-आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'C'

BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND
SHRI RAJPAL YADAV, JUDICIAL MEMBER

Misc. Application No.02 and 03 /Ahd/2015
IN
आयकर अपील सं./ **IT(SS)A No.99, 106/Ahd/2004**
*निर्धारण वर्ष/***Asstt. Year: Block Period**

Jivraj V. Desai 5, Ashokkumar Society Radhanpur Road Highway Mehsana, North Gujarat.	Vs.	ACIT, Cent.Cir.1(1) Ahmedabad
(Applicant)		(Respondent)

Assessee by	:	Shri T.P. Hemani, AR
Revenue by	:	Shri Prasoon Kabra, Sr.DR

*सुनवाई की तारीख/*Date of Hearing : 20/04/2018
*घोषणा की तारीख /*Date of Pronouncement: 06/06/2018

*आदेश/***O R D E R**

PER RAJPAL YADAV, JUDICIAL MEMBER:

Present Misc. Applications are directed at the instance of the assessee pointing out apparent error in the order of the Tribunal dated 13.12.2013 passed in IT(SS)A.No.99/Ahd/2004 and IT(SS)A.No.106/Ahd/2004. In other words, cross appeals were decided by the Tribunal wherein Misc. application pointing out apparent errors have been filed by the assessee.

2. MA No.2/Ahd/2015 is running into 16 pages whereas MA No.3/Ahd/2004 is running into 5 pages. The Tribunal order is running into 89 pages. Thus, the assessee has devoted lot of

energy for pointing out alleged apparent error in the order of the Tribunal. Therefore, we embark upon an inquiry on the facts of the present case in order to find out whether any apparent error committed by the Tribunal or not while passing the impugned order on 13.12.2013. We think it appropriate to bear in mind certain basic principles for exercising powers contemplated in section 254(2) of the Income Tax Act, 1961.

4. There are series of decisions at the end of the Hon'ble Supreme Court as well as Hon'ble High Court expounding scope of exercising powers under section 254(2) of the Act. We do not deem it necessary to recite and recapitulate all of them, but suffice to say that core of all these authoritative pronouncements is that power for rectification under section 254(2) of the Act can be exercised only when mistake, which is sought to be rectified, is an obvious and patent mistake, which is apparent from the record and not a mistake, which is required to be established by arguments and long drawn process of reasoning on points, on which there may conceivably be two opinions. For fortifying this view, we make reference to the decision of the Hon'ble jurisdictional High Court in the case of ACIT Vs. Saurashtra Kutch Stock Exchange Ld., 262 ITR 146 which has been upheld by the Hon'ble Supreme Court reported in 305 ITR 227. The Hon'ble Court has laid down following proposition while concluding the judgment:

> *"(a) The Tribunal has power to rectify a mistake apparent from the record on its own motion or on an application by a party under s. 254(2) of the Act;*
>
> *(b) An order on appeal would consist of an order made under s. 254(1) of the Act or it could be an order made under sub-*

s. (1) as amended by an order under sub-s. (2) of s. 254 of the Act;

(c) The power of rectification is to be exercised to remove an error or correct a mistake and not for disturbing finality, the fundamental principle being that power of rectification is for justice and fair play;

(d) That power of rectification can be exercised even if a mistake is committed by the Tribunal or even if a mistake has occurred at the instance of party to the appeal;

(e) A mistake apparent from record should be self-evident, should not be a debatable issue, but this test might break down because judicial opinions differ and what is a mistake apparent from the record cannot be defined precisely and must be left to be determined judicially on the facts of each case;

(f) Non-consideration of a judgment of the jurisdictional High Court would always constitute a mistake apparent from the record, regardless of the judgment being rendered prior to or subsequent to the order proposed to be rectified;

(g) After the mistake is corrected, consequential order must follow and the Tribunal has power to pass all necessary consequential orders."

5. It is pertinent to observe that in hierarchy of appellate jurisdiction under the Income Tax Act, ITAT is the last fact finding appellate authority, thereafter appeal to the Hon'ble High Court under section 260A of the Act is provided on point of law involved therein. Operative force of the arguments advanced by Shri Hemani on behalf of the assessee was that ITAT has conceived facts wrongly and cumulative effect of this conceivement of these wrong facts would be that they will goad the adjudicating authority on wrong conclusion. Assimilation of incorrect facts would lay foundation of wrong reason and result in an incorrect

adjudication. We are conscious of the fact that error of fact and law in appreciating the circumstances section and provision could fall in the ambit of apparent error but not error of judgment reached after applying correct fact and correct law, because that will be process of adjudicating the controversy and that can lead to difference of opinion *qua* result. But if incorrect facts and incorrect provisions are considered, then that would come in the ambit of apparent error.

