

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3929, 3930, 3931 and 3932/Del/2015
(Assessment Year: 2004-05 and 2005-06)

ITO, Ward-47(1), New Delhi	Vs.	Vishnu Goel, C-65, 1 st Floor, Sangam Apartment, Sector-9, Rohini, Delhi PAN: AGGPG1385A
(Appellant)		(Respondent)

Revenue by :	Shri S.S.Rana, CIT DR
Assessee by:	Shri Shivir Bajaj, CA
Date of Hearing	26/09/2018
Date of pronouncement	15/10/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

01. These are the four appeals in case of Shri Vishnu Goel, Delhi (The Assessee) for two A.Y.s i.e. AY 2004-05 and 2005-06 filed by the ld Income Tax officer, Ward 47 (1), New Delhi (the ld AO) against the order of the learned CIT(A), New Delhi. Out of these, two appeals are against deletion of quantum addition and other two appeals are against deletion of penalty u/s 271 (1) (C) of the act.
02. In short, facts shows that assessee is an the individual who is according to the tax audit report is engaged in the business of trading and commission agent of food grains under the name and style of his proprietary concern, M/s Suraj enterprises. For both the AYs, the issue in this appeal is that

assessee is one of the associate of the accommodation entry provider Mr. Sanjay Kumar Garg and found to have deposited huge amount of cash in his bank accounts. For AY 2004-05 and 2005-06 , ₹ 13,48,58,000/- and Rs. 29,32,85,755/- respectively are such deposits. The ld AO made the addition on protective basis in the hands of the assessee and substantive basis in the hands of Mr. Sanjay Kumar Garg. Even in the hands of Mr. sanjay Kumar Garg the addition was made of commission income @ 1 % of the accommodation amount. The ld CIT (A) deleted the addition on the ground that as the commission in the hands of Mr. Sanjaykumar Garg stood already confirmed, the addition of the amount deposited could not be taxed in the hands of the assessee This shows that the amount of cash deposited in the bank accounts were neither taxed in the hands of the assessee and nor in the hands of Mr. Sanjay Kumar Garg but only 1% of the whole amount of accommodation entries in the form of commission is taxed in the hands of Mr. Sanjay Kumar Garg.

03. Survey u/s 133A of The Income Tax Act, 1961 was conducted on 12/7/2004 in case of business entities connected with Shri Sanjay Kumar Garg. During the course of survey, Shri Sanjay Kumar Garg was found to be carrying on activity of providing accommodation entries to various food grain merchants on a mass scale basis through various bogus concerns and dubious entities created by him. The investigation wing of the department was investigating this information. It alleged that cash was received from food grain merchants, which was deposited in the bank accounts of such

bogus concerns and dubious individuals against which cheques, pay orders, demand drafts were issued in favour of the beneficiaries.

04. The background facts of the whole case is recorded by the learned assessing officer in para number 2 & 3 of his assessment order for A.Y. 2004 – 05 as under:-

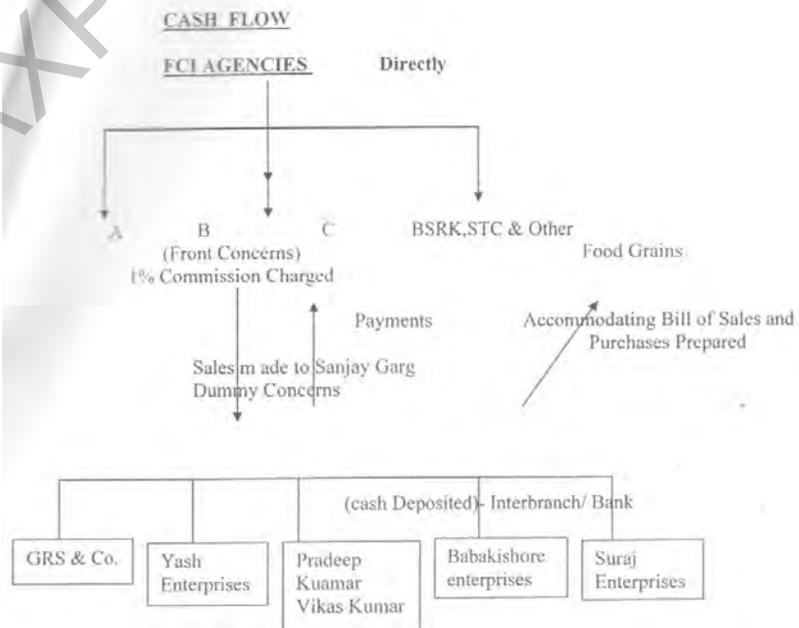
“2. This case is being connected with the case of Shri Sanjay Kumar Garg, where Survey U/s 133 A of I.Tax Act 1961 was conducted on 12.07.04. This case was also centralized, initially with Central Circle-17, New Delhi and subsequently transferred to Central Circle-9, New Delhi.

3. Background of the case

The Investigation Wing of the Department was investigating information that certain food grain merchants were making purchases of damaged food grains in large quantities from Food Corporation of India and other allied govt, agencies. The incentives to do so was because these damaged food grain could be converted into improved quality by sortex process and sold at a much higher sale price than sold as cattle feed to cattle feed manufacturers. However, in view of a specific condition laid down by FCI that damaged food grains could be sold only as cattle feed or to cattle feed manufacturers, the food grain merchants had to resort to showing fictitious sales of cattle feed to bogus purchasers/cattle feed manufacturers. For such purposes, these food grain merchants needed purchasers/cattle feed manufacturers and the receipts to show that the gains had been sold as cattle feed. In order to satisfy this condition, services of such parties like Shri Sanjay Kumar Garg were taken who provided names of such purchasers/cattle feed manufactures in whose names these sales were made, who were in fact merely bogus concerns of Shri Sanjay Kumar Garg and similar other persons. The modus operandi adopted was to sell the damaged food grains, purchases by these merchants, against cash payment, after sortex processing at a much higher price outside the books. The cash thus generated were then paid to Shri Sanjay Kumar Garg who deposited with the same bank in various

o h fi titious concerns which w e f oated by him. The
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 a h v m e e c ncerns by the food
 a o o Shri Sanjay Kumar
 G y e len s a he w s compensated for
 ro e c o s of sho i g bo us sales of damaged
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t e uiries revealed that the damaged food grain was
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 u G c rdi g y survey u/s 133A was
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 o epi cted as below:-



3.1 During the course of survey, statement of Shri Sanjay Kumar Garg was recorded. The salient features of the said statement are as under:-

1. The statement was recorded on oath by the authorized officer in Hindi.

2. The answers to various questions were written by Shri Sanjay Garg himself in his own hand writing.

3. Shri Sanjay Kumar Garg stated that he is doing work of commission agents and filing his return at PAN A A YPK9568P, in ward 28(4).

