has been introduced/ received in the garb of advance for sale of these properties

which was forfeited. Thus the entire claim of the assessee is nothing but to give a colour of forfeiture of advance of assessee's own unaccounted income. Though the payment was received through banking channel yet it is not sacrosanct nor it can make a non-genuine transaction as genuine. Thus the ld. DR has submitted that the AO has conducted enquiry by issuing commission to DIT, Calcutta and report of the enquiry reveals that the said company was not found at the given address. He has relied on the order of the AO.

2.6 On the other hand, the ld.AR has submitted that the assessment of the assessee was completed u/s 143(3) of the Act on 29-03-2014. Subsequently, a search and seizure action was conducted on 17-12-2014 u/s 132 of the Act but no incriminating material was found to disclose any undisclosed income of assessee. Since the assessment was not pending as on the date of search, therefore, the addition made by the AO of Rs. 8.00 crores is not sustainable in law in the absence of any incriminating material found during the course of search and seizure action. The AO has relied on the report of the Investigation Wing, Calcutta which is not a incriminating material found during the course of search of the assessee. The ld.AR further submitted that the agreement found during the course

of search and seizure action cannot be disputed by the department as the agreement itself does not disclose any undisclosed income and the AO has treated the agreement as well as transaction as bogus. Hence, the department cannot take a contradictory stand by saying that agreement found during the course of search is an incriminating material and at the same time it is held to be bogus. The ld.AR has also raised the legal objection that the Revenue has not challenged the findings of the ld. CIT(A) on the issue of deleting the addition without any incriminating material found during the course of search and seizure action. Thus the ld.AR has contended that once the department has not challenged the findings of the ld. CIT(A) on the legal issue, the ground raised by the department on the merit of the addition would become infructuous. In support of his contention, the ld.AR submitted that ld. CIT(A) has followed various binding precedents including the decision of Hon'ble Jurisdictional High Court as to the addition made by the AO without any incriminating material.

2.7 On merits, the ld.AR has submitted that the assessee has discharged her onus to prove three ingredients as provided u/s 68 of the Act. The identity of M/s. Makesworth Projects & Developers Pvt. Ltd is provided

from the agreement itself, assessment order dated 03-06-2014 passed u/s 143(3) of the Act and Company Master Data in ROC. The genuineness of the transaction is established as the payment is made through RTGS transfer and there was no finding or any record to show that prior to the said payment any cash was deposited in the bank. The assessee filed the confirmations as well as Board Resolution of M/s. Makesworth Projects & Developers Pvt. Ltd. The creditworthiness of the purchaser has been proved by filing the evidence which includes the return of income. The financial statements filed for the Assessment Year 2010-11 and 2011-12 show that the said company was having huge net worth and current assets to purchase the properties. Thus the assessee has explained the source of receipt of Rs. 8.00 crores and satisfied all the requirements of section 68 of the Act. The ld.AR has further contended that the AO relied on the statement of Shri Praveen Agarwal recorded by the Investigation Wing, Calcutta. However, said statement itself is not a conclusive proof to hold that transaction between the assessee and M/s. Makesworth Projects & Developers Pvt. Ltd., is bogus. The AO has not conducted any enquiry or any question was asked regarding the specific transaction between the assessee and the said company. Even the statement of third party cannot

be used against the assessee without giving any opportunity of cross examination. Therefore, the assessment made by the AO is bad in law. He has relied on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Supertech Diamond Tools Pvt Ltd (2015) 229 Taxman 62. The ld.AR relied on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries vs CCE (2015) 127 DTR 241. Once the assessee has discharged her onus as required u/s 68 of the Act then the said amount of Rs. 8.00 crores received by the assessee as an advance for sale of the properties was forfeited due to failure of the company to make the balance payment. Thus as per provisions of the Income Tax Act, it cannot be reduced from the cost of acquisition at the time of sale of these properties. The ld.AR has also made an alternative plea that the said amount was found deposited in the bank through RTGS transfer. Therefore, it is not a credit in the books of account and consequently, the provisions of Section 68 cannot be invoked. In support of his contention, he has relied on the following decisions.

1. Smt. Ramilaben B Patel vs ITO (2019) 174 ITD 694 (Ahd. Tribunal)
2. Satish Kumar vs ITO (2019) 175 DTR 121 (Asr. Tribunal)

3. Mehl V Vyas vs ITO (2017) 164 ITD 296 (Mumbai Tribunal)

The ld.AR thus supported the order of the ld. CIT(A).

2.8 We have considered the rival submissions as well as relevant material on record. The AO has referred to seized material being agreement to sell dated 10-10-2011 whereby the assessee alongwith her husband Shri D.P. Sehgal agreed to sell their properties situated at Nemi Sagar Colony, Vaishali Nagar, Jaipur for a consideration of Rs. 56.00 crores. The said agreement was entered into with M/s. Makesworth Projects & Developers Pvt. Ltd which paid an amount of Rs. 8.00 crores out of Rs. 56.00 crores through RTGS transfer in the month of Sept. 2011 to the assessee and Shri D.P. Sehgal as an advance towards the purchase of the properties referred in the said agreement. The advance money was transferred in the bank account of the assessee. The balance amount of Rs. 48.00 crores was to be paid on or before 31 Dec. 2011. The AO doubted the genuineness of the transactions and referred to the report of the Investigation Wing and then again referred to the statement of one Shri Pramod Kumar Sharma, Director of M/s. Makesworth Projects & Developers Pvt. Ltd, recorded on 10-11-2012. On the basis of the said

report of the Investigation Wing, Calcutta, the AO held that the transaction of alleged sale of the properties to M/s. Makesworth Projects & Developers Pvt. Ltd is not genuine as the said company was found to be indulged in providing accommodation bogus entries. It is pertinent to note that the agreement sell dated 10-10-2011 was found during the course of search and part of the seized material marked as Exhibit-11, Annexure A. It is clear that the said agreement is not an afterthought manufactured document but it was found at the time of search and hence the existence of the agreement cannot be doubted. The agreement itself does not reveal any undisclosed income but it clearly states that the assessee and her husband agreed to sell these 09 number of plots situated at Nemi Sagar Nagar, Jaipur to M/s. Makesworth Projects & Developers Pvt. Ltd. for a consideration of Rs. 56.00 crores. Out of the said sale consideration, the assessee received Rs. 8.00 crores as an advance towards this transaction of sale of properties. The payment of said amount of Rs. 8.00 crores received through RTGS transfer is not in dispute. Therefore, the identity of the said purchaser M/s. Makesworth Projects & Developers Pvt. Ltd is not in dispute as the said transaction of money took place through banking channel and assessment in the case of said