6. Apart from above, at the time of hearing the ld.DR relied un two judgments of the Hon'ble High Court rendered in the case of CIT Vs. Gujarat Institute of Housing Estate Developers, and Pr.CIT Vs. Nirma Limited both reported in 84 taxmann.com 148 and 188 (Guj). He has placed on record copies of both these judgments. In the case of Gujarat Institute of Housing Estate Developers (supra), the assessee received contributions from its members. It claimed non-taxability of such contributions on the principle of mutuality. However the AO did not concur with the view of the assessee and dispute travelled upto the Tribunal. The Tribunal passed a common order dated 29.9.2015 confirming the view of the AO and the CIT(A) holding that such income was taxable. In such order, Tribunal referred to the latest decision of Hon'ble supreme Court in the case of Bangalore Club Vs. CIT, 350 ITR 509 and noted that as per decision of the Hon'ble Supreme Court there are three basic features, which would have to be tested viz. complete identity between the class of contributors and the participators, the action of the participators and contributors should be in furtherance of the mandate of the association, and lastly that there should not be any scope of profiteering by the contributors from a fund made by them which could only be

extended or returned to themselves. In this way, the Tribunal held that principle of mutuality would not apply in the case of assessee and dismissed its appeal. The assessee thereafter filed MA pointing out apparent error in the order of the Tribunal. This MA was allowed and order of the Tribunal was recalled. Dissatisfied with the order of the Tribunal, the Revenue went in appeal before the Hon'ble High Court and the Hon'ble High Court set aside the order of recall and restored the original one. It is imperative upon us to take the following finding of the Hon'ble High Court:

> *"4. In the present case, as noted the Tribunal had given detailed reasons for coming to the conclusion that the principle of mutuality would not apply. While accepting the assessee's rectification applications, the Tribunal undertook equally painstaking and elaborate consideration of the very same issues and very same facts to come to a contrary conclusion. It is not necessary nor possible for us to hold whether the Tribunal's first view was correct or the subsequent one. It is enough to hold that the Tribunal could not have undertaken such incisive and detailed examination of facts and law to come to the conclusion which are completely contrary to its own conclusion arrived at after detailed considerations. Such powers simply do not flow from the power of rectification under sub-section (2) of Section 254 of the Act."*

7. Next decision referred by the ld.DR is in the case of Nirma Ltd. In this case, the assessee had claimed interest expenditure under section 36(1) of the Act allegedly incurred by it on premature redemption of secured premium notes issued by the company. The AO did not accept this claim of the assessee which was concurred by the CIT(A) as well as by the Tribunal. The assessee filed appeal against the order of the Tribunal before the Hon'ble High Court as well as filed MA before the Tribunal. The

Tribunal earlier was of the view that since the assessee has filed appeal before the Hon'ble High Court, therefore, MA ought not to be taken up. But the assessee went to the High Court and direction was made for adjudicating the MA. After hearing the assessee the Tribunal recalled its order. Dissatisfied with the order of the Tribunal, the Revenue went in appeal before the Hon'ble High Court, and the Hon'ble Court has vacated the order of the ITAT. Finding recorded by the Hon'ble High Court explaining the power of the Tribunal under section 254(2) is worth to note. It reads as under:

> *"4. We have heard learned counsel for the parties. We have perused the documents on record. We are of the view that the Tribunal committed a legal error in recalling its earlier detailed judgement. As noted, there was a raging controversy between the Revenue and the assessee regarding the assessce company's claim of deduction of interest expenditure at all stages before the Assessing Officer. Commissioner (Appeals) and the Tribunal. This issue received minute scrutiny. The Tribunal in particular had referred to the facts on record, findings and the observations of the Assessing Officer and the Commissioner (Appeals) and ultimately gave its own reasoning for coming to the conclusion that the transaction leading to the assessee's claim of interest expenditure was not genuine and it ultimately put its seal on the decisions of the Revenue authorities. Whether .such opinion of the Tribunal was legally sustainable or not is the subject matter before us in the present tax appeal. The relevant question is, could the Tribunal have exercised the power of rectification to recall such judgement? The answer being obvious, is in the negative. The powers of rectification flowing from Section 254(2) of the Act are for correcting apparent errors and not for re-examination of the issues already considered and concluded. It is well recognised that the powers of rectification cannot be equated to that of review. The Tribunal thus travelled far beyond its power of rectification in accepting the assessee's various contentions which were not confined to pure factual errors apparent on the record. Some*