4. He stated that he is owner of Garg Sales Corporation 2650/2, Naya Bazar.

5. He further admitted that he has some more concerns in his name and in the name of his friends and relatives. He admitted that these firms are being operated by him and their bank account are also being used by him. He further admitted that cash is deposited and cheques are issued by him in these account as he was having their complete blank signed cheque books for use. He further gave description of these accounts:-

	Name of fictitious concern	Proprietor	Relation with Shri Sanjay
	<i>Suraj Enterprises</i>	<i>Vishnu Goel</i>	<i>Brother-in-law</i>
	<i>Pardeep Kumar Vikas</i>	<i>Pradeep Kumar</i>	<i>Brother-in-law</i>
	<i>Baba Kishore Enterprises</i>	<i>Prem Prakash Garg</i>	<i>Friend</i>
	<i>Yash Enterprises</i>	<i>R.C. Garg</i>	<i>Father</i>
	<i>Shiv Shankti</i>	<i>Harish Kumar</i>	<i>Friend</i>
	<i>GRS & Co.</i>	<i>Prashant</i>	<i>Friend</i>
	<i>Rahul Enterprises</i>	<i>Sanjay Kumar</i>	<i>Self</i>
	<i>Rishabh & Co.</i>	<i>Amit Jain</i>	<i>Friend</i>
	<i>Garg Sales Corporation</i>	<i>Self</i>	<i>Self</i>

6. It has been stated that in reality these firms are not doing any work nor the purchase and sales are real. It has been further stated that the desirous firms are issued purchase and sale bills as per their requirement after getting commission @ 25 paise per Rs.100 and out of this commission 10 paise given to those persons in whose names these accounts are operated and approximately five paise is spent on other expenses. It has been certified that from these firms only adjustment /accommodation entries have been provided.

7. Regarding books of account it has been stated that current year books of account were not available as the same were not prepared till the date of survey.

8. It has been stated that bills for transportation were prepared for giving entries, without the knowledge of the transporters.

9. When confronted with the statement of Shri IK. Sabberwal (Chartered accountant who has given Audited P&L A/c, balance sheet and Audit report) which was recorded before the assessee, that he does not have any of the books of account of any of the concern of the assessee or other firms of assessee, the assessee stated that he has already destroyed accounts up to FYs 2002-03 and thereafter the accounts of subsequent period have not been prepared till date.

10. He admitted having given two cheques of Rs.50 Lakhs to M/s Mahesh Agro (P) Ltd. having office in Naya Bazar on 29-06-2004 and 01-07-2004 and one cheque of 1,00,00,000 to M/s LMJInternational having office in New Delhi on 29-06-2004. It has been further admitted that these cheques have been given to these firms against the purchase bills and the same (Cheques) have been given after taking cash from them. In reality no purchases made from these parties.

11. It has admitted that cash is brought by his own man namely Shri Ram, Hira, Hari Ram. Parmed. The cheques are given to Shri Mahavir Garg of Mahesh Agro, Shri Vijay Modi of LMJ and Shri Ramesh Kumar of Anand Ankit.

12. It has been admitted having given entries to M/s Shashi Traders, M/s Saraswati Trading Co Scree Hanuman Enterprises, Tropicana Trading (India) Pvt. Ltd., and B.S.P K. Che r'.:cal Pvt.

Ltd. It has also been admitted that cash / cheque are brought by his men These are given to Shashi of Shashi Traders, Shiya Ram of Jain Agro, Shri Rampal of Saraswati Co., Mr. Arora of Tropicana Trading.

13. When confronted with documents as per Annexure A-1(relevant survey u/s 133A), Shri Sanjay Kumar Garg admitted that these papers belongs to his daily business and have been written by him or his men as per his directions. These papers contain date of transactions, party name, from whom cheque and cash has been received and date of depositing cash/cheque in bank. It has been stated that Rs. 30,68,446 has been received from Jain Agro on 30-06-2004 and this amount has been received against purchase bills of GRS, Suraj Enterprises and further this amount has been deposited in SBA/cs . It has also been deposed that the details of commission on these transaction is not mentioned as the same is taken as cash. He also admitted that he has made DDs after taking cash from the account M/s Baba Kishore Enterprises with HDFC. Besides the demand draft have also been got made by him in the name of Sushil, Naveen Daulat Ram.

14. It has been admitted that wherever entries have been given, the expenses relating to godown, loading unloading, and other goods freight expenses, are not justified.

15. It has been admitted by Shri Sanjay Kumar Garg that his firm as well as all other firms which are in his control, have done business to the tune of Rs. 100/150 crores.

16. It has been categorically stated that he has stated true facts and nothing has been hidden and that his statement was given without any fear, pressure or promise.

3.2. During the of survey operation, various documents in the form of Loose papers etc. were found and impounded. At the same time, information about various Bank accounts maintained by the assessee Shri Sanjay Kumar Garg and his various concerns, was also gathered.”

05. In this background for A.Y. 2004 – 05, assessee filed his return of income for ₹ 74,304/- on 1/11/2004. Pursuant to the information gathered during

survey, notices u/s 143 (2) and 142 (1) of the act were issued to the assessee from time to time and questionnaire was issued for compliance, but the same remained uncomplied with. In the questionnaire dated 6/11/2007 at para number 18, the learned assessing officer noted that that bank account number 1000028825 being operated in the name of M/S Suraj enterprises with state Bank of Bikaner and Jaipur , Karol Baug branch, Delhi , cash to the tune of ₹ 1 34858000/- has been deposited during the financial year 2003 – 04. The assessing officer extracted the date-wise chart of the deposit of the cash in the Suraj enterprises' bank account and asked the assessee to explain the nature entries of these cash deposits. None appeared on behalf of the assessee in response to such notices. Therefore, the learned assessing officer passed an assessment order Observing the reasons for the addition in para number 5 and 6 of his assessment order as under:-

“5. But on the date and time of hearing, none attended nor any written submission was filed. Since no compliance has been made by the assessee, the undersigned is left with no option but to make best judgement assessment, exparte of u/s 144 of I T Act 1961, on the basis of information available on record. Besides,~the information contained in the return of income, following information is also available on record to the decide the case

- i. Statement of Sh. Sanjay Kumar GSrg recorded on 12.07.2004 at the time of survey u/s 133 A of Income Tax act 1961 in his own case Refer para 3.1 .above).*
- ii. As per the order of assessment passed by the Assessing Authority Ward 28 (Sale Tax Deptt.) under section 23 (3) of the Delhi Sales Tax Act 1975, the Gross Turnover (G.T.O) is assessed at Rs. 19.24.52.202/-.*