company was completed u/s 143(3) on 3-06-2014 for the Assessment Year 2012-13. Even the report of Investigation Wing, Calcutta itself does not dispute the existence of the said company as the statement of the director was recorded. The creditworthiness of the purchaser was also not disputed by the AO. The AO has not brought any material on record to show that the said company was not having sufficient fund at the time of payment of Rs. 8.00 crores to the assessee. On the contrary, the assessee produced the financial statement of the said company showing the net worth of the said company of more than Rs. 20.00 crores. As regards the genuineness of the transactions, the AO doubted the genuineness based on the report of the Investigation Wing, Calcutta. On the contrary, the assessee has contended that the transaction is through banking channel and the amount is received as an advance towards sale of these properties under agreement to sell dated 10-10-2011. The existence of the agreement is not in dispute as found during the course of search and the payment was made through banking channel. Thus in the absence of any findings or any material to show that assessee's own unaccounted money have come back in the shape of alleged advance the genuineness of the transaction cannot be doubted merely on suspicion. Therefore, the

reliance placed by the AO on the report of Investigation Wing, Calcutta itself is not a conclusive evidence to contradict or disprove the evidence produced by the assessee to prove the identity, creditworthiness of the purchaser and genuineness of the transaction. Once the assessee has discharged her onus to prove the identity and creditworthiness of the creditor/ purchaser and genuineness of the transaction, the burden is shifted on the AO to prove the contrary with some tangible material. The AO has not conducted any independent inquiry except the Commission issued to Calcutta Wing which has resulted nothing but reported that the company was not found at the address which is otherwise not disputed by the Revenue as the assessment was completed and statement of the director of the said company was recorded by the Investigation Wing in earlier investigation proceedings. Therefore, the said report of the Commission issued by the AO is contrary to the earlier investigation report to dispute the identity and existence of the said company. On query from the Bench whether the bank account in which this amount was deposited was declared in the return of income filed by the assessee. The ld.AR referred to the computation of income and details of interest income offered to tax which includes the interest in this amount and

therefore, the said bank account was duly disclosed in the return of income. Once the transaction of the receipt of Rs. 8.00 crores is found to be as an advance towards the sale of the properties in question then as per provision of Section 51 of the Act, if the said amount is forfeited by the seller the same shall be deducted from the cost for which asset was acquired or written down value or fair market value as the case may be in computing the cost of acquisition for the purpose of capital gains on transfer of the said assets. For ready reference, we quote the provision of Section 51 as under:-

> ''**51.** Where any capital asset was on any previous occasion the subject of negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition.
>
> [Provided that where any sum of money, received as an advance or otherwise in the course of negotiations for transfer of a capital asset, has been included in the total income of the assessee for any previous year in accordance with the provisions of clause (ix) of sub-section(2) of Section 56, the, such sum shall not be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition]''

The ld. CIT(A) has decided this issue in para 7.1. to 8.7 as under:-

> ''7.1 I have considered the impugned order, the arguments advanced and the case laws cited. I have also gone through the order of AO, detailed submissions made from pages no. 1 to 47 with accompanying documents in the APB from pg. 48 to 164. I have perused the relevant judgments relied on in the case law compilation book from pages 1 to 323.

In my view the issues to be decided are:

(A) Whether in case of an assessment is completed and not pending on the date of search, whether an AO is competent to travel beyond the evidence found as a result of search which does not suggest any undisclosed income?

(B) on merits, whether the addition made u/s 68 is sustainable in law as also in facts of the present case?

7.2 For deciding issue (A) above, there cannot be better guidance than the decision of jurisdictional high court in the case of Jai Steel (India), (2013) 36 Taxmann.com 523. In the said case, the facts were that A search under Section 132(1) of the Act was conducted at various business premises of Suncity Alloys Group of Companies, Jodhpur, to which, the appellant firm belong and at the residence of directors/partners of various firms/companies on 20.02.2004. Several incriminating documents were recovered from the residential premises of such partners/directors and from business premises of the firms/companies of the group; notice under Section 153A of the Act was issued on 05.10.2004 for filing of return within 35 days of receipt of the notice, which was served on 12.10.2004; in compliance to this notice, return declaring income of 'NIL' was filed on 07.04.2005. In the return filed in response to the notice under Section 153A of the Act, the assessee, inter alia, claimed deduction of Sales Tax Incentive relying on decision in the case of *Dy. CIT v. Reliance Industries Ltd.* [2004] 88 ITD 273 (Mum.) (SB). The said claim was not made in the original return filed under Section 139(1) of the Act it was contended that such claim can be made in the return filed in response to notice under section 153A of the Act as it was over riding all proceedings earlier taken overall. The claim was not held to be admissible by all the authorities. When further appeal was filed, Hon'ble Rajasthan High Court while analysing the provision of sec. 132 r.w.s 153A held thus:

18. To consider the rival submissions made at the Bar in the context of the present case and the substantial question of law framed, the scope of 'assessment and reassessment of total income' under Section 153A(1)(b) and the first and second proviso have to be considered. Further, for answering the above issues, guidance will have to be sought from Section 132(1) of the Act, as Section 153A of the Act cannot be read in isolation, inasmuch as, the same is triggered only on account of any search/ requisition under Sections 132 or 132A of the Act. If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and, found in the course of search, such books of account or other documents have to be taken into consideration while assessing or reassessing the total income under the provisions of Section 153A of the Act. Even in a case where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration. The requirement of assessment or reassessment under the said section has to be read in the context of Sections 132 or 132A of the Act, inasmuch as, in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise, which would require more reiteration and it is only in the context of the abated assessment under second proviso which is required to be assessed.

19. The underline purpose of making assessment of total income under Section 153A of the Act is, therefore, to assess income which was not disclosed or would not have been disclosed. The purpose of second proviso is also very clear, inasmuch as, once a assessment or reassessment is pending' on the date of initiation of search or requisition and in terms of Section 153A a return is filed and the AO is required to assess the same, there cannot be two assessment orders determining the total income of the assessee for the said assessment year and, therefore, the proviso provides for abatement of such pending assessment

and reassessment proceedings and it is only the assessment made under Section 153A of the Act would be the assessment for the said year.

20. The necessary corollary of the above second proviso is that the assessment or reassessment proceedings, which have already been 'completed' and assessment orders have been passed determining the assessee's total income and, such orders are subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In such cases, where the assessments already stands completed, the AO can reopen the assessments or reassessments already made without following the provisions of Sections 147, 148 and 151 of the Act and determine the total income of the assessee.

21. The argument raised by the counsel for the appellant to the effect that once a notice under Section 153A of the Act is issued, the assessments for six years are at large both for the AO and assessee has no warrant in law.