of the contentions of the assessee were highly contentious legal issues. Once the Tribunal had taken a particular view, it was always open for the aggrieved party to challenge such views before the higher court. The Tribunal could not have been persuaded to re-examine the issues on the premise that there was an error apparent on the record."

8. In the MA, the assessee has made reference to the decision of Hon'ble Gujarat High Court in the cases of Mercury Metals P.Ltd. Vs. ACIT, and Rameshchandra M. Luthra, 257 ITR 297/460. On strength of these decisions, it has been pleaded that if the Tribunal failed to consider judgment of the Hon'ble Supreme Court or jurisdictional High Court, then it would tantamount to an apparent mistake. We do not have any hesitation *qua* this proposition canvassed by the ld.counsel for the assessee, because we have already referred the decision of the Hon'ble Supreme Court in the case of ACIT Vs. Saurashtra Kutch Stock Exchange Ltd. (supra).

9. In the light of the above, let us consider the facts of present case. As alleged earlier, the assessee has filed MAs running into 16 and 5 pages. It has filed two synopsis – one running into 8 pages and other 15 pages. With the assistance of ld.representatives, we have gone through all these details. Synopsis showing mistake running into 8 pages is being reproduced here. It reads as under:

1. *(i)* *Issue :*

The presumptions drawn by the Hon'ble ITAT u/s 132(4) on the Diary A-I found from Arvind A. Shah.

(ii) *Observation of Hon'ble ITAT :*

The Hon'ble ITAT on page 37 to 39 in para 8.10 to 8.11, while recording the findings has drawn presumptions u/s 132(4) in the case of appellant Jivraj V. Desai and recorded the following findings:

"In the present case, we have noted that learned CIT(A) has overlooked the statement recorded u/s 132(4) of IT Act and given undue weightage to the statement recorded u/s 131 of IT Act which were otherwise not supported by evidence. At this juncture we may like to further clarify that the evidence are those evidences which are found at the time of search in search related matters. The entire proceeding revolved around the evidences or documents found in the possession, and unearthed at the time of search; so as to demonstrate that the diary A-I was belonging to the assessee and not to any third person".

(iii) Observation in Asst. Order :

Since the issue was not raised by AO during the course of assessment proceedings, there is no discussion in the assessment order on presumption u/s 132(4).

(iv) Observation in CIT(A)'s Order :

On page No 68 in para 13, the issue relating to presumption u/s 132(4) has been discussed and while recording the findings on page 69 under para 5.11, the Ld.CIT(A) has recorded the findings as under:

"I have carefully considered the facts and the rival submissions and I have also gone through the seized records. I have also gone through the remand reports and the submissions of the appellant on the remand report, as reproduced herein above. It is an undisputed fact impugned diary being Annexure A-I has been found during the course of search, from the residence of Shri Arvind Shah, appellant's accountant. Apart from the diary, there are other various loose papers also, which has been found from the residence of Shri Arvind Shah, which has direct link with the notings in the said diary, on the basis of which, the A.O. has made the addition.

(v) Conclusion :
1) Hon'ble ITAT has wrongly drawn that Ld.CIT(A) has overlooked the statement recorded u/s 132(4).

2) The presumption u/s 132(4) is applicable in case of Arvind Shah as said diary was found from the possession of Arvind Shah and not from the appellant Jivraj V. Desai.

3) Therefore, Hon'ble ITAT on page 39 in para 8.11 has wrongly drawn the presumption in case of Jivraj V. Desai presuming that the said diary has been found from the possession of Jivraj V. Desai whereas the said diary was found from the possession of Arvind Shah.