- iii. *In the Final account statements like the Balance Sheet and Profit & Loss account attached with the return, the assessee has neither shown any sale or purchase of goods nor any opening or closing stock.*
- iv. *The assessee has failed to comply with the requirement of the questionnaire as a whole and especially questions relating to business as questions asked vide para Q.No. 9, 10, 10 (ii), 10 (iii), 11, 12, 13, 14.15, 15.1, 15.2, 15.3 & 17 & 18 of, questionnaire dated 06.11.2007 have not been replied.*
- v. *One Sh. Naresh Goel Prop. M.s Mahade Enterprises whose case is also connected with Sh. Sanjay Kumar Garg , during the course of his assessment proceeding has filed an affidavit , duly attested by Notary Public, on 04.12.2006. in which he has deposed that Sh. Sanjay Kumar Garg has been operating his bank accounts himself & through his man by taking blank signed cheque books from him. He has also produced photocopies of certain cheques & pay in slip, procured from bank authorities to substantiate his claim that these have been filled up in the hands of Sh. Sanjay Kumar Garg. Pay in slip dated 10.02.2004 &*
- vi. *14.02.2004 and cheque dated 14.02.2004 relating to his bank account no. 28706 with State Bank of Bikaner & Jaipur Khari Baoli, New Delhi.*

6. *Inferences*

As mentioned earlier, the assessee did not comply with the requirements of the notices and questionnaire, so following inferences are drawn

- i. *Since the assessee failed to justify the business results through production of books of accounts with supporting documents, it is safely inferred that assessee has filed Income Tax Return for the sake of filing of return without any basis & the Audit Report attached with the return is a shame affair.*
- ii. *It is also interesting to note that the other persons connected with this group of persons have also got the audit done from the same Chartered Accountant and the Income Tax returns have also been filed nearly on the same date with similar nature of income declared "By Arhat Received"*
- iii) *The profit and loss account, balance sheet and audit report in Form No 3 CB and Form No 3 CD is not reliable and is not supported with any documentary evidences. Hence the book version of the assessee*

assessee is liable to be rejected by- taking recourse to provisions of Section 145 (3) of IT Act, 1961.”

06. Therefore, in view of the information available with the revenue in the form of statement of Mr. Sanjay Kumar Garg recorded at the time of survey u/s 133A, in his case, followed by the local enquiries and elaborate discussion by the learned assessing officer, learned assessing officer held that cash deposit of Rs. 13,48,58,000/- is treated unexplained income of the assessee as the assessee failed to adduce any evidences regarding the nature and source of cash entries in his bank account. According to him, it is required to be treated as unexplained income from undisclosed sources. The learned assessing officer further noted that in view of the fact that Mr. Sanjay Kumar Garg, being the actual entry operator the above income shall be considered in the hands of Sanjay Kumar Garg on substantive basis and, therefore, on protective basis in the hands of the assessee. Consequently the addition of Rs 13,48,58,000/- was treated as unexplained income.
07. The learned assessing officer further noted that as per information gathered from the sales tax Department, quantum of sale shown to the sales tax Department from the sales tax order of bogus purchases and sales bills is also bogus and therefore commission income earned by the assessee thereon is required to be added. The learned assessing officer noted that gross turnover of the assessee was noted at Rs 258924916/- and statement of Shri Sanjay Kumar Garg shows that the main entry operator is Mr. Garg and the assessee must have been compensated in the form of commission as sub broker and a bank name lender. The learned AO

noted that prevalent rate of commission of the sub- broker is normally Rs. 0. 40 – ₹ 0.55 per quintal. After noting the comparable instances of other parties, he stated that regular broker gets commission between ₹ 3 - ₹ 2.05 per quintal. Therefore, assessee must have been compensated for lending name of his concern to Mr. Sanjay Kumar Garg and to allow for use of his bank account by issuing the blank signed cheques. Consequently, on the total turnover as per sales tax order of ₹ 258924916/- The learned assessing officer computed the accommodation charges @ 0.5% amounting to ₹ 12 94625/- as income of the assessee. He supplied his reason as under :-

“8. As. per details gathered from the Sales Tax Department, the quantum of sales (Gross Turnover) shown to the Sales Tax Department, as evidenced from the Sales Tax Order, referred to above is based on the quantum of turnover resulting from bogus purchase and Sales bills. As per the order of assessment passed by the Assessing Authority Ward 28 (Sale Tax Department) under section 23 (3) of the Delhi Sales Tax Act 1975, the Gross Turnover (G.T.O) is assessed at Rs.25.89,24,916/- . In view of statement of Sh. Sanjay Kumar Garg recorded on 12.07.04 and even otherwise, the assessee must have been compensated in the form of commission as sub broker as a bank name lender. The prevalent rates of commission of sub broker is normally 40-55 paisa per Qtl (Sh. Naresh Kumar Goel prop. M/s Mahadev Enterprises has also mentioned the same in his own assessment proceedings), of rice whereas regular broker gets commission between Rs. 3 to 5 per Qtl . In addition to the being acting as a sub broker, the assessee must have been compensated for lending name of his concern and allow to use of his bank account through blank signed cheques.

9. Looking into these facts and circumstances, the assessee has earned Income by way of providing accommodation entries. It is held that the assessee has earned at the rate of 0.5% of the total turnover declared to Sales Tax Department and the same is worked out as under Total Turnover as per Sales Tax Order: Rs. 25,89,24,9 1 67- Accommodation Charges @ 0.5% as

discussed above

: Rs 12,94,6257-“

08. Consequently the assessment order u/s 144 read with section 147 and 148 of The Income Tax Act was passed on 24/12/2007 determining the total income of the assessee at ₹ 13 6220 6929/- against the returned income of Rs. 74 304/-.
09. The assessee aggrieved with the order of the learned AO preferred appeal before the learned CIT (A) – 16, New Delhi who passed an order on 31/3/2015. He deleted the above addition of Rs. 1 34858, 000 on account of cash deposit and Rs. 12,94,625/- on account of the commission income holding that in the case of Shri Sanjay Kumar Garg , the coordinate bench has decided the issue wherein it was held that the amount deposited in the account of dummy concern was to be treated as total receipts on which commission income was to be determined as it was held that Mr. Sanjay Kumar garg was merely an accommodation entry provider. Consequently the coordinate bench held that commission income of Mr. Sanjay Kumar Garg on gross basis is ₹ 0.25 and ₹ 0.05 has been incurred as an expenditure for carrying on this business and therefore, the assessing officer was directed to estimate the commission income by applying 0.2% commission on turnover determined by the learned CIT appeal for both the A.Y.s as against 1% considered by the learned CIT appeal. In nutshell the coordinate bench held that Shri Sanjay Kumar Garg is the main accommodation entry provider and all the cash deposited in the various bank accounts stated by him are the turnover of Mr. Sanjay Kumar Garg for