22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

1) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original Jurisdiction, for which, assessments have to be made;

2) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and

3) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made.

Though such a claim by the assessee for the first time under Section 153A of the Act is not completed, the case in hand, has to be considered at best similar to a case where in spite of a search and/or requisition, nothing incriminating is found. In such a case though Section 153A of the Act would be triggered and assessment or reassessment to ascertain the total income of the person is required to be done, however, the same would in that case not result in any addition and the assessments passed earlier may have to be reiterated.

Noticing the above ratio laid down, it can be safely concluded that when a search is initiated in the case of an appellant, the AO shall issue notice to such person requiring him to file return in respect of each assessment years falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted and shall assess or reassess the total income for such years. However as per second proviso, only those assessments will abate which are pending on the date of search. Thus the assessment not pending on the date of search will not abate and assessment for such non pending years will be only on the basis of incriminating material found during search. In respect of non abated assessment, though the assessment is to be framed regarding, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and in absence of any incriminating material, the completed assessment can be reiterated. Just as the appellant cannot raise any additional claim for any exemption/deduction in respect of unabated assessment where no incriminating material is

found, the powers of the AO will be also limited to make addition/disallowances only to the extent of incriminating material for a non abated assessment. The judgment of jurisdictional high court in the case of Jai Steel *(supra)* has been considered in all the judgments of Delhi High court, Karnataka High Court and Gujarat High court relied upon by the appellant and therefore they are not discussed herein. At the same time, useful reference can be made to the judgment of Hon'ble Bombay High Court in the case of Murali Agro Products Ltd. (2014) 49 Taxmann.com 172 wherein it was held thus:

8. We find it difficult to accept the above contention raised on behalf of the revenue. The object of inserting Sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIV B of the Income-tax Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 (see 260 III{ (St) 191 at 219) was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as 'undisclosed income' or whether a particular income could be said to be relatable to the material found during the course of search, etc. which led to prolonged litigation. To overcome that difficul0, the legislature by Finance Act 2003, decided to discard Chapter XIV B provisions and introduce Sections 153A, 153B and 153C in the IT Act.

9. What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/ reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31 / 5 / 2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the

previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/ reassessment proceedings which are pending on the date of search/ requisition. Section 1 5 3A(2) provides that when the assessment made under Section 153 (A) (1) is annulled, the assessment or reassessment that stood abated shall stand revived.

*10. Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation qfproceedings under Section 153A, it is only the assessment/ reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/ reassessments already finalised for those assessmentyears covered under Section 153A of the Act. By a circular No. 8 of 2003 dated 18-9-2003 (See 263 /*TR *(St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/ reassessment shall not abate. It is only because, the finalised assessments/ reassessments do not abate, the appeal, revision or rectification pending against finalised assessments/ reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/ reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A (1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).*

11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for

the assessment year 1998-99 was finalised on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalised on 29-12-2000.

12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act could not have disturbed the assessment/ reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/ reassessment were contrary to the facts unearthed during the course of 153A proceedings.

The above quoted passage was also approved by Bombay High court in the case of Continental Warehousing Corporation (374 ITR 645, para 30 thereof) It appears that there is unanimity of view on the subject that when a search is initiated and an assessment is to be framed u/s 153A in respect of a year which was not pending on date of search and which does not abate, the same can be only on the basis of incriminating material. In absence of any incriminating material, the completed assessment can be reiterated. Completed assessment can be interfered with by the AO while making assessment u/s 153A only on the basis of some incriminating material unearthed during the course of search which were not produced or not already disclosed. I have not come across any contrary view being taken by jurisdictional high court or tribunal. Thus following the decision of Jurisdictional high court in the case of Jai Steel (supra) as also Delhi, Bombay, Karnataka and Gujarat high court cited

(supra) I hold that the AO could not have travelled beyond any incriminating material found during search while framing assessment u/s 153A in respect of assessment which was not pending on the date of search.

7.3 Having held as above, the next question that needs to be answered is as to whether the Agreement to Sale/Bayana found during the search can be considered as incriminating material so as to make addition on the basis amount stated to be received therein? Though there is no definition of *'incriminating material,* the same has to be given a contextual meaning. In one case the same may not be incriminating, while in respect of same material but in respect of another person the same can be held so. Briefly explaining, the incriminating material should be such which by itself is able to lead to computation of undisclosed income. The books of accounts, vouchers, bank accounts, summary of accounts maintained in regular course of business and duly disclosed cannot be considered as incriminating in nature. In the case of RRJ Securities Pvt. Ltd. (380 ITR 612), Hon'ble Delhi High Court held that data in hard disk found at the premises of a chartered accountant on basis of which accounts are prepared and return are filed cannot be considered as incriminating material so as to proceed in respect of a completed assessment. Following the judgment in case of RRJ Securities (supra) Delhi high court in case of Refam Management Services (80 Taxmann.com 251) held that cheque book maintained in regular course of business cannot be considered as incriminating material so as to make assessment in respect of completed assessment. Hon'ble Delhi High court in case of Harjeev Agarwal (70 Taxmann.com 95) held thus:

> *A plain reading of section 158BB(1) does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words 'evidence found as a result of search° would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded*

would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the Explanation to section 132(4). However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the Assessing Officer to make a block assessment merely because any admission was made by the assessee during search operation.

Though the above principle is laid down in relation to assessment of block period u/s 158 BC of the act, the same was also applied in respect of assessment u/s 153A by Delhi High Court in case of Best Infrastructure (84 Taxmann.com 287) when it was held thus:-

38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra).

7.4 In the present case there is no such statement admitting unexplained cash credit. Even statement u/s 132(4) refers to statement of appellant who is searched and whose assessment is framed u/s 153A. Based on all these cases, it can be held that since agreement to sale found during search which by itself does not lead to computation of undisclosed income cannot be used to make further inquiries and hold that the transaction is not genuine.

7.5 In view of the above reasoning, I hold that since on date of search, the assessment for impugned year was not pending and hence not abated. Therefore, based on reasoning of Hon'ble jurisdictional high court and host of all other courts

cited above, I hold that the AO could not have travelled beyond the seized material which by itself is not incriminating in nature. Since the *'Agreement to Sale/Bayana'* found during search is not of incriminating in nature and which by itself does not reveal/ hint any un- disclosed income, the AO exceeded his jurisdiction in making addition on the basis of such document found during search.