2. *(i) Issue :*

No discussion about the amount of Rs.23,43,08,700 deleted by CIT(A) pertaining to Mr. Manoj Vadodaria, as challenged by the revenue in the grounds of appeal no.1

(ii) Observation of Hon'ble ITAT :

While deleting the revenue appeal in IT(ss)A No.99/Ahd/2004 (Revenue's Appeal) relating to ground appeal No.1, as discussed by the Hon'ble ITAT on page 2 of the order, the amount deleted by the CIT(A) of Rs.26,80,09,000/- includes pertaining to Manoj Vadodaria. Hon'ble ITAT on page 16 to 18 in para 4.3 discussed the said issue relating to 3 parties of Rs.26,80,09,000/

Thereafter, Hon'ble ITAT in para 4.4 has discussed the facts relating to amount of Rs.2,21,71,300/- in the name of Jignesh V. Desai and amount of Rs.1,15,29,000/-in the name of Vikasbhai Shah, but has not discussed the issue relating to Rs.23,43.08,700/- pertaining to Manol Vadodaria which was discussed in Para (viH available on page no.21 to 22. Para (vii) of the order of the CIT(A).

(iii) Observation in Asst. Order :

(iv) Observation in CIT(A)'s Order :

(v) Conclusion :
Accordingly, the submission with respect to the major amount of Rs.23,43,08,700/- with respect to Manoj Vadodaria has altogether been ignored by the Hon'ble ITAT while dealing with the ground of appeal No.1 of the Revenue's appeal and only facts relating to the amount of Jignesh V. Desai & Vikasbhai Shah has been discussed in para 4.4, immediately after reproducing the table in para 4.3.

3. (i) *Issue :*

Written submission of D.R. considered by Hon'ble ITAT was not made available to the A.R. of the appellant,

(ii) Observation of Hon'ble ITAT :

The Hon'ble ITAT on page nos. 22 to 25 in para 5.1 while considering the side of the Revenue has reproduced the relevant portion of the so called written submission of DR.

(iii) Observation in Asst. Order :

(iv) Observation in CIT(A)'s Order :

(v) Conclusion :

Neither the said written submission was filed during the course of appeal hearing, nor copy of the same has been provided to the A.R. of the appellant.

Two written submissions have been filed by the D.R. viz. dated 9/4/2013 (which has been replaced by new submission dated 9/4/2013) and 10/4/2013 which has been provided to the A.R. of the appellant Submission which has been reproduced by the Hon'ble ITAT as claimed to have been filed by D.R. in para No.5.1 was not made available to the A.R. of the appellant.

4. (i) *Issue :*

Finding of the Hon'ble ITAT, is contrary to the findings recorded by the AO.

(ii) Observation of Hon'ble ITAT :

The Hon'ble ITAT on page No. 28 in para-8 has observed:

"The diary has single entry ledger account of various sharafi business related parties".

(iii) Observation in Asst. Order :
On page 29 of the assessment order in para 2, AO while analyzing the transaction found recorded in the Diary A-I has recorded the following findings:

"The accounts/transactions in the diary are not purely sharrafi in nature. The same are classified in three categories as under:

a) Transactions/accounts pertaining to Thaltej land deal,
b) Other Sharafi transactions/accounts with debit balances/entries including miscellaneous accounts.
c) Sharafi transactions/accounts with credit balances/entries".

(iv) Observation in CIT(A)'s Order :

(v) Conclusion :

The said finding of the Hon'ble ITAT is contrary to the finding of the A.O. as pointed out during the course of appeal argument and specifically vide para No.3.5 of the Synopsis of the Arguments. The said finding of the Hon'ble ITAT is contrary to the finding of the A.O.

5. *(i) Issue :*

Finding of the Hon'ble ITAT relating to the Statement dated 250/10/2000 of Shri Arvind A. Shah.

(ii) Observation of Hon'ble ITAT :

The Hon'ble ITAT on Page No.29 in para No.8, has discussed the statement of Shri Arvind A. Shah recorded u/s. 143(4) on 20/10/2000 and therefore concluded as under:

"In the light of the said statement of Sri Shah, we have carefully perused the photocopy of the said diary, being a part of the compilation as well as an English version of the said diary placed before us from the side of the Revenue".

(iii) Observation in Asst. Order :

(iv) Observation in CIT(A)'s Order :
(v) Conclusion:

The discussion of the Hon'ble ITAT on page No.28 & 29 in para No.8 is pertaining to the Statement u/s 132(4) of Arvind A. Shah on 20/10/2000, which is on the basis of discussion made by the AO on Page 8 of the Assessment Order. However, vide Synopsis of the Argument submitted during the course of appeal hearing by the A.R., attention to para No.2.3 was drawn on the Statement u/s 131 of the said Shri Arvind A. Shah

recorded on 24/9/2002 wherein while answering to question No.6, the loose page No.93 to 99 were clearly explained as relating the said land.