providing accommodation entries and he is entitled to only the commission income. Consequently net commission income of 0.2% of the turnover was considered as the income of Mr. Sanjay Kumar. Based on this, the learned CIT – A, upheld that on substantive basis addition has been made in the hands of Mr. Sanjay Kumar on account of income arising from all-cash deposits in the various bank accounts of the concerns controlled by him, therefore the protective addition made by the learned assessing officer in the hands of the assessee of the total cash deposited in the bank account of M/S Suraj enterprises is not sustainable. With respect to the commission income added by the learned assessing officer, The learned CIT – A, deleted the addition of Rs. 12, 94, 625/- holding that as the main entry operator is Mr. Sanjay Kumar Garg, there is no income earned by the assessee as it has already been taxed in the hands of Mr. Sanjay Kumar Garg. Consequently, the learned CIT – A deleted both the additions made by the learned assessing officer. He dealt with the whole issue as under :-

“4. The submission of the appellant was carefully considered. The order of the Hon’ble ITAT, New Delhi in the case of the main person, Sh Sanjay Kumar Garg, (SKG for short) was also perused carefully. The Hon’ble ITAT pronounced its verdict on this issue in the connected case of Sh S.K.G. mentioned supra in the following terms:-

“46. Further the Assessing Officer added the amount of Rs. 67,53,90,956 deposited in the bank accounts held in the names of M/s. Yash Enterprises, GRS & Company, Pradeep Kumar Vikas Kumar, Suraj Enterprises, M/s. Baba Kishore Enterprises and M/s. Mahadev Enterprises. Before the Id. CIT (A) the assessee vehemently objected that he had no nexus whatsoever with these bank accounts which were owned and operated by independent persons. They were assessed separately and were genuine concerns. Hence, the amount

deposited in the bank accounts of above concerns could not be related in any manner to the assessee. On consideration of the contention of the assessee, Id. CIT (A) observed that an un-disputed fact was that Shri Sanjay Kumar Garg was carrying the business of providing accommodation entries to the needy business persons and collecting commission from them. The requirement of those business persons were many-fold. Hence, it was not possible to help them in the name of only one entity. With this purpose, the assessee floated various concerns in the names of close relatives and friends and carried on the business of entry' provider. The evidences found in the course of survey in the form of bank pay-in slips and cheques lent support to the belief that the assessee was in-charge of entire business of accommodation bills. Further some of the persons in whose names bogus concerns were created have categorically declared that though bank accounts were held in their names, but in reality the same have been operated and controlled by the assessee for providing bills on commission basis. Hence it was difficult to accept the submission of the assessee that he had no connection whatsoever with those entities. Moreover, the assessee himself had admitted in the course of survey, the modus operandi of the entire business module, how he had issued accommodation bills and collected the amounts etc. Therefore, there could not be any iota of doubt about the person who had operated the bank accounts. The business carried on by the assessee was undisputedly to earn commission income. There was no activity of any trading carried on by the assessee through these concerns. In that process cash had been accepted and deposited in the bank accounts and in lieu of the same, cheques were issued to various parties. The Assessing Officer had simply taken all cash entries in the above bank accounts and the total of same had been assessed as income from other sources. The Id. CIT (A) further noted that the assessee was receiving cash and issuing cheques to beneficiaries. Similarly receipt of cheque was followed by payment in cash. In view of this it was not correct to hold the cash deposits as separate item of income for which there was no source found by the Department. In the alternative Id. CIT(A) also noted that if the cash deposits represented the sales made by the assessee in his trading account, then due deduction was necessary to be allowed for purchases as well. There was no evidence found in the course of survey to the effect that the assessee had carried on any business trading activities. Accordingly, only commission income was required to be computed in case of dummy entities considering

the total cash entries as turnover of the assessee. Therefore, he came to the conclusion that commission income has to be computed on cash deposits also. He, therefore, directed the Assessing Officer to compute commission at the rate of 1 per cent.

46.1 The Id. CIT (Appeals) thereafter worked out the total credits in the names of six dummy concerns at Rs. 1384571462/-.

M/s. Yash Enterprises	Rs. 1404000/-
M./s. GRS & company	Rs. 160453727/-
M/s. Suraj Enterprises	Rs. 7,78,34,977
M/s. Pradeep Kumar Vikas Kumar	Rs. 60,37,67,397
M/s. Baba Kishore Enterprises	Rs. 15,90,15,160
M/s. Mahadev Enterprises	Rs. 38,20,96,201

He estimated the commission income of Rs. 1,38,45,714 by applying 1 per cent rate on turnover of Rs. 38,20,96,201. The contention of the assessee that 50 per cent of commission income should be allowed as deduction as paid to the sister concerns was rejected on the ground that no evidence to this extent was led by the assessee and the bank accounts of all the dummy concerns were controlled and operated by the assessee himself. The Id. CIT (A), however, held that the assessee should be given the benefit to the extent of commission income disclosed by these concerns in their return of income.

46.2 Thus in assessment year 2005-06 Id. CIT(A) estimated commission income from direct business of entry operations carried out in the names of M/s. Garg Sales Corporation and M/s. Rahul Enterprises at Rs. 30,83,34 and from business carried in dummy concerns at Rs. 1,38,45,714 totaling to Rs. 1,69,28,748.

47. Before us, the Id. AR of the assessee submitted that that assessee is engaged in the business of food grains at commission basis. He relied on the turnover declared to sales tax Department for the contention that assessee was engaged in commission business in food grains. During the course of survey assessee has stated to have received commission at the rate of .25 per cent out of which 1 per cent was given to the persons in whose names the bank accounts were maintained and expenditure of .05 per cent was incurred in the

business of providing entries. On the other hand, the Id. CIT (D)R submitted that the Assessing Officer has estimated the commission at the rate of 1.75 per cent and, therefore, the Id. CIT (A) was not justified in estimating the commission at the rate of 1 per cent. She further stated that the assessee had to explain the source of deposits in the various bank accounts and in the absence of any such evidence the amounts deposited in the bank accounts have to be treated as his income. Therefore, the Id. CIT (A) was not justified in deleting the addition in respect of amounts deposited in the banks and estimating the commission income on such deposits.