8. As regards of addition u/s 68 on merits of the case the same is discussed herein.

8.1 The AO has treated the amount received from Makesworth as unexplained cash credit. The sole reason is found to be statement of Mr. Pravin Agarwal recorded by investigation wing at Kolkata. From the statement of Mr. Pravin Agarwal it is observed that he was indulging in providing bogus accommodation entries in form of *'bogus share capital, long-term capital gain, Unsecured loan, sell of shares etc.'* through several companies controlled by him though he himself is not a director of many such companies. This fact is stated to be confirmed by Mr. Pramod Sharma who himself is a director of Makesworth. However neither his statement is available with the AO nor the copy of same is provided to the appellant inspite of asking for the same. The AO has made available only the copy of statements of Mr. Pravin Agarwal. However it is not forthcoming as to how he is said to have controlled Makesworth. Whether the control is through shareholding or any relative holding such share is not forthcoming. Any person who, in the language of appellant, is a *`rank outside?* cannot come and say that he is controlling a company merely by stating so. For this purpose and to bring out the truth an opportunity of cross examination becomes necessary. If that be the case, a question remains to be answered as to why the income of Makesworth is assessed in its hands and not Mr. Pravin Agarwal. Thus a bald statement of a person stating to be controlling a company cannot be considered as sacrosanct till it is put to test by the person relying upon it and also by the person who is adversely affected by such statement.

Neither the AO, nor investigation wing has put any question to Mr. Pravin Agarwal about the transaction of Makesworth with the appellant. In such a situation, no credence can be given to his statement to hold the sale agreement as bogus or sham.

8.2 Here it is useful to refer to two judgments of Hon,ble Supreme Court in the cases of *Chhugamal Rajpal v. S.P. Chaliha* [1971] 79 ITR 603 (SC) and *ITO v. Lakhmani Mewal Das* [1976] 103 ITR 437 (SC). In *Chhugamal Rajpal s* case *(supra)* the ITO had initiated reassessment proceedings on the basis of a 'circular' issued from the office of the Commissioner, Bihar & Orissa, which stated that three persons named in that circular, were merely name-lenders and their transactions were bogus and proper investigation regarding the loans from such persons was necessary before accepting the returns. The ITO merely on the basis of that 'circular' initiated reassessment proceedings. The Supreme Court held that the circular by itself without any other material and investigation, could not afford any basis to the ITO for forming a reasonable belief that the appellant had not made a full and true disclosure of the relevant facts on which account the income of the appellant chargeable to tax had escaped assessment. In *Lakhmani Me2val Das's* case *(supra),* the appellant in his return, claimed deductions of certain sums paid by way of interest on the borrowings, including the one from Mohan Singh Kanayalal, who was shown as one of the creditors of the appellant. A confession had allegedly been made by Mohan Singh Kanhaiya Lal to the effect that he had only lent his name. However, there was nothing to show that the confession related to any loan advanced to the appellant or even the period during which name and not loan was lent. There was no other material either to show that the confession made was in relation to the period 1-4-1957 to 31-3-1958, subject-matter of the assessment which was sought to be reopened. It was in that fact situation that Hon'ble Supreme Court found that the information based on the confession of the creditor Mohan Singh Kanhaiya Lal was vague, indefinite, remote and far-fetched and could not justify the formation of any belief that the income of the

appellant had for the period 1-4-1957 and 31-3-1958 escaped assessment. If on the basis of such vague and substantiated information even reopening which is to be only on basis of subjective satisfaction is held to be invalid, how the mere statement of Mr. Pravin Agarwal without referring to transaction with appellant, period and nature of transaction can be considered as a final word in an assessment pursuant to search which can be only on the basis of objective analysis of evidence of record. In my opinion, mere general statement of Mr. Pravin Agarwal without any reference to transaction of appellant with Makesworth cannot be considered as a final word to hold the same to be sham or bogus.

8.3 In view of above discussion, let me deal with the reasoning given by the AO to hold the agreement to sale as sham or bogus. When the appellant stated that she wanted to settle abroad and hence wanted to sale her property, the AO questioned such decision by holding that she never intended to sale her business establishments but only property. In my opinion, a person is free to decide the way he wants to conduct his affairs. The AO is not to enter the shoe of a businessman and decide how he should conduct his affairs. He has just to decide whether any income is accruing from any transaction undertaken by him and not question the wisdom in doing business. The AO also questioned the wisdom of Makesworth in not claiming the advance given. The answer for same has to come from Makesworth itself and not the appellant. During the course of assessment proceedings, the appellant provided fresh confirmation as also its present whereabouts from authentic record and the broker who mediated the transaction. No exercise was done thereafter by AO. In the words of Hon'ble Supreme Court in the case of Sreelekha Banerjee (49 ITR 112)

"Before the department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or

evidence which it has in its possession. The department cannot be merely rejecting unreasonably a good explanation, convert good proof into no proof."

Applying the above principle, the AO in present case could not have rejected the explanation without any further material in its hands.

8.4 The AO though relied upon the statement of Mr. Pravin Agarwal, did not allow the appellant to cross examine him in spite of same was asked for repeatedly. Rather, he justified his action of not providing cross examination by citing judicial rulings. The AO has relied upon the judgment of Rajasthan High Court in case of Rameshwar Lal Mali (256 ITR 536) for not allowing cross examination, whereas the appellant has relied upon judgment of Rajasthan High Court in case of Supertech Diamond Tools (2014 44 Taxmann.com 460). In the case of Rameshwar Lal Mali (supra) the finding of the court was that:

"In the instant case, the estimation of sales has not been made solely on the basis of the statements of the witnesses recorded during the survey. It is based on the entire facts relating to the business of the assessee which includes location of the shop, past history, various defects in the books of account and the statements of the persons available on the spot during the survey. Thus, it cannot be said that the estimation is solely on the basis of the statements of the witnesses recorded on the spot."

Thus there is no law laid down that the statement of persons who are outsiders, recorded and used against the appellant need not be given. While in the case of Supertech Diamond Tools (supra) the law laid down was thus:

"8. The reference to the statements made by some of the persons related with the said investing companies is of no effect because such statements could not have been utilized against the assessee Company when the assessee-company had not been afforded an opportunity of confronting and cross-examining the persons concerned. There does not appear anything occurring in the statements of the persons relating with the assessee-company so as to provide a basis for the findings recorded by the AO."