Accordingly, the conclusion has been drawn only on the basis of Statement dated 20/10/2000, ignoring Statement dated 24/9/2002.

6. *(i) Issue*

Finding of the Hon'ble Tribunal that no supporting evidences were furnished.

(ii) Observation of Hon'ble ITAT :

Hon'ble ITAT after discussing the Statements recorded u/s 132(4) and 131 in para No.8.5 & 8.6 has come to the conclusion in para No.8.8 that assessee has changed the statement and no corroborative documentary evidences were submitted by the assessee to substantiate the said claim.

(iii) Observation in Asst. Order :

(iv) Observation in CIT(A)'s Order :

On page no.70 to 73 under para 5.12 while recording findings by Cir(A), reference has been made to the following loose papers:

Page	*Loose Papers*
71	*A-3 Page 35-36 being MOU*
72	*A-3 Page 82*
73	*A-3 Pages 26, 30, 31, 32, 49 to 52*
74	*A-3 Page 1* *A-3 Page 7 & 8* *A-4 Page 91* *A-3 Page 2*

Conclusion:

In this respect, attention is drawn to the elaborate arguments which has taken placed during the course of appeal hearing by the A.R. wherein attention was drawn to the fact that several Remand Reports were sought by the CIT(A) from the A.O. but

none of the observation of the A.O. in the Remand Report has been considered by the Hon'ble Tribunal. The only two statements recorded u/s 132(4) and 131 has been considered and reference to various loose papers of Annexure A-3 and A-4 as made by the CIT(A) in para No.5.12 of the Order of the CIT(A) has altogether been ignored. Therefore, the said finding is contrary to the records and findings of the CIT(A)

7. *(i) Issue :*

That the assessee has not discharged onus relating to 9 ledger accounts in the Diary A-I.

(ii) Observation of Hon'ble ITAT :

Hon'ble ITAT on page 36 in para 8.9 in the beginning part has discussed the issue relating to the 9 ledger accounts of the diary A-I and observed that assessee was granted several opportunities to produce those parties in respect of the contention that it was not relating to the sharafi business and assessee has not discharged said onus.

(iii) Observation in Asst. Order :
(iv) Observation in CIT(A)'s Order :
(iv) Conclusion :

The list of the said 9 parties is appearing on page 25 of the order of the CIT(A) and it was submitted to CIT(A) as well as Hon.ITAT that only one name Vikasbhai Shah is included in the 9 names which has been deleted by the CIT(A) of Rs. 1,15,29,0007-. As complete identity and the details of Vikasbhai Shah was submitted to the AO in the Remand Report proceedings which has been discussed by the CIT(A) in the beginning part on page No.74 of his finding. Therefore, the Hon'ble ITAT has overlooked the fact that addition which has been deleted bv CIT(A) with respect to Manoj Vadodaria and Jignesh V. Desai is not forming part of the said 9 names and further about Vikasbhai A. Shah onus was discharged as copy of the Block assessment in the case of Vikas A. Shah wherein this aspect has already been considered was also pointed out in para No.9.2 of the Synopsis of Arguments and the copy of the assessment order in the case of Vikas Shah was also submitted on page Nos. 148 to 152 of the Additional Paper Book. Therefore, the said observation of the Hon'ble ITAT is contradictory to the records and facts.

8. (i) Issue :

Thaltej land has been taken as security against the loan advanced.

(ii) Observation of Hon'ble ITAT :

The Hon. ITAT in para No.8.11 has given finding as under:

"Therefore, the conclusion is that the Thaltej land was also connected with the sharafi business and the assessee was monitoring the land transaction so as to secure his loan advanced to the parties as noted in the diary. Learned CIT(A) has not looked in this aspect and unilaterally held that the amount which was recorded was required to be considered in the case of one Sri Manoj Vadodaria".