48. We have heard both the parties and gone through the material available on record. During the course of survey operations, statement of the assessee was recorded wherein it has been categorically admitted that no purchase and sale activities are undertaken in the names of firms. The assessee was using the firms for the purpose of providing sale bills for which he was collecting commission. The assessee was depositing cash in the bank accounts of the dummy firms as well as his own firms through which he was carrying out accommodation entry business. At the time of survey no evidence was found to suggest that the assessee was engaged in real commission business. No other source of income was also found. It is also the case of Assessing Officer that the assessee was carrying on business of entry provider. The assessments were reopened for this purpose only. The Id. CIT (Appeals) has given a finding of fact that the assessee was engaged in the business of providing accommodation entries and, therefore, the amounts deposited in the account of dummy concerns was to be treated as total receipts on which commission was to be determined. Therefore, we are in agreement with the view of the Id. CIT (A) that only commission can be determined on the deposits made in the bank accounts of the dummy concerns. Therefore, we do not find any infirmity in the order passed by the Id. CIT (A) that the amount deposited in the account of dummy concerns cannot be treated as income of the assessee. Therefore, the Id. CIT (A), in our considered opinion, is justified in treating the cash deposited in various bank accounts controlled and operated by the assessee as the turnover of the accommodation entry business and commission income has to be estimated thereon.

49. The next issue arises for estimation of commission income. In the statement the assessee at the time of survey under section 133A had stated that he charged 25p as commission for

providing accommodation entries and out of that 25p he paid 10p to others in whose name bank accounts were maintained and 5p was spent on expenses incurred in relation such business and hence, net commission earned was 10p i.e. 0.10 per cent. The Id. CIT (A) had taken the commission at 1 per cent as against 1.75 per cent applied by the Assessing Officer for which no evidence during the course of survey was found. The Id. CIT (A) has also noted that there was no clear standard rate of commission for accommodation activities. According to him the people who are engaged in this type of business would not charge less than 1 per cent on the bill amount as done in the case of brokerage on real estate business. He further observed that the rate of 1 per cent commission is very reasonable. Now the issue arises as to whether the commission should be estimated at the rate of .01 per cent or 1.75 per cent or 1 per cent. The Id. CIT (A) for arriving at the rate of commission earned has relied on rate of commission normally charged in case of real estate transactions, real estate transactions the broker has to identify the suitable buyer/purchaser, inspection of property, visit interested parties, negotiations of rates, registration of sale deeds etc. whereas in case of bogus entries Providers no such activities are involved. Interested party gives cash to entry provider which is deposited in bank account and the entry provider issues cheque. Hence the transactions of bogus entry providers cannot be compared with the transactions of real estate business transactions. He has to ensure the nature of the property and has to satisfy both seller and purchaser. The services rendered by the brokers in real estate transactions are more than the entry providers. Hence both the transactions are not comparable. Therefore, the comparison of commission earned on a real estate transaction, which in fact takes place and commission on transaction which does not at all occur, are not comparable. In accommodation entries the transaction does not take place and, therefore, commission will be certainly lower than the commission in the case of real estate or real transactions. Moreover, neither the Id. CIT (A) nor the Assessing Officer had given any comparable case wherein commission at the rate of 1.75 per cent as taken by the Assessing Officer or 1 per cent adopted by the Id. CIT (A) has been admitted by other assessee engaged in business of bogus provider. Therefore, in the absence of any such material on record, the statement given by the assessee on oath during the course of survey proceedings has to be given credence. The assessee has floated the bogus concerns and has controlled the accounts. During the course of survey, no material was

found on the basis of which it could be said that the assessee had passed on .1 per cent commission to the persons in whose names the bank accounts were maintained. In the absence of any evidence having brought on record, we are unable to agree with the assessee that the assessee had passed on commission of 10p to the persons in whose names dummy concerns were floated. However, in the business of entry provider certain expenditure has to be incurred which has been stated to be 5p during the course of survey. Therefore, credit of 5p out of 25p received as commission has to be allowed. Therefore, the Assessing Officer is directed to estimate commission income by applying 0.2 per cent net commission on turnover determined by the Ld. CIT (A) for both the assessment years as against 1 per cent taken by him. ”

Having gone through the order of the Hon'ble ITAT, the relevant portion of which is reproduced above, I am of the considered view that no case survived against the appellant. In such circumstances I strongly feel that the ends of justice would be met by following the orders of the final fact finding body i.e. Hon'ble ITAT, New Delhi in the case of the connected person SKG, whose case had a direct bearing on the addition made in the appellant's own case. The Hon'ble ITAT sustained the entire additions made in the hands of SKG on substantive basis for the purpose of working out the commission income by reason of the above order. Under such circumstances the addition made by the AO in the hands of the appellant on protective basis collapses like a house of cards. Meaning thereby that the statement of Mr. SKG, who declared on oath that nine concerns floated by him were his dummy concerns i.e. including the appellant's, who was a mere name lender, was upheld by the final fact finding body upon analysis and careful examination of the entire prevailing facts. Therefore the doctrine of binding precedent' and judicial discipline persuade me to toe the line of the Hon'ble ITAT, New Delhi and delete the addition made on protective basis in the case of the appellant. For the sake of facility and clarity the doctrines of "judicial discipline and binding precedent" are reproduced below:-

“Binding nature of the Tribunal decisions:- This issue was the subject matter of consideration before the Supreme Court in Union of India v Kamalakshi Finance Corporation Ltd. ". As this decision is not reported in ITR, the operative part of the order is extracted below:-

“The Ld Additional Solicitor General submits that the Ld Judges have erred in passing severe strictures (1990) EL.T 231 (Bom) against the two

Assistant Collectors who have dealt with the matter. He submitted that these officers had given reasons for classifying the goods under heading 39.19 and not 85.46 and could do no more. He submitted that they acted bona fide in the interests of Revenue in not accepting a claim which, they felt, was not tenable. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely jell that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching their conclusion, bypassed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticized this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to, them in The appellate hierarchy. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy, to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under section 35E(1) or (2) to keep the interests of the department alive. If the officers' view is the correct one, it will no doubt be finally upheld and the revenue will get the duty, though after some delay which such procedure would entail. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assessee public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for

giving effect to the orders of the higher appellate authorities which are binding on them." (Emphasis supplied) From the observations of the Supreme Court extracted above, it may be considered as settled law that the decision of the higher authority is binding on the lower authority in the judicial hierarchy. Accordingly, it would stand to reason that CIT (Appeals) would be bound by the decision of the Income-tax Appellate Tribunal. Tribunal Bench consisting of two members ought to follow the decision of larger Bench of the Tribunal which had decided the same issue, even if the two-member Bench formed a different Notwithstanding many precedents, where the decision of the Tribunal has been held to be binding on the Assessing Officers, some of the officers, including the first appellate authority and the Commissioner acting under section 263 of the Income-tax Act continue to entertain the misunderstanding that the Tribunal being a fact-finding authority its interpretation of law cannot be binding. The view, that it is so binding, taken in Union of India v Kamlakshi Finance Corporation Ltd' in an excise matter has been adopted in sales-tax as well as for income-tax in a number of cases. For sales-tax, it was so held in Senthil Raja Metal v CT02, where the statement in the grounds of appeal, that the decision is contested because it is not acceptable to the Department, was found to be objectionable Such disregard of the Tribunal's order may even be treated as bordering on contempt'. The Supreme Court itself in yet another case pointed out to the binding nature of the Tribunal's order'. There are also precedents in income-tax law to the same effect'. Decision of any Bench of the Tribunal will be binding on the authorities all over India in view of the fact that income-tax statute is an all-India enactment. "