Thus the observations of Rajasthan High Court in the case of Supertech Diamond Tools (supra) are more relevant and applicable to the facts. Hon,ble Gujarat High Court in case of Kanubhai Maganlal Patel (79 Taxmann.com 257) held that *It emerges from the impugned orders and even the order passed by the Assessing Officer that the Assessing Officer made additions under section 69B, relying upon the statements of two farmers [e., two sellers of the land] in which, according to the department, they admitted of having received on-money in cash. However, it is required to be noted and it is an admitted position that the statements of those two farmers upon which reliance was placed by the department were not furnished/ given to the assessee to controvert the same. Not only that when a specific request was made before the Assessing Officer to permit them to cross examine the aforesaid two farmers, the same was rejected by the Assessing Officer. Under the circumstances, as rightly observed by the Tribunal, the Assessing Officer was not justified in making addition under section 69B solely relying upon the statements of those two farmers.*

Similar view is adopted by Bombay High Court in case of R.W. Promotions (61 Taxmann.com 54) where in it was observed thus:

> *11. We find that there has been a breach of principles of natural justice inasmuch as the Assessing Officer has in his order placed reliance upon the statements of representatives of M/s Inorbit and M/s Nupur to come to the conclusion that claim for expenditure made by the appellant is not genuine. Thus the appellant was entitled to cross examine them before any reliance could be placed upon them to the extent it is adverse to the appellant. This right to cross examine is a part of the audi altrem partem principle and the same can be denied only on strong reason to be recorded and communicated. The impugned order holding that it would have directed cross examination if it felt it was necessary, is hardly a reason in support of coming to the conclusion that no cross examination was called for in the present facts. This reason itself makes the impugned order vulnerable.*

Thus the ratio emerging is that when an adverse view is to be drawn on the basis of statement of a third party, the person affected should be afforded an opportunity to rebut such statement and cross examination if asked for. The supreme court in case of C. Vasantlal & Co. (45 ITR 206) has held that *"it was open to the income-tax officer to collect materials to facilitate assessment by private inquiries. But if be desires to use the material so collected, assessee must be informed of the material and must be given an adequate opportunity to explain it."* In the present case it is seen that after the statement of Mr. Pravin Agarwal were furnished to the appellant, the appellant explained that there is no authority with him to state that all the transaction of Makesworth is sham/bogus, there is no reference to name of appellant involving in bogus transaction, the nature of transaction of appellant is not similar to transaction admitted to be bogus, the director Mr. Pramod Sharma who is director of Makesworth and competent to state on the nature of transaction of Makesworth has not admitted so and his statement is not furnished. Thus the appellant pointed out

several holes in the statement of Mr. Pravin Agarwal. In spite of all these, the AO has chosen to continue with holding that the transaction of appellant with Makesworth is bogus. In my opinion, if as per Supreme Court in the case of C. Vasantlal (supra) the assessee is to be given an adequate opportunity of explaining the statement and if the appellant points out holes and lacuna in such statement then such statement could not have been continued to be accepted as sacrosanct without any further exercise on the part of AO. Hence it can be concluded that sole reliance of the AO on the statement of Mr. Pravin Agarwal is to be discarded and if such statement is discarded, then the AO has no further material to hold that the transaction of appellant with Makesworth is bogus or sham so as to consider the same as unexplained.

8.5 I find that the appellant has demonstrated that the required ingredients to explain the cash credit as genuine. There is no doubt about the identity of Makesworth which is discernible from agreement itself entered into, its tax returns and assessment orders etc. The genuineness of transaction is also proved by the appellant by bringing on record the Sale agreement alongwith extension letters itself being found during search and receiving payment through banking channels and fresh confirmation during assessment proceedings. As against this, there is no contrary evidence. When a person is to sale his assets and to receive payment before selling the assets, the person need not question the worth of the person who wants to purchase. Only if he has worth, he will enter into a transaction of purchase. Why and in what circumstances, Makesworth decided to purchase the property can be answered by Makesworth only. Even going by balance sheet of Makesworth, it has huge netwroth and current assets to purchase the property. Thus the appellant has proved the three important ingredients to hold any cash credit as explained. I therefore hold that the addition u/s 68 is required to be deleted and it is so held now.

8.6 Before parting it is made clear that legislature has already anticipated such situation of advance money received on sale agreement of property, its forfeiture. Taxation of forfeiture of advance money so received is provided in section 51 of I.T. Act. The advance received on the agreement to sale will be appropriately considered u/s 51 when the final sale deed is entered into or when the property is transferred within the meaning of s. 45 of the Act. For the sake of ready reference section 51 reads as under:

Advance money received.

51. Where any capital asset was on any previous occasion the subject of negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition :

[Provided that where any sum of money, received as an advance or otherwise in the course of negotiations for transfer of a capital asset, has been included in the total income of the assessee for any previous year in accordance with the provisions of clause *(ix)* of sub-section (2) of section 56 then, such sum shall not be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition.]

Thus the advance of 8 Crores received and forfeited by the appellant will be subjected to tax as per section 51 of the Act.

8.7 Considering the above the AO is directed to delete the addition of 8 crores made u/s 68 of the Act. The grounds raised are allowed."

Thus the ld. CIT(A) has relied on various decisions including the Hon'ble Jurisdictional High Court in the case of Jai Steel (India) [2013] 36 Taxmann.com 523 as well as decision of Hon'ble Bombay High Court in the case of Murali Agro Products Ltd [2014] 49 Taxmann.com 172. In view of the facts of the case as discussed above, we do not find any error or illegality in the order of the ld. CIT(A) qua this issue.

3.1 In the cross appeal for the Assessment Year 2012-13, the assessee has following grounds:-

> ''1. Under the facts and circumstances of the case, the ld. CIT(A) has grossly erred in law as well as facts in making the addition of Rs. 5,00,000/-
>
> 2. Under the facts and circumstances of the case, the ld. CIT(A) has erred in law as well as facts in making addition of Rs. 5.00 lacs offered by the appellant before Settlement Commission ignoring that:-
>
> (i) The application before ITSC was filed along with the group for the purpose of settlement of the cases of the group.
>
> (ii) The offer in the application was conditional.
>
> (iii) No evidence of such undisclosed income was found in the search or enclosed with the application.
>
> (iv) The application was filed to get quietus to the disputes, the objective of approaching the ITSC was different than the assessment, it was settlement.

(v) Only real income can be assessed to tax as per section 4 of the Act and not hypothetical income offered for settlement.

(vi) The order of settlement u/s 245D(4) is not an assessment as held by Hon'ble Apex Court in Brijlal's case.

(vii) Section 245HA of the Act does not hold that offer of additional income u/s 245C(1) is a conclusive proof or that AO shall presume the offer as unaccounted income.

(viii) Offer of income for settlement is not more than an information for the purpose of assessment and it cannot be lawfully presumed as undisclosed income of assessee without AO carrying out independent enquiries.

3. Under the facts and circumstances of the case, the ld. CIT(A) has erred in law as well as facts in believing the application made by the assessee before Settlement Commission as having more evidentiary value than mere statements recorded u/s 132(4) or section 131 of the IT Act, 1961 for sustaining the addition of Rs.5 lacs.