(iii) Observation in Asst. Order :
(iv) Observation in CITf AVs Order :
(v) Conclusion :

It is respectfully submitted that the said observation of the Hon'ble ITAT that Thaltej land was connected with the sharafi business and assessee was monitoring the land transaction to secure his loan advanced to the parties noted in the diary, is contrary to the facts and records. It was not the finding of both the lower authorities that Thaltej land has been taken as security by the appellant for his financing business; rather issue before both the lower authorities was that the Diary inter alia includes transactions relating to the Thaltej land in which appellant was not involved as per documentary evidence in the form of MOU dated 5/7/1998. Therefore, the CIT(A) after co-linking the various other seized material with the amount noted in the dairy has deleted the addition, by observing as under in para No.5.12, as considered by ITAT in para No.4.5:
"5.12 Therefore, the contention raised by the appellant during the course of appeal hearing was very much available before the Assessing Officer in the statement recorded by, still Assessing Officer in the statement recorded by, still Assessing Officer has preferred to make the addition in the hands of the appellant on the basis of said diary without excluding the transactions pertaining to the said land, which in mv view is not correct as neither during the course of search, not in the post search enquiries, including the remand reports, any evidence has been brought on record by the Assessing Officer indicating any investment by the appellant in the said land. Therefore, in

absence of any evidences, suggesting either ownership or control or payment by the appellant pertaining to the said land, I am afraid no addition can be made in the hands of appellant for such transactions, moreover, when during the course of search, certain other evidences were also found from the residence of Arvind Shah indicating transactions between such persons as referred by the appellant, which I shall be discussing in the later part of this order".

9. (i) Issue :

That CIT has not perused the case records of Manoj Vadodaria.

(ii) Observation of Hon'ble ITAT :

Hon.ITAT has further observed on page 39 in para 8.11 as under:

"The decision of learned CIT(A) appears to be incorrect because on his part in the absence of perusal of the case records of Sri Manoj Vadodaria, it was not justifiable for CIT(A) to take decision by appreciating the facts of one side only".

(iii) Observation in Asst. Order :
(iv) Observation in CITf AVs Order :

(v) Conclusion :

It is respectfully submitted that when the CIT(A) passed order in case of appellant on 19/1/2001, only the notice u/s. 158BD was issued in case of Manoj Vadodaria and assessment was completed in case of Manoj Vadodaria u/s 158BD on 29/12/2004. Therefore, there was no occasion to consider CIT(A) the assessment in case of Manoj Vadodaria. Therefore, the said observation is also contrary to the facts and records."

10. Brief facts of the case are that a search under section 132 of the Income Tax Act, 961 was carried out on 20.10.2000. A notice under section 158BC was issued and served upon the assessee. He has filed his return of income on 14.10.2002 declaring NIL income for the block period starting from the assessment year 1991-92 and ending on 2001-02. According to the AO, the assessee is the main person of Master Group which is engaged in

the development of residential and commercial blocks. Group is also in the business of land transaction and hotel business. The AO further noticed that the assessee was doing business of cash finance. During the course of search certain documents were found showing *sharafi* business. The AO has made an addition of Rs.27,32,38,000/- in respect of *sharafi* business. On appeal, the ld.CIT(A) restricted this addition to Rs.52,29,000/-. Revenue in its appeal i.e. IT(SS)A.No.99/Ahd/2004 challenged this part of deletion. The Tribunal made detailed analysis of the material available on record and reversed the finding of the ld.CIT(A) major error according to the assessee crept in the finding of the Tribunal while dealing with this ground of appeal. It is pertinent to observe that a diary, annexure A/1 was found from the residential premises of one Shri Arvindbhai Shah who happened to be accountant of the assessee He has disclosed that this diary was being written on the basis of instruction of the assessee. Thus the Tribunal was called upon to make an analysis of the statement of Shri Arvind Shah recorded under section 132(4) of the Act on 20.10.2000. Thereafter, his statement was recorded under section 131 on 19.9.2002. On an analysis of the seized materials as well as finding of the AO, the Tribunal arrived at a conclusion that the ld.CIT(A) has erred in deleting the addition on account of *sharafi* business partly.