On a plain and simple reading of the above, it is as clear as the sky that the objection of the AO expressed before me during the hearing with him on 26/03/2015 that the order of the Hon'ble ITAT may not be followed is not sustainable in the eye of law. The subordinate appellate bodies are required to follow the decision of the higher bodies irrespective of the fact that their decisions are contested before any High Court.

Aside from the above, it is deemed meet to add at this stage that in income tax appeal evidence on any matter that has happened up to the time of the actual hearing of the appeal may be received, provided such matter has relevancy to the assessment year to which the assessment or reassessment under appeal relates (Minister of National Revenue V Pawluk - 1955 CTC 369, Kullick Nixon & Co. Vs CIT 1967 66 1TR 714 SC)

The principle upon which the above doctrine rests is that when a party prefers an appeal, the assessment proceedings are kept alive for decision by the superior authorities. Therefore, it cannot be said that after the AO completes an assessment, the assessment proceedings come to an end and are dead. (Kamakshya Narain Singh (Raja Bahadur) Vs CIT 1947, 15 ITR 311 (FC).

A hearing before the appellate court is in the nature of rehearing and if pending appeal, some relevant matters come to light, either of facts and circumstances or of legislative changes, touching upon the subject of the appeal, they would form part of the appellate proceedings.

Besides the powers of the appellate court are not confined to see whether the lower court's decision is correct, according to the law as it stood at the time when it gave its decision. As an appeal is in the nature of a rehearing and the appellate authorities in moulding the relief to be granted are entitled to take into account even facts and circumstances and changes in law which happened after the AO completed the assessment (Banwari Debi Vs ITO 1964 53 ITR 100, 105 SC) CIT Vs Dewan Bahadur Ramgopal Mills Ltd 1961 41 ITR 280, 290 (SC), Straw Products Ltd Vs ITO 1968 68 ITR 227 (SC). Kalaratic Devi Harlalka vs CIT (1967 66 ITR 680 SC), Ram PyafiDevi Sarogi vs CIT 1968 67 ITR 84(SC), Sankappa (s) v ITO 1968 68 ITR 760 (SC) Raja Bahadur Vs CIT 1954 26 ITR 563-570, 571 (Pat). State Raja Syed Mohammed Saddat Ali Khan 1961 41 ITR 737 (SC), CIT Vs Straw Products Ltd 1966 60 ITR 156(SC), Madeva Upendra Sinai Vs UOI - 1975 98 ITR 209 -SC I. .vangadhar Chemical Works Ltd Vs CIT 1975 101 ITR 491 (Bom.), Shah JM Vs Bhatia JM AAc 1979, 94 ITR 519 (Bom), Anglo French Textiles Ltd v ITO 1976 103 ITR 2-2 'Rad.), it stands to reason that the development arising in the interval i.e. Hon'ble ITAT passing the order in the meanwhile in the appellant's main case i.e. SKG's logically and necessarily, had to be taken cognizance of by me while passing the order in the case at hand. It is pertinent to add that appellate authorities cannot shut their eyes to the true facts which could not be known when the question actually arose, but which came to light only subsequently. It is advisable not to resort to guess work when certainty is available and known (Smart vs Lincoln Shire Sugar Co. Ltd 1937 20 TC 643, 671 (HL) Elson Vs Price Tailors Ltd 1963 40 TC, 671 Chd).'

In the light of the aforesaid discussion of the matter, I am not at all impressed by the oblique suggestions of the AO that the appeal should be dismissed merely by reason of the fact that appeal was preferred

against the findings of the Hon'ble ITAT, New Delhi by the department before the Hon'ble High Court of Delhi in the case of the substantive assessee, Mr. SKG. Not prepared to be pinned down by the dik-tat of the AO, I proceed to put the lid on the case for the time being as per the principles of judicial discipline.

Relevant it is to add that a subordinate authority cannot dictate, as was mechanically done here as to how or in what manner or in whose favour I should exercise my power when certainty was available and known in the instant case in the form of concrete findings of fact of the Hon'ble Tribunal, in the appellant's substantive case. Therefore, I have no hesitation in allowing subject to the outcome of future litigations the grounds of appeal 3 & 4 of the appellant despite the reservation of the AO expressed during the hearing held with him on 26.03.2015, which is a recorded fact."

10. Therefore, the learned assessing officer, aggrieved by the order of the learned CIT – A, has preferred an appeal before us contesting the deletion of both the above additions made by him.
11. The learned CIT – DR vehemently supported the order of the learned assessing officer and assailed the order of the ld CIT A) on following counts
 - a. Cash deposited by the assessee in bank account of M/s Suraj enterprises has not been explained by the assessee.
 - b. Department has preferred appeal before the Hon'ble Delhi High Court against the order of ITAT in case of Mr. Sanjay Kumar Garg.
 - c. if the assessee is said to be an accommodation entry provider then assessee must explain that from whom the money has been received and to whom the accommodation entries have been provided. Unless the assessee shows who are the beneficiaries, assessee cannot escape

responsibility of explaining where from the money has been deposited in his bank account.

- d. unless the assessee explicitly explain the nature of the business With respect to the beneficiaries also and the amount of commission actually received by him, onus cast upon the assessee of showing each deposit and consequent issue of cheque to various beneficiaries is not shown, then such onus cannot be said to have been discharged by the assessee.
- e. The figures for relevant AY in case of income offered by Mr. Sanjay Garg and Turnover of the assessee are not matching. Therefore, to that extent the income is required to be taxed in the hands of the assessee. He referred to the order of the ITAT in case of Mr. Sanjay garg

In view of this, he vehemently stated that the learned CIT – A, has erred grossly in deleting the addition of cash deposit in the bank account of Mr. Suraj enterprises of Rs. 13, 48, 58, 000/- made on protective basis in the hands of the assessee.