3.2 The issue raised by the assessee in the cross appeal is regarding enhancement of assessment made by the ld. CIT(A) on the basis of the application made u/s 245C(1) of the Act before Settlement Commission which was rejected for want of any conclusive proof or document disclosing undisclosed income offered by the assessee.

3.3 Pursuant to search and seizure action dated 17-12-2014 on M/s. Amritanandan City Space Pvt Ltd. in which the assessee is a Director and

her husband is a shareholder who approached the Settlement Commission to settle their cases arising as a result of search and they filed the application u/s 245C(1). The assessee offered a sum of Rs. 35.00 lacs as her additional income for the Assessment Year 2009-10 to 2015-16. The details of the additional income offered by the assessee are as under:-

A.Y.	Net total income as per return of income filed u/s 153A/139	Addl. income offered before Settlement Commission	Total Income	Addl. tax on additional income for cl. No. 3	Addl. Interest on additional income for Cl. No 3	Addl. tax and interest on additional income cl.No.3
1	2	3	(4)= (2+3)	5	6	7
20009-10	392619	2,00,000	592619	50739	49026	99765
2010-11	655470	3,00,000	955470	92700	0	92700
2011-12	561970	4,00,000	961970	99083	0	99083
2012-13	1033770	5,00,000	1533770	154500	83430	237930
2013-14	1116150	5,00,000	1616150	154500	72615	227115
2014-15	1230570	6,00,000	1830570	185400	55620	241020
2015-16	893090	10,00,000	1893090	297988	73578	371566
Total	5883639	35,00,000		1034910	334269	1369179

The said application was rejected by the Settlement Commission while passing order u/s 245D(1) of the Act on the ground that additional income is declared merely on the basis of estimates and therefore, it does not fulfill the conditions laid down as per provisions of Section 245C(1) of the Act. The ld. CIT(A) in the course of appellate proceedings noted that the assessee has offered additional income of Rs. 5.00 lacs for the Assessment Year 2012-13 and Rs. 10.00 lacs for the 2015-16.

Accordingly, the ld. CIT(A) proposed to enhance the assessment by making the additions of respective amounts to the income based on the disclosure in the application made to the Settlement Commission u/s 245C(1) of the Act. The assessee objected to the said enhancement and contended that when the Settlement Commission itself has rejected the application for want of any incriminating material supporting the additional income then said additional income offered in the application u/s 245C(1) cannot be a basis for addition in assessment. The ld. CIT(A) did not accept the contention of the assessee and made addition of the respective amounts for two assessment years. For the Assessment Year 2012-13, a sum of Rs. 5.00 lacs was added to the income of the assessee.

3.4 Before us, the ld.AR of the assessee submitted that in search no incriminating material as to any undisclosed income of the assessee was found. However, since the husband of assessee Sh. D.P. Sehgal and their group company M/s Amritanandan City Space Pvt. Ltd. approached the Settlement Commission, the assessee also filed a settlement petition where additional income of Rs.35 lacs was offered between AY 2009-10 to 2015-16 on estimated basis. Considering the same, the Settlement Commission has not allowed the application filed by the assessee to be

proceeded with since the assessee is not having any details of transactions from which the additional income is claimed to have arisen. Thus, when the Settlement Commission itself has observed that there is no details of transactions from which the additional income is claimed to have arisen, on the basis of such petition no addition can be made to the income of assessee without bringing any material on record which generated such income. In support of his contention, the ld.AR of the assessee relied on the decision of ITAT Mumbai Bench in the case of Anantanadh Constructions & Farms Pvt. Ltd. vs DCIT ,166 ITD 83 and submitted that the Tribunal has held that confidential information submitted before the Settlement Commission cannot be a basis of addition in the assessment proceedings in the absence of any incriminating material found during the course of search and seizure action. Thus the ld.AR of the assessee submitted that in the case of the assessee when no incriminating material was found during the course of search and seizure action substantiating the alleged undisclosed income, the addition cannot be made solely on the basis of income offered by the assessee in the application u/s 245C(1) of the Act which was rejected by the Settlement Commission.

3.4 On the other hand, the ld. DR supported the order of the ld. CIT(A) and contended that there is no confidentiality clause either in the provision of Section 245C or 245D of the Act or in the Income Tax Rules relating to Settlement Commission. Regarding the provision of Section 245HA(3), the AO shall be entitled to use all the material and other informations produced by the assessee before the Settlement Commission or the results of the enquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it. Thus the ld. DR has supported that the material which is a part of the proceedings before the Settlement Commission can be used by the AO or other Income Tax Authority for the purpose of assessment.

3.5 We have considered the rival submissions as well as the relevant material on record. The ld. CIT(A) has made the addition being enhancement of assessment in para 10.1 of the impugned order for the Assessment Year 2012-13 as under:-

> ''10.1 I do not agree with the contention that income offered in settlement application cannot be taxed as it is not evidence. In fact such application is drafted without any presence of income tax officials (thus there is no threat or coercion, to say the least). Disclosure made by the appellant is backed by a detailed note by the appellant regarding seizure of loose papers, documents (refer page 15 & 16 of

settlement application). Such application is duly signed by the appellant, also certifying that all the conditions relating to tax payments are fulfilled. Such application is duly verified and signed by the appellant on 21-12-2016. Sums and substance of these observations is that such application has far more evidentiary value than mere statement recorded u/s 132(4) of the Act. Further facts contained in settlement application can always be used in view of section 245HA (3) which read under:-

> Section 245HA(3) for the purpose of sub-section (2), the Assessing Officer, or, as the case may be, other income tax authority, shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it, as if such material information, inquiry and evidence had been produced before the Assessing Officer or other income tax authority or held or recorded by him in the course of the proceedings before him [Emphasis supplied]

Considering the above, I am of the view that Rs. 5 lakh is concealed income for the A.Yr. 2012-13, which was offered before the settlement commission and was not disclosed before the AO. Thus AO is directed to enhance the income of the appellant by Rs. 5 lakhs. Penalty u/s 271(1)(c) is also initiated for concealment of income of Rs. 5 lakhs as it is a clear case of concealing income. Notice u/s 271(1)(c) is being issued separately for stated default.''