11. Let us revert to the specific objection highlighted by the assessee in his synopsis filed during the course of hearing before the Tribunal. The first issue pointed by the assessee is that ITAT has drawn presumption under section 132(4) on the diary A/1 found from Shri Arvind Shah. With regard to this, the assessee has propounded two fold submissions. In his first fold of

submissions, he contended that diary was found from Arvindbhai Shah at his residence. Thus, presumption of truth *qua* that material could not be drawn in the case of assessee from whose possession such diary was not found. In the second fold of submissions the assessee has submitted that the Tribunal has wrongly observed that the ld.CIT(A) has overlooked the statement recorded under section 132(4) of the Act. On due consideration of all these objections, we are of the view that in the present proceedings, we are not called upon to find out whether the Tribunal has committed an error in appreciating the evidence. Our jurisdiction is, had this point submitted by the assessee been taken on the face value then also, could the result on this aspect be different ? It is pertinent to observe that before the Tribunal the issue was, whether diary found during the course of search is to be considered as relatable to the assessee, and he is required to explain the noting in this diary. Second aspect is whether statement recorded under section 132(4) at the time of search of Shri Arvind Shah is to be given preference over the statement recorded under section 131 in September, 2002. To our mind, there is no apparent error in the order of the Tribunal. The Tribunal has made analysis of the statement of Shri Arvind Shah, and thereafter observed that according to this statement, diary was to be considered as relatable to the assessee, because the Shri Arvind Shah was accountant working with the assessee and used to write diary under the instructions of the assessee. Statement given at the time of search is the first statement which otherwise also admissible as provided in section 132(4), but that was also, according to the rule of prudence that once the first statement given by a person without any consultancy, the

statement given after two years of search is being presumed to be given after due deliberations and consultation. We are not here to explain the order of the ITAT as to what operated in the minds of Hon'ble Members while appreciating the controversy, our concern is whether any apparent error has been committed which goad the Tribunal to reach wrong conclusions. To our mind there is no such error. The Tribunal has appreciated the evidence according to its understanding and taken one of the possible opinions.

12. In the next issue it has been pleaded that no discussion was made about the amount of Rs.23,43,08,700/- deleted by the ld.CIT(A). Again to our mind, it is very minor peripheral issue. At the time of hearing Tribunal took into cognizance bifurcation of Rs.27,32,38,000/-. While taking cognizance of the statements made by the assessee in para 5.3, the Tribunal has taken into consideration bifurcation of total amounts and as to how Rs.23,43,08,700/- has been treated by the CIT(A) could be assessable in the hands of Manoj Vadodaria in whose case 153-BD proceedings was allegedly pending. Once the Tribunal has taken into consideration whole amount and appreciated the controversy with that angle, reversed the finding of the ld.CIT(A) then not taking into considering this issue separately, is not an apparent error. It is such a minor aspect which has not influenced the decision making processing. Impliedly, this ground and aspect is embedded in the overall finding of the Tribunal running into first 40 pages.

13. In the next issue, the assessee has pleaded that the Tribunal took cognizance of the written submission of the ld.DR, which was

not supplied to it. We have passed an interim-order on this aspect on 27.11.2017, which reads as under:

> *"27.11.2017 After conclusion of hearing in these Misc.Applications, Tribunal has observed that reference to page no.82, para 6 of the Tribunal's order was made by the ld.representative and it was contended that investment was made from explained sources duly accounted in the books of accounts, and such books of accounts have not been rejected. These books have already been called for and examined by the ld.AO and the Tribunal ought to have not set aside issue to the file of the AO. While verifying the above assertion, we faced little difficulty on certain factual issues, and therefore, these MAs. were re-fixed for clarification of certain issues.*
>
> *During the hearing, the ld.counsel for the assessee contended that these issues are involved in M.A.No.4 and 5. The assessee did not press these MAs., and they can be dismissed. MA No.4 and 5 are being filed in the order of the Tribunal dated 13/12/2013 passed in ITA No.3437 and 3438/Ahd/2007. Tribunal has decided other appeals also along with this order Considering stand of the assessee, these two MAs. are dismissed.*
>
> *As far as MA No.2 and 3 in ITA No.99/Ahd/2004 and 106/Ahd/2004 are concerned, the assessee has raised a plea apart from other submissions that Tribunal has taken cognizance of the submissions made by the ld.DR in para 5 1. In other words, the Tribunal has reproduced written submissions given by the ld.DR. According to the assessee, copy of this submission was never given nor was discussed during the course of hearing. On verification of record, we find that copy of this written submission is available, but it is without signature of any authority and without any date. The above plea taken by the assessee has raised a doubt about sanctity of proceedings before the Tribunal, and if on verification of record, it is found to be correct, then proceedings would be construed as vitiated. Thus, assessee cannot be permitted to raise a bald allegation on the proceedings for conducting a roving inquiry without any consequence for the allegator. The assessee should atleast file an affidavit in support of such allegations so that a report from DR's office could be called for exhibiting under whose signature and on which date such submissions were filed before the Tribunal. It is also pertinent to observe that after hearing these MAs., in the last one-and-half months Judicial Member remained either on tour or on leave. Therefore, MAs., could not be disposed within time limit stipulated in Rule 34 of Income*