12. With respect to the 2nd ground of appeal, He submitted that it cannot be presumed that assessee has done business on behalf of Mr. Sanjay Kumar Garg and has not earned any commission by lending his name, bank account, issue of cheques and deposit of cash in his bank account. He further stated that, in turn, it has been proved by the assessing officer relying on the statement of Mr. Sanjay Kumar Garg that assessee is working

for Mr. Sanjay Kumar Garg. He therefore submitted that it cannot be presumed that assessee has not earned anything and has worked free for Mr. Sanjay Kumar Garg for carrying on such a huge transaction of sales. He further stated that the learned CIT – A, has not at all considered this fact, while deleting the above addition.

13. The learned authorized representative submitted that total amount of cash deposit has been considered in the hands of Mr. Sanjay Kumar Garg and the coordinate bench has estimated the commission income on such cash deposit on the accommodation entry operation of Mr. Sanjay Kumar Garg. He therefore stated that original addition has been made by the learned AO in the hands of the assessee on protective basis and in the hands of Mr. Sanjay Kumar Garg on substantive basis, and now as the coordinate bench has already decided the issue in the hands of Mr. Sanjay Kumar Garg, by charging accommodation entry commission of 0.2% in his hands, there is no scope for any addition in the hands of the assessee. He further relied on the decision of the coordinate bench in case of Mr. Prashant Agarwal wherein the coordinate bench has decided the identical issue with respect to the addition of commission as well as the penalty. He submitted a copy of the decision which is reported at 2017 (11) TMI 803 – ITAT, Delhi. He further submitted the copy of the decision in case of Mr. Sanjay Kumar Garg for A.Y. 2000 – 012 2005 – 06 dated 28/01/2010 to show that amount has been added in the hands of Mr. Sanjay Kumar Garg for working out the commission income. In view of this, he submitted that there is no error in

the order of the learned CIT – A, and further, the issue is squarely covered in favour of the assessee by the decision of the coordinate bench.

14. We have carefully considered the rival contentions and gone through the orders of the lower authorities. We have also carefully perused the various decisions cited by the parties . In this case the brief fact are that the assessee is part of the Sanjaykumar Garg group who is engaged in the business of issuing the bogus accommodation entries. In case of Sanjay Kumar Garg, the coordinate bench for assessment year 2000 – 01 to assessment year 2005 – 06 has held that on account of all the gross receipts deposited in the bank account of the assessee shall be chargeable to tax in the hands of Mr. Sanjay Kumar garg at the rate of 0.2% on net commission basis as income. Respectfully following the decision of the coordinate bench we also hold that here is no infirmity in the order of the learned Commissioner appeals in holding that assessee is part of that group and no income shall be chargeable to tax in the hands of the assessee on account of accommodat on entries.
15. However it is important to note that whatever gross turnover as determined in the case of the assessee is also to be verified whether the identical amount has been considered in the hands of Mr. Sanjay Kumar Garg or not for determining commission income in his hands. We have carefully seen the order of the coordinate bench in Case of Mr. sanjay garg and noted that for assessment year 2005 –06 the gross receipts deposited in the bank account of the assessee is Rs. 29,32,85,755/- whereas for 2005-06 amount considered for the purposes of working out income in the hands of

Shri sanjaykumar garg is only Rs. 7,78,34,977/- . There is a vast difference in the deposits shown by the assessee deposited in his account as well as gross receipts on which commission is taxed in the hands of Sanjaykumar Garg. The learned authorized representative was also asked to show the reconciliation of the same. However, he expressed his inability to do so. Furthermore it was not found that what is the amount of gross receipts for computing commission income in the hands of Mr. Sanjay Kumar for assessment year 2004 – 05 as there is no information available in the order of the coordinate bench, Whereas in the hands of assessee the total gross receipt was shown at ₹ 13,48,58,000/. Therefore, we set aside this issue back to the file of the learned assessing officer to verify the amount of gross receipts deposited in the bank account of the assessee , with the amount shown in the hands of Mr. Sanjay, Garg as amount deposited in Suraj enterprise. If the amount deposited is reconciled, with the amount of deposited in the hands of Mr. Sanjay Kumar Garg for the respective years then no addition is required to be made in the hands of the assessee. In case if it is found that the amount deposited in the bank account of the assessee is much more than the amount shown by Mr. Sanjay Kumar Garg as amount deposited in bank account of M/s Suraj enterprise for working out his commission income, then it is apparent that no addition is made in the hands of Mr. Sanjay Kumar Garg on that gross receipts. Therefore to that extent the learned assessing officer is directed to make an addition in the hands of the assessee on substantive basis. However at the time of making the addition the learned AO will only take the amount of

commission at the rate of 0.2% net commission as held in the case of Mr. Sanjay Kumar Garg by the coordinate bench. Accordingly, the issue with respect to deposit of cash in the bank account of M/s Suraj enterprises of the proprietor concern of the assessee is decided accordingly.

16. Coming to the 2nd issue where the assessee has shown the sales as evidence from the sales tax order. The amount of turnover shown by the assessee for assessment year 2004 – 05 is ₹ 25 8920 4916/-. The learned assessing officer has added the amount of commission at the rate of 0.5% of the total turnover in the hands of the assessee of ₹ 1 294625/-. The learned Commissioner appeals relying on the order of the coordinate bench in case of Sanjay Kumar Garg, has held that nothing is chargeable to tax in the hands of the assessee as coordinate bench has held that the amount of commission on the turnover, which is a fictitious turnover shown by the assessee, is chargeable to tax in the hands of Mr. Sanjay Kumar and not assessee. On reading of the order of the coordinate bench, we do not find any infirmity in the order of the learned Commissioner appeals in holding so. However, it is important to note that that the amount of gross turnover shown in the hands of the assessee should have been included while working out the commission income in the hands of Mr. Sanjay garg. As These facts has not been verified by the learned Commissioner appeals while deciding the issue, Therefore, we also set aside this issue back to the file of the learned assessing officer to determine if the gross turnover shown by the assessee has already been taken in the hands of Mr. Sanjay Kumar Garg for working out the commission income in his hands, than no

addition in the hands of the assessee is required to be made. If that is not the case, then the addition may be made in the hands of the assessee at the rate of 0.2% on the balance sum as held in the case of Mr. Sanjay Kumar Garg as commission income.