Thus the ld. CIT(A) has considered the application submitted by the assessee u/s 245(C(1) of the Act as an evidentiary value and additional income offered in the said application of Rs. 5.00 lacs in the year under consideration was added to the income of the assessee. At the outset, we

note that the Settlement Commission has rejected the application of the assessee by giving the reasons mentioned in the order dated 6-01-2017 as under:-

> ''11…….Apparently, in the case of Smt. Renu Sehgal, the additional income has been declared merely on the basis of estimates. In response to specific query raised by the Bench in this regard, the A.R. fairly admitted that applicant is not in possession of any details of transactions from which the additional income is claimed to have arisen. In view of this position, we are in no position, even got to the prima facie findings that a full and true disclosure has been made. Accordingly, the Settlement Application filed by Smt. Renu Sehgal does not fulfill the conditions laid down as provision of section 245C(1). Accordingly, the application filed by this applicant i.e. Smt. Renu Sehgal is not allowed to be proceeded with.''

Thus it is a finding of the Settlement Commission while rejecting the application that application filed by the assessee does not fulfill the conditions as per provisions of section 245C(1) of the Act as additional income has been declared merely on the basis of estimates without any details of transactions resulting the additional income or any other material substantiating the additional income. The Settlement Commission while rejecting the application has also taken a note of the facts as stated in the statement of facts. There is no quarrel that the

material and other information produced by the assessee before the Settlement Commission or any evidence recorded by the Settlement Commission in the proceedings before it can be used by the AO as well as other income tax authority for the purpose of assessment. However, when application filed by the assessee u/s 245C(1) itself fails for want of any material supporting the additional income disclosed then mere disclosure of income in the application u/s 245C(1) cannot be a basis of addition to the income of the assessee. What is provided u/s 245HA(3) is the evidence which may be in the shape of material, information or result of the enquiry held or evidence recorded by Settlement Commission in the course of proceedings. However, in the case in hand, there was no occasion of conducting any proceedings or enquiry or recording any evidence as the application of the assessee was rejected for want of any supporting material. The ld. CIT(A) has also not referred to any incriminating material to disclose the income which was offered by the assessee in the said application filed u/s 245C(1) of the Act but disclosure made in the application itself was considered as an evidence. The ITAT Mumbai Bench in the case of Anantnadh Constructions & Farms (P) Ltd.

vs DCIT, 166 ITD 83 while considering the identical issue held in para 13 to 19 as under:-

13. We find that assessee has made declaration and filed some information before Settlement Commission admitted under section 245D of the Act and it can be used only for limited purpose for settlement of tax dispute and passing an order under section 245D(4) of the Income Tax Act and not for other purpose. The assessee has made a disclosure and such disclosure ultimately ended in settlement order under section 245D(4) of the Act. The disclosure came to the possession of AO. The fact that the disclosure made under section 245D(1) of the Act even if constructed as if no order under section 245D(4) has been passed it will not give a license to the AO to use the confidential information disclosed in an annexure to the application of the Settlement Commission. If the application is treated as not admitted under 245D(1) of the Act, then the provisions are clear that confidential information can never be passed on to the AO nor can it be used in evidence against the assessee. Section 245D(4) has clearly held that admission of assessee's application under section 245(1) was incorrect. We find that any confidential information disclosed in annexure to the settlement application before Income Tax Settlement Commission can never be the basis to make the addition. We find that in the instant case, the AO has reopened the assessment under section 147. Thereafter, AO has not brought any evidence or made any inquiry that assessee has earned additional income of Rs.5 lakhs as brokerage income. In the instant case, after reopening the assessment order, the AO had not made any inquiry and not examined the material which was before him that how this income was declared by the assessee and addition has been made simply relying upon the declaration made in the application before the Settlement Commission under section 245D. The AO was in possession of the paper relating to the income but in absence of any material no addition can be made. The Hon'ble Gujarat High Court in the case of Commissioner vs. Maruti Fabrics 47 Taxmann.com 297 has held that whatever material is produced along with application by the assessee before Settlement Commission or result of inquiry held or evidence recorded by the Settlement Commission in course of proceedings before it can be used by the adjudicating authority as if same had been produced before such Central Excise Officer. Once application or proceedings before Settlement Commission fails, Central Excise Officer is required to adjudicate entire proceedings and show cause notice and Hon'ble Gujarat High Court has held as under:

"Considering sub-section (2) of section 32L of the Act, in a case where an order is passed by the Settlement Commission under sub-section (1) of section 32L and thereafter adjudicating authority is required to adjudicate the case, the Central Excise Officer shall be entitled to use

all the materials and other information produced by the assessee before the Settlement Commission or the result of inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence have been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him on fair reading of sub-section (2) of Section 32L of the Act whatever is admitted by the assessee while submitting the application before the Settlement Commission submitted under Section 32E(1) of the Act straightway cannot be said to be admission on behalf of the assessing accepting the liability. Whatever the material is produced alongwith the application and/or any material and/or other information produced by the assessee before the Settlement Commission or the result of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it can be used by the adjudicating authority as if such materials, information, inquiry and evidence has been produced before such Central Excise Officer, while adjudicating the show cause notice and the proceedings. If the contention on behalf of the appellant is accepted, in that case, there is no question of further adjudication by the Central Excise Officer with respect to the amount admitted by the assessee while submitting the application before the Settlement Commission submitted under Section 32E(1) of the Act. Once the application or proceedings before the Settlement Commission fails, the Central Excise Officer is required to adjudicate the entire proceedings and show cause notice. Under the circumstances, so far as proposed question of law No.1 is concerned, the present Tax Appeals deserve to be dismissed and are, accordingly, dismissed by answering the proposed question of law No.1 against the Revenue."

14. Respectfully following the same, we hold that Hon'ble Gujarat High Court's judgment in the case of Maruti Fabrics pertains to Central Excise but if we compare central excise under section 32E of the Central Excise Act this section is parallel to section 245C of the Income Tax Act. One primary condition mentioned in section 32E for filing central excise settlement petition is "a show cause notice for recovery of duty issued by Central Excise Officer has been received". In Income Tax Act section 245C requires some pendency of proceedings. The Central Excise application is allowed or rejected vide order under section 32F(1). This section is parallel to section 245D(1). Section 32L gives the powers and procedure of Central Excise Settlement Commission. This section is similar to section 245F of the Income Tax Act. Section 32L gives the powers of the Settlement Commission to send the case back to the Central Excise Officer. Section 32L reads as under:

"32L(1) The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E has not co-operated with the Settlement Commission in the proceedings

before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with provisions of the Act as if no application under section 32E had been made.

32L(2) For the purpose of sub-section (1), the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him."