Tax (Appellate Tribunal) Rules, 1963. Thus, on account of this cumulative effect i.e. non-adjudication of the MAs., within time limit coupled with fact that the assessee has not filed affidavit supporting allegation that department has not filed written submissions during the course of hearing, we deem it appropriate to hear these MAs. afresh. Therefore, they are released and Registry is directed to list them for hearing on 5th January, 2018. Both parties be informed accordingly.

Sd/- *Sd/-*
(PRAMOD KUMAR) *(RAJPAL YADAV)*
ACCOUNTANT MEMBER *JUDICIAL MEMBER"*

14. The assessee has filed an affidavit stating therein that copy of the submissions was not supplied. The ld DR pointed out that original copy of submissions is available with the file of DR. It is also filed on the record of the ITAT. He further pointed out that whenever submissions are being given across the bar, acknowledgements are not being taken. Once the copy of the submissions on the record of the Tribunal and has been considered by the Tribunal, then on the basis of such affidavit, it could not be concluded that proceedings have been vitiated. On the other hand, the ld.counsel for the assessee contended that copy of the submissions was not supplied to the assessee.

15. We have considered this issue and perused the written submissions reproduced in para 5.1. We find that nothing new is contained in the submissions. It is not something, which if excluded, would change the result or impacted the assessee adversely. It is one fold of submissions amongst others, which is otherwise noted and submitted during the course of hearing. The assessment order is based on this line of submissions, and therefore, it could not be concluded that something new is taken from the back of the assessee. Thus, we are of the view that arguments of the assessee in this respect are devoid of any merit

because alleged submissions was one fold of contentions amongst others, and not some discovery of new facts. Even for arguments sake, it is presumed that copy was not supplied then also this one-half page submission reproduced by the ITAT is not a sole basis of reasoning given in its order. It is just one facet for corroboration of conclusions. On the basis of this plea of the assessee, we cannot say that proceedings were vitiated or any error crept in the finding of the Tribunal. The assessee could file appeal and point out this error, but it does not fall within the ambit of section 254(2) of the Act.

16. Next error pointed out by the assessee is that while recording conclusion in para 8.8, the Tribunal made reference to the statement recorded under section 132(4) and 131 of Shri Arvindbhai Shah, but failed to take cognizance of various loose papers found at the time of search inventorised as A/3, A4 containing page nos.26 to 52 of A/3 and 91 of A/4. The ld.CIT(A) has considered these pages, and thereafter harboured a belief that out of total transactions narrated in the diary, some of the transactions are related to Thaltej land, and these transactions were not belonging to the assessee, rather they related to Manoj Vadodara. According to the assessee, Tribunal failed to take cognizance of these loose papers and finding of the ld.CIT(A), thus arrived at a wrong conclusion. On due consideration of all these pleas of the assessee, we are of the view that we are not sitting in appeal over the order of the Tribunal. We are required to re-appreciate the evidence. We have to find out whether these aspects have been considered or not by the Tribunal. It is conscious decision after evaluation of all evidences. There is no apparent error as such in the order of the Tribunal. The assessee

is trying to point out very minor apparent error i.e. observation of the Tribunal that diary has a single entry ledger account of various *sharafi* business, whereas according to the AO diary contained accounts/transaction not purely *sharafi* in nature. The same are classified in three categories. We do not see that reference to such small aspects would have bearing on the decision making process. The Tribunal has analyzed the issue. More so, these aspects are not to be looked into in a proceeding under section 254(2) of the Act. On overall analysis of both the MAs. we are of the view that the assessee has tried to get the order of the Tribunal reviewed in the garb of pointing out apparent mistake, which is not permissible in law. We do not find any apparent mistake in the order of the Tribunal, hence, both the MAs. are rejected.

17. In the result, both the MAs. are dismissed.

Order pronounced in the Court on 6th June, 2018.

Sd/-	Sd/-
(PRAMOD KUMAR)	(RAJPAL YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad; Dated 06/06/2018