17. Accordingly ground number 1 – 4 for assessment year 2004 – 05 and for assessment year 2005 – 06 in the appeal filed by the revenue are disposed off. In short, appeal of the revenue is allowed partly for statistical purposes.
18. ITA number 3931/del/2015 and 3932/del 2015 has been filed by the assessing officer against the order of the Commissioner of income tax (appeals) – 16, New Delhi or assessment year 2004 – 05 and 2005 – 06, wherein the penalty levied by the learned assessing officer of Rs. 4,49,22,426/- and Rs. 9,89 98,390/- respectively for both the years are deleted. Therefore, the learned assessing officer being aggrieved with the order of the Commissioner appeals is filed appeal before us.
19. It is the contention of the learned departmental representative that in the present case the assessee is found to be an accommodation entry provider and has deposited huge cash in his bank account as well as issued various bills in the form of accommodation entries. The income has been taxed in the hands of the assessee based on those accommodation entries and therefore the assessee has camouflaged fictitious credits in his books of accounts as sales. He therefore submitted that the learned assessing officer has held that that assessee has concealed income of the assessee and therefore penalty has been levied. He further submitted that the learned Commissioner of income tax has deleted the penalty for both the years

as the quantum addition is already deleted without verifying the fact. He therefore submitted that the order passed by the learned Commissioner appeals deserves to be set aside.

20. The learned authorized representative vehemently stated that when the addition itself has been deleted by the Commissioner appeals and when the assessing officer himself has made the addition on 'protective basis' there cannot be any penalty in the hands of the assessee on that account. He specifically referred to the assessment order for assessment year 2005 - 06 wherein the addition of ₹ 29.32 crores is made by the learned assessing officer and has held that this income is taxed on substantive basis in the hands of Mr. Sanjyakumar garg being the actual account operator, and on protective basis in the hands of the assessee. He further stated that similar is the case for assessment year 2004 - 05. He further submitted that on identical facts and circumstances in the case of Shri Prashant Agarwal for assessment year 2004 - 05 and 2005 - 06 vide order dated 14/11/2017 in 2017 (11) TMI - 803 - ITAT Delhi has deleted the penalty. He further referred to the para-number 16 of that order wherein the coordinate bench has held that the addition has been made in the hands of the assessee purely an estimate basis and there is no material to pin point upon assessee directly who is merely acting as facilitator. Therefore there cannot be any case for either concealment of income offered or furnishing of inaccurate particulars of income. It was the further stated in that order that even after the addition of 0.20% made in the hands of the assessee, the income of the assessee will fall below the tax limit on which no tax is computed. On this

ground, also the penalty was deleted. He therefore submitted that on identical facts and circumstances the penalty couldn't be levied in the hands of the assessee for both the years.

21. We have carefully considered the rival contention and the orders of the lower authorities. Admittedly, the learned assessing officer has made the addition in the hands of the assessee on protective basis. The addition on substantive basis as been made in the hands of Mr. Sanjay Kumar Garg. Therefore it is apparent that no penalty can be levied in the hands of the assessee where there is no certainty about the income to be chargeable to tax in whose hands. As per the decision of the coordinate bench in the case of Mr. Sanjay Kumar Garg, it has been held that the income shall be chargeable to tax on the gross receipts in the hands of Mr. Sanjay Kumar Garg at appropriate percentage of 0.2%. Therefore, apparently there is no income chargeable to tax in the hands of the assessee. Furthermore the addition is also been made in the hands of the assessee on protective basis. There cannot be any penalty of concealment where the income is charged to tax on protective basis. Though protective assessment is not specifically provided, the Supreme Court in Lalji Haridas v. ITO [1961] 43 ITR 387 had held that such assessment is not barred. This was followed in Bhatia Motor Stores v. CIT [2007] 288 ITR 31 (MP). However now the issue is whether the penalty in the case of protective addition can be levied under section 271 (1) © of the act or not. Identical issue has been considered by the Hon'ble Gujarat High Court in case of 49 taxmann.com 539 in case of Bhailal Manilal Patel V CIT where it has been held as under:-

“5.6 Under the circumstances, unless and until the substantive assessment is made and final assessment order is passed in case of the assessee adding the income in the hands of the assessee, even the initiation of the penalty proceedings are not permissible. There cannot be any initiation of the penalty proceedings with respect to the protective assessment order. The aforesaid is supported by the decision of this Court in the case of *Bankim J. Shah (Supra)*. In the said case also penalty was sought to be levied under Section 271(1) of the Act on the protective assessment and to that it is held that there cannot be any protective initiation of the penalty proceedings. It is further observed and held that in a given case a particular income belong to A or B and although the Income Tax Officer reaches to the conclusion that the said income belongs to one of them, he may make protective assessment on the other hearing regard to the fact that the matter was likely to be carried in appeal. It is observed that such a protective assessment may be permissible under the law but there cannot be protective initiation of the penalty proceedings. It is further observed that as such the basis or foundation for initiation of the penalty proceedings is the requisite satisfaction as provided in Section 271(1) of the Act and as such satisfaction could not be reached when the Income Tax Officer himself believes that the income for which the assessee is charged for concealment or furnishing of inaccurate particulars does not belong to him and he is assessed only as a protective measure.

5.7 Even the same view has been taken by the Calcutta High Court in the case of *Super Steel (Sales) Co. (Supra)*.

6. Under the circumstances, the tribunal has materially erred in in treating the order passed by the Assessing Officer as substantive assessment order.

7. Now so far as the prayer to remand the matter to the tribunal to assess the factual aspects whether the promissory notes are to be included and/or excluded in the income of Shri Jitendra R. Patel or not, as per the assessment order passed by the Assessing Officer is concerned, the same is rejected and consequently the question referred to this Court is held in favour of the assessee and against the revenue.”

22. In view of this, penalty under section 271 (1) (c) Of the act cannot be levied so far of the addition remains on protective basis in the hands of the assessee. Further more as the issue with respect to the addition has been set aside to the file of the learned assessing officer for verification of whether the amount which has been considered in the hands of the assessee as deposited in various bank accounts or shown as sales has been considered in the hands of Mr. Sanjay, for working out commission income in his hands, we also set aside the issue of the penalty to the file of the learned assessing officer with a direction that if he finds

that any amount which has been credited in the bank account of the assessee or shown as sales income of the assessee, but has not been considered in the hands of Mr. Sanjaykumar Garg , the then on that sum, the amount of profit at the rate of 0.2% shall be determined as income of the assessee and to that extent the penalty under section 271 (1) © of the act shall be levied by the learned assessing officer after granting assessee proper opportunity of hearing.

23. Accordingly, ITA number 3931 and 3932/del/2015 filed by the revenue for assessment year 2004 – 05 and 2005 – 06 are sent back to the file of the learned assessing officer with above direction.
24. In the result appeal filed by the learned assessing officer are allowed for statistical purposes.

Order pronounced in the open court on 15/10/2018.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 15/10/2018

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	