15. We find that section 245HA(1) of the income Tax Act lists several circumstances in which the case before the Settlement Commission would abate; whereas in section 32L(1) non - cooperation of the petitioner is the only ground. The Central Excise Officer derives its power its power to assess such abated proceeding vide section 32L(2) of the Central Excise Act. This is identical to powers vested with an AO under section 245HA(2) and 245HA(3) under the Income Tax Act. It is therefore very clear that the provisions of Central Excise Settlement Commission and that for Income Tax settlement Commission are identical. Therefore, the judgment of Hon'ble Gujarat High Court in the case of Maruti Fabrics although pertaining to Central Excise should be applied to cases abated under section 245HA of the Income Tax Act also.

16. Therefore, we are of the view that the judgment of Hon'ble Gujarat High Court is applicable to the facts of the assessee's case. We find that Hon'ble Gujarat High Court has held that if the petition filed before the Settlement Commission wherein assessee has made declaration but proves that assessee has neither earned such income nor any incriminating material was found during the search relating to undisclosed income then no addition can be made.

17. We have also gone through the judgment of ITAT, Mumbai in the case of Dolat Investment vs. Dy. Commissioner of Income Tax wherein the ITAT has specifically held in para 22 which reads as under:

"22. The first issue is whether the case of the assessee for assessment year 2005-06 was admitted by the Settlement Commission under section 245D(1) of the Act?

On this issue, we have already seen that in the order dated 30-11-2007 under section 245D(4) of the Act, the Settlement Commission has clearly held that the assessee for assessment year 2005-06 does not satisfy the criteria of offering income on which at least an income-tax payable should exceed Rs. 1 lakh. The Settlement Commission has further held that when admitting the petition of the assessee for

assessment year 2005-06, this aspect was overlooked and that they are rectifying the apparent error by excluding assessment year 2005-06 of the assessee from the process of settlement. Thus, the case of the assessee for assessment year 2005-06 cannot be considered to have been admitted for the process of settlement under section 245D(1) of the Act. Consequently, the confidential information disclosed in the Annexure to the Settlement application could not have been used by the Assessing Officer against the assessee to make the impugned addition. Therefore, the addition to the income made by the Assessing Officer in assessment year 2005-06 which is based only on the disclosure made in the Annexure to the Settlement Commission is not valid in law. Consequently, the imposition of penalty on the basis of such invalid addition cannot be sustained. In view of the above conclusion, we do not wish to go into the other alternate argument of the learned counsel for the assessee regarding abatement of proceedings before Settlement Commission and use of confidential information disclosed by the assessee in such proceedings by the Assessing Officer in making assessment."

18. From the above decision of the Tribunal where they have discussed the section 245C(1) and section 245D(i) and 245HA by following observation:

"20. The Finance Act, 2007 made changes to the provisions for settlement of cases contained in Chapter XIX-A of the Income-tax Act 1961. One change involves introduction of a new concept of abatement of proceedings before the Settlement Commission for which provisions has been made in the newly inserted section 245HA relevant portion whereof reads thus : —

"245HA. *Abatement of proceeding before Settlement Commission.—(1)* where....

(i)an application made under section 245C on or after the 1st day of June, 2007 has been rejected under sub-section (1) of section 245D;

(ii)an application made under section 245C has not been allowed to be proceeded with under sub-section (2A) or further proceeded with under sub-section (2D) of section 245D;

(iii) an application made under section 245C has been declared as invalid under sub-section (2C) of section 245D;

(iv) in respect of any other application made under section 245C, an order under sub-section (4) of section 245D has not been passed within the time or period specified under sub-section (4A) of section 245D, the proceedings before the Settlement Commission shall abate on the specified date.

Specified date would be (i) in respect of an application referred to in sub-section (2A) or sub-section (2D), on or before the 31st day of March, 2008; (ii) in respect of an application made on or after 1st day of June, 2007 within nine months from the end of the month in which the application was made.

(2) Where a proceeding before the Settlement Commission abates, the Assessing Officer or as the case may be any other income-tax authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 245C had been made.

(3) For the purposes of sub-section (2), the Assessing Officer or as the case may be, other income-tax authority, shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it, as if such material, information inquiry and evidence had been produced before the Assessing Officer or other income-tax authority or held or recorded by him in the course of the proceedings before him."

21. Thus, when a proceedings before the Settlement Commission abates, it reverts to the income-tax authority before whom it was pending at the time of making the application for settlement and the income-tax autho-rity has to dispose of the case in accordance with the provisions of the Act as if no application for settlement had been made and for that purpose, it is entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it."

19. We find from the above proposition of law by Hon'ble Gujarat High Court and Tribunal that simply relying upon the declaration made before the Settlement Commission no addition can be made. In this group case, the search was conducted in the business premises of Lodha Group and subsequent to search action assessee company along with other companies of Lodha Group filed a petition under section 245C(1) of the Act before Settlement Commission. The assessee has offered additional income of Rs.5 lakhs towards the land brokerage income. This offer was made for maintainability of petition before Settlement Commission as stated in clause (i) and clause (ia) of section 245C(1) of the Act. We are of the view that after reopening of the assessment order no addition can be made on the basis of income offered by the assessee before Settlement Commission. We find that no incriminating material was found during the course of search action substantiating that assessee has actually earned undisclosed income. Therefore, just because assessee has offered

> additional income before Settlement Commission, no addition can be made without basis. Hence, the addition made by the AO and Ld. CIT(A) is deleted."

Thus the Tribunal in the said case followed the decision of Hon'ble Gujarat High Court in the case of Maruti Fabrics (2014) 47 Taxmann.com 298 wherein Hon'ble High Court held that once the application or proceedings before the Settlement Commission fails, the AO is required to adjudicate upon the entire proceedings and show cause notice. In the case in hand, in the absence of any material much less the incriminating material, no addition can be made on the basis of income offered in the application u/s 245C(1) which was rejected by the Settlement Commission. Accordingly, the enhancement made by the ld. CIT(A) is deleted.

4.1 For the Assessment Year 2015-16, the only issue raised by the assessee is regarding enhancement of income of Rs. 10.00 lacs based on the additional income offered by the assessee in the application u/s 245C(1) of the Act.

4.2 This ground is common to the ground of assessee's appeal for the Assessment Year 2012-13. In view of our findings on this issue for the Assessment Year 2012-13, this ground of the assessee's appeal stands

decided in favour of the assessee and consequently the addition made by the ld. CIT(A) is deleted.

5.0 In the result, the appeals of the assessee is allowed and that of the Revenue is dismissed.

Order pronounced in the open court on 19/08/2019.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल राव)
(Vikram Singh Yadav)	(Vijay Pal Rao)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 19 /08/ 2019
*Mishra
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The ACIT/DCIT, Central Circle-3, Jaipur
2. प्रत्यर्थी / The Respondent- Smt. Renu Sehgal, Jaipur
3. आयकर आयुक्त(अपील) / CIT(A),
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.708/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar