आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1284, 596, 597/JP/2018
निर्धारण वर्ष/Assessment Year : 2012-13, 13-14 & 16-17.

Smt. Reema Harish Bhatia, 49-A, New Colony, Gumanpura, Kota.	बनाम Vs.	The Deputy Commissioner of Income-tax, Central Circle, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN No. ABZPB 7782 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 789 & 790/JP/2018
निर्धारण वर्ष/Assessment Year : 2014-15 & 16 17.

The Deputy Commissioner of Income-tax, Central Circle, Kota.	बनाम Vs.	Smt. Reema Harish Bhatia, 49-A, New Colony, Gumanpura, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN No		ABZPB 7782 J
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri P.C. Parwal (CA)
राजस्व की ओर से/ Revenue by: Shri B.K. Gupta (CIT-DR)

सुनवाई की तारीख/ Date of Hearing : 09.04.2019.
घोषणा की तारीख/ Date of Pronouncement : 25/04/2019.

आदेश/ ORDER

PER BENCH :

These are three appeals by the assessee for the assessment years 2012-13, 13-14 & 16-17 and appeal by the revenue for the assessment year 14-15 and cross appeal by the revenue for the assessment year 2016-17 against separate orders dated 28.09.2018 and 23.03.2018 of ld. CIT (A)-2, Udaipur. First, we take up the assessee's appeal for the assessment year 2012-13 wherein the assessee has raised the following grounds :-

1) The ld. CIT (A) has erred on facts and in law in confirming the addition of Rs. 14,285/- on account of undisclosed interest income, being difference between the interest income of Rs. 2,00,027/- shown in the statement of affair and interest income of Rs. 1,85,742/- declared in the return filed u/s 153A on the basis of interest income reflected in Form No. 26AS.

2) The ld. CIT (A) has erred on facts and in law in confirming the addition of Rs.17,30,520/- u/s 2(22)(e) of the Act in the assessment framed u/s 153A even when the assessment proceedings for the year under consideration has not abated and no incriminating material relating to the same was found in search and thus, the addition so made is illegal and bad in law.

3) The ld. CIT (A) has erred on facts and in law in upholding the finding of AO that advance of Rs. 23,30,520/- received from M/s. Bhatia Corporation Pvt. Ltd. against the salary of Rs. 6 lacs is in the nature of loan or advance, thereby confirming the addition of Rs. 17,30,520/- u/s 2(22)(e) of the IT Act.

4) The assessee craves to amend, alter and modify any of the grounds of appeal.

5) The appropriate cost be awarded to the assessee.

Ground No. 1 is regarding addition of Rs. 14,285/- on account of undisclosed income.

2. The assessee is an individual and also Director in the company M/s. Bhatia Corporation Pvt. Ltd. The assessee filed her return of income on 29.12.2012 under section 139 of the IT Act declaring total income of Rs. 9,80,570/-. A search and seizure operation was carried out at various premises of Shubham Group, Kota on 3rd March, 2016. Assessee is also covered under the said search and seizure action. In response to notice under section 153A, the assessee filed her return of income on 27th September, 2016 at the same income as declared in the return of income filed

under section 139 of the Act. During the course of assessment proceedings under section 153A, the AO noted that the assessee has shown interest income of Rs. 2,00,027/- in the statement of affairs but the assessee has declared interest income of Rs. 1,85,742/- in the return of income filed under section 153A. The assessee explained that in the statement of affairs the interest on FDR is calculated by the assessee at Rs. 2,00,027/- whereas in the return of income the interest is declared at Rs. 1,85,742/- as reflected in 26AS. Thus the assessee contended that the difference cannot be considered as undisclosed interest in as much as in the statement of affairs the assessee has calculated interest as per her own working whereas the interest reflected in the 26AS as per working of the banker. Thus the assessee explained that it is only a matter of difference in computation of interest as per the accrual of income. The banker has calculated the interest lesser than the assessee and the difference of one year is covered by the difference of the interest calculated in the subsequent years. The AO did not accept this contention of the assessee and made an addition of differential amount of Rs. 14,285/-. The ld. CIT (A) has also confirmed the addition made by the AO.

3. Before us, the ld. A/R has submitted that the difference in the interest as per Form 26AS and in the statement of affairs is only due to the different working adopted by the banker and the assessee. The assessee has computed the interest on FDR as on 31st March, 2012 whereas the banker has computed the interest as per their date of credit of interest given in the account. The ld. A/R has referred to the details of the interest computed by the assessee in the statement of affairs and the differential amount in comparison to Form 26AS and submitted that if the interest income for the assessment years 2013-14 to 16-17 is taken into

consideration then the total amount of interest declared in the return of income as per Form 26AS as well as as per statement of affairs would be almost same. The AO has accepted the higher interest offered to tax by the assessee in the return of income for the assessment years 2015-16 and 16-17 whereas the addition was made of the differential amount for the assessment year 2012-13 to 2014-15. Therefore, there is a double taxation of the interest income which was offered to tax for the assessment years 2015-16 and 16-17 and also added by the AO for the assessment years 2013-14 and 14-15. Alternatively, the ld. A/R has submitted that the assessment was not pending as on the date of search and therefore, the same was not got abated by virtue of search as on 03.03.2016. Thus, no addition can be made in the absence of any incriminating material found or seized during the search and seizure action. The addition was made by the AO based on the statement of affairs filed by the assessee during the assessment proceedings. The ld. A/R has thus contended that in the absence of any incriminating material, the addition made by the AO is not sustainable. The elaborate arguments on this point were advanced by the ld. A/R while arguing ground no. 2.

4. On the other hand, the ld. D/R has submitted that the assessee herself has admitted the correct interest income for the assessment year under consideration of Rs. 2,00,027/- as against the interest income disclosed in the return of income of Rs. 1,85,742/-, therefore the differential amount was added by the AO based on the assessee's own statement of affairs. The ld. D/R has thus contended that it is a case of surrender of income on account of interest which was suppressed in the return of income. He has relied upon the orders of the authorities below.

5. As regards the legal issue raised by the ld. A/R, the ld. D/R has submitted that he will submit his argument while responding to the ground no. 2 of the assessee's appeal.

6. We have considered the rival submissions as well as the relevant material on record. At the outset, we note that the addition was made by the AO based on the statement of affairs in which the assessee has shown the interest on FDR at Rs. 2,00,027/- as against the interest income shown in the return of income at Rs. 1,85,742/-. There is no dispute that the AO has not referred any incriminating material in respect of this addition of interest income. Even otherwise, no material whatsoever was found during the course of search but the difference of interest income was noticed by the AO from the statement of affairs filed by the assessee during the course of assessment proceedings under section 153A of the Act. Without going into the legal objection raised by the assessee at this stage as the same is considered in respect of ground no. 2, we at the outset note that the interest income declared by the assessee in the return of income for the assessment years 2012-13 to 16-17 and the income shown in the statement of affairs as well as the differential amounts are as under :-

AY	Interest shown in the		Difference
	Return	Statement of Affair	
2012-13	1,85,742	2,00,027	14,285
2013-14	2,05,725	2,31,814	(26,089)
2014-15	2,26,767	2,51,683	(24,916)
2015-16	2,92,349	2,72,340	20,009
2016-17	3,04,972	2,83,370	21,602

Thus it is clear from the details reproduced above that the computation of interest as shown in Form 26AS by the bankers may be based on the difference in the accrual date taken by the banker as against the interest calculated by the assessee on FDR as on 31st March of each year. Therefore, it appears that there is a double taxation to the extent of Rs. 41,611/- which was offered to tax by the assessee in the return of income more than the computation of interest in the statement of affairs. The AO has made addition in respect of assessment years 2012-13 to 14-15 on account of less interest shown in the return of income in comparison to the statement of affairs whereas the interest income offered by the assessee more than the statement of affairs for the assessment years 2015-16 and 16-17 were accepted by the AO. Thus the difference due to the computation by taking the different accrual dates will be subsume to the extent of extra interest income offered to tax by the assessee for the assessment years 2015-16 and 16-17. Accordingly, the addition made by the AO of Rs. 14,285/- is covered by the additional interest income offered by the assessee to tax for the assessment years 2015-16 and 16-17. Hence the same is deleted.

Ground No. 2 is regarding addition made on account of deemed dividend under section 2(22)(e) of the IT Act while passing the assessment order under section 153A of the Act.

7. The ld. A/R of the assessee has submitted that the AO has taken the differential amount of Rs. 23,30,520/- received by the assessee during the year under consideration from the company M/s. Bhatia Corporation Pvt. Ltd. as against the salary for the year of Rs. 6,00,000/-. Therefore, the difference of Rs. 17,30,520/- was considered by the AO as loan/advance and treated the same as

deemed dividend under section 2(22)(e) of the Act. The ld. A/R has submitted that the assessee has explained before the AO as well as the ld. CIT (A) that the said amount was an advance against the salary and, therefore, it was not a loan or advance but it was an advance salary received by the assessee against the future salary payable to the assessee, hence the same cannot be treated as loan/advance for the purpose of section 2(22)(e) of the Act. The ld. A/R has further contended that since the assessment was not pending as on date of search and there is no incriminating material found and seized disclosing any income on account of deemed dividend, the addition made by the AO is not sustainable in law. He has submitted that assessee filed the original return of income on 29.12.2012. The time limit for service of notice u/s 143(2) for the relevant AY was upto 30.09.2013. No notice was issued to the assessee before this date. Thus, the assessment proceedings for the year under consideration were not pending on the date of search. In search, no incriminating material indicating any undisclosed income for the year under consideration was found. Section 153A empowers the AO to issue notice to a person who is searched u/s 132 to file return in respect of 6 AY's preceding the assessment year in which search is conducted and to assess or reassess the total income of these years notwithstanding anything contained in section 139, 147 and other related sections. Thus, the assessment u/s 153A are not de novo assessments since the purpose of making the reassessments under section 153A is subject to tax, the hitherto undisclosed income unearthed during the course of the search. It is for this reason that the second proviso to section 153A(1) provides only for the abatement of the pending assessments. This is done to ensure that the regular assessment proceedings under the normal provisions and the assessment proceedings under

section 153A are not conducted simultaneously since that would result in redundancy. Therefore, already completed assessments do not abate and they shall hold the field. It can be interfered by the AO while making the assessment u/s 153A only if some incriminating material is unearthed during the course of search or requisition of documents or undisclosed income or property is declared in the course of search which were not produced or not already disclosed or made known in the course of original assessment. The issuance of notices under section 153A(1) for all the six assessment years does not entail altogether a fresh exercise of making a fresh assessment. Hence, the completed assessment can be interfered with by the AO while making assessment u/s 153A only on the basis of the incriminating documents found in search. Thus, when no incriminating documents for the year under consideration were found, disallowance made by the AO in assessment proceedings u/s 153A is illegal and bad in law. In support of his contention the ld. A/R placed reliance on the following cases laws :-

Jai Steel India) vs. Assistant Commissioner of Income Tax
219 Taxman 233 (Raj. HC)

Saumya Construction Pvt. Ltd.
387 ITR 529 (Guj. HC)

PCIT vs. Meeta Gutgutia
395 ITR 526 (Del. HC)

CIT vs. Kabul Chawla
126 DTR 130 (Del. HC)

DCIT vs. M/s. A.M. Exports
In ITA No. 561/JP/2018 dated 07.01.2019.

Thus the ld. A/R has submitted that in the proceedings under section 153A the AO can reassess the income in respect to 6 preceding years, however, there must be some incriminating material available with the AO for making addition to the returned income. The addition made de hors the incriminating material is not sustainable in law. Since no incriminating material was unearthed during the search, no addition could have been made to the income already assessed.

8. On the other hand, the ld. D/R has submitted that as per provisions of section 153A, the AO has to issue notice under section 153A(1) of the IT Act for six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted. Further, the AO has to assess or reassess the total income of such years. The provisions of section 153A do not mention about any incriminating material for the purpose of assessment or reassessment of the income for these six years. The ld. D/R has pointed out that in a case where the assessee has not filed any return of income under section 139 of the Act for the relevant as essment year and no assessment order is passed under section 144 of the Ac then even if no incriminating material is found during the search but other information available with the AO at the time of assessment which lead to addition to the total income of the assessee then if no addition could be made to the total income of the assessee in the assessment completed under section 153A of the act, the provision of section 153A(1) would be redundant which cannot be the intention of the legislature. Therefore, the ld. D/R has submitted that the provisions of section 153A do not require any incriminating material for assessment or reassessment of income. Similarly, when no scrutiny assessment under section 143(3)/144 of the Act was made then the AO is duty bound to assess

the total income of the assessee whether it is based on incriminating material found during the course of search or on the basis of information available on record or comes to his notice during the assessment proceedings. In support of his contention, he has relied upon the decision of Hon'ble Kerala High Court in case of CIT vs. St. Francis Clay Décor tiles, 70 taxmann.com 234 (Kerala) as well as in case of E.N. Gopakumar vs. CIT, 75 taxmann.com 215 (Kerala). The ld. D/R has submitted that the Hon'ble High court has observed that neither under section 132 nor under section 153A, phraseology 'incriminating' is used by Parliament, therefore, any material which was unearthed during search operations or any statement made during course of search by assessee is a valuable piece of evidence in order to invoke section 153A. The ld. D/R has also relied upon the decision of Hon'ble Kerala High Court in case of CIT vs. Dr. P. Sasikumar 73 taxmann.com 173 (Kerala) as well as decision of Hon'ble Karnataka High Court in case of Canara Housing Development Co. vs. DCIT, 49 taxmann.com 98 (Kar.) He has further pointed out that the SLP filed by the department in case of PCIT vs. Best Infrastructure (India) Pvt. Ltd., 94 taxmann.com 115 (SC) has been admitted and, therefore, the decision of Hon'ble Delhi High Court has not attained finality. Thus the ld. D/R has submitted that the addition made by the AO is based on the material available with the AO at the time of assessment and, therefore, the technical objection of incriminating material found during the course of search will not absolve the assessee from the tax liability on such income.

9. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the assessee filed the return of income under section 139 on 29.12.2012 which was processed under section 143(1) of the IT Act.

Subsequently, a search and seizure operation was carried out on 03.03.2016. It is also not in dispute that as on date of search on 03.03.2016 the assessment on the original return of income under section 139 was not pending and consequently the assessment was not got abated due to the reason of search and seizure action. Therefore, it is a case of reassessment as per the provisions of section 153A of the Act. There is no quarrel on the point that once a search and seizure action is carried out, the AO is bound to issue notice under section 153A in respect of six years preceding to assessment year in which search is conducted to assess or reassess the income of the assessee. However, the reassessment of the income consequent to the search and seizure action depends upon the status of the assessment proceedings as on the date of search. If the assessment for a particular assessment year falling within six assessment year is pending as on the date of search, the same shall abate by virtue of the search and seizure action under section 132 of the IT Act and consequently the AO shall assess the income of the assessee under section 153A which will be conside ed as a regular assessment and not a reassessment. On the other hand, if the assessment was not pending as on the date of search then the Assessing Officer has to reassess the income of the assessee depending upon the undisclosed income detected during the course of search and seizure. Therefore, the completed assessment can be disturbed by the Assessing Officer while making the assessment under section 153A only if there is incriminating material found during the search disclosing undisclosed income of the assessee. Otherwise the income as declared by the assessee in the original return of income and accepted in the assessment under section 143(1) or 143(3) would be reaffirmed. In the case in hand undisputedly neither any incriminating material was found or seized during the

course of search disclosing undisclosed income for the year under consideration nor assessee has disclosed any income in the statement made under section 132(4) or under section 131(1) of the Act on account of deemed dividend. The transactions of alleged loans/advances were already matter of record as nothing new was detected or unearthed during the search and seizure action in respect of the deemed dividend in question. Accordingly, the decisions relied upon by the ld. D/R will not help the case of the revenue when there is no incriminating material indicating any undisclosed income nor any disclosure made by the assessee in the statement in respect of the deemed dividend in question. The decision of Hon'ble Delhi High Court as well as the decision of Hon'ble Jurisdictional High Court were finally taken up to the Hon'ble Supreme Court in case of PCIT vs. Meeta Gutgutia, 257 Taxman 441 (SC) and the SLP filed by the revenue was dismissed. This Tribunal in case of DCIT vs. A.M. Exports (supra) after considering all the relevant decisions relied upon by either of the parties have discussed this issue in para 8 as under :-

> *"8. We have considered the rival submissions as well as relevant material on record. The first aspect involved in the matter is sustainability of the addition made by the Assessing Officer without any incriminating material found or seized during the course of search and seizure action. There is no dispute that the original return of income filed by the assessee U/s 139(1) of the Act on 11/10/2010 was not pending assessment as on the date of search on 03/4/2013. Therefore, the assessment was completed U/s 143(1) and it was not abated due to the search and seizure action U/s 132 of the Act on 03/4/2013. The order of the Assessing Officer is based on the statement of the assessee recorded U/s 132(4) of the Act and specifically the question No. 77. It is pertinent to note that during the course of search and seizure action,*

the statement of the assessee was being recorded from 04/4/2013 to 05/4/2013 and as many as 78 questions were put to the assessee. The statement of the assessee recorded U/s 132(4) runs into about 50 pages. The statement of the assessee was recorded from 12.00 noon on 04/4/2013 and continued up to 1.00 a.m. on 05/4/2013. After the break, the recording of statement again resumed at 7.50 a.m. on 05/4/2013 we note that up to question No. 67 were recorded on 04/4/2013 and up to 1.00 a.m. on 05/4/2013 and thereafter the statement of the assessee was again resumed in the morning of 05/4/2013 and continued up to question No. 78. It is manifest from the statement recorded U/s 132(4) of the Act that repeated questions were asked about the genuineness of the loans taken by the assessee during the financial year 2009-10 relevant to the assessment year under consideration and the assessee has given the answer and stated that all these loans are genuine and taken through banking channel and the assessee also repaid these loans prior to the date of the search. These transactions are very much part of the regular books of account of the assessee. However, the search team again put question to the assessee as question No. 77 in which the assessee has stated that the assessee has checked the details of the loans from M/s Dipnarayan Vyapar Pvt. Ltd. for which the assessee received cash and the same was declared as undisclosed income for the year of the search. We find that prior to that the assessee was also asked question No. 34 to 36 and question No. 39. Even after the statement recorded U/s 132(4) of the Act, the Investigation Wing again summoned the assessee U/s 131 of the Act for conducting post search enquiry and the statement of the assessee was recorded on 30/05/2013 wherein in response to question No. 12, the assessee clarified that the earlier statement of the assessee in question No. 77 was not a correct statement regarding the loan taken from M/s Dipnarayan Vyapar Pvt. Ltd.. Thus, for understanding of the issue, all the relevant questions put to the assessee and answered to them are to be read conjointly. Hence, we quote question No. 34 to 36 and question No. 39 of assessee's statement recorded U/s 132(4) dated

04/4/2013 and question No. 77 of statement recorded U/s 132(4) on 05/4/2013 and question No. 12 and reply of the statement of the assessee recorded U/s 131 of the Act in post search investigation by the ADIT as under:

प्र.34 मैं आपसे आपकी भागीदारी फर्म ए.एम.एक्सपोटर्स बुक में निम्नलिखित अनसिक्योरर्ड लोन क्रेडिटर्स के लेजर दिखा रहा हूँ–

(i) Interlink saving & finance Pvt. Ltd. 57 Adarsh Nagar, Rishikesh, dehradun, Uttranchal.

(ii) Parmatma Developers Pvt. Ltd., 101, Balaram Dey Street, Gr Floor, Kolkata

(iii) Rameshwar Finvest Pvt. Ltd., 101 Balaram Dey Street, Kolkata

(iv) Sri Ram Tie Up Pvt. Ltd., 2, Banarashi Ghosh 2nd Bye Lane, Kolkata

(v) _____do _____

(vi) Tara Vinimay Pvt. Ltd., 101, Balaram Dey Street, G. Floor, Kolkata

(vii) Victor Project Pvt. Ltd., 2 Mullick Street, Ist Floor, Kolkata

(viii) Yatan Traders Pvt. Ltd., 62/1, Hriday Krishna Banerjee Lane, Howrah.

उपरोक्त सभी Transactions की प्रमाण स्पष्ट करें?

उत्तर– उपरोक्त खातों की नकलों को मैंने देखकर यह कहना चाहता हूँ यह वित्त वर्ष 2009–2010 ब्याज पर कर्जा लिया हुआ वित्त वर्ष 2011–12 मैंनें चुका दिया।

प्र.35 उपरोक्त वर्णित सभी कम्पनियां आपके सम्पर्क में कैसे आयी विवरण दे।

उत्तर– मेरी फर्म द्वारा जयपुर एवं जयपुर के बाहर मैं जहां से भी व्यापार के लिए मुझे कर्जा प्राप्त हुआ मैंने लिया तथा लोटाया एवं गत वर्षों में इनसे मेरा सम्पर्क कैसे रहा मुझे अभी याद नहीं आ रहा है।

प्र.36 इन कम्पनियों से क्या रेट ऑफ इनट्रेस्ट दिया है विवरण दे?

उत्तर– गत वर्षों की बात मुझे जबानीतौर पर याद नहीं है। यह फर्म द्वारा पेश की गई खातों में गणना कर निकालना होगा जो श्रीमान् के कार्यालय में हाजरी देने आऊंगा जब गणना कर बताऊंगा।

प्र.39 आपकी फर्म A.M. Exports का Dipnarayan Vyapaar Pvt. Ltd. के साथ क्या सम्बन्ध है, स्पष्ट करें?

उत्तर– मैंने Dipnarayan Vyapaar Pvt. Ltd. से लगभग तीन वर्ष पहले ब्याज से पैसा उधार लिया था मुझे यह पैसा किस ब्याज दर पर दिलाया था मुझे अभी याद नहीं आ रहा है। Dipnarayan Vyapaar Pvt. Ltd. से किस व्यक्ति के माध्यम से पैसा उधार लिया था अभी मुझे याद नहीं आ रहा है। इस सम्बन्ध में जानकारी प्राप्त कर मैं आपको बता दूंगा।

प्र.77 हमने प्रश्न सं. 39 में A.M. Exports एवं Dipnarayan व्यापार के ज्तंदेंबजपवदे के बारे में पूछा तो आपने अधूरी जानकारी दी थी क्या अब आपको इस बाबत् और अधिक विवरण बताना है?

उत्तर– जी हाँ, ''मेरे को दो दिन से याद करते हुए याद आ रहा है एवं विभाग से सहयोग की इच्छा रखते हुए बताना चाहता हूँ कि मैंने मैसर्स Dipnarayan Vayapar Private Limited को चैक दिया था जिसका मुझे इस साल में कैश प्राप्त हो गया जिसे मैंने इस वित्त वर्ष की अघोषित आय के रूप में विभाग को समर्पित कर दिया''।

प्र.12 आपने प्रश्न संख्या 11 के जवाब में एनेक्सर As Exibit-5 के पेज संख्या 37 क जवाब में बताया कि आपने मैसर्स दीपनारायण व्यापार प्रा.लि से ब्याज पर पैसा लिया हुआ है। उसका ए एम एक्सपोर्ट की लेखा पुस्तकों में दिनांक 01.04.11 से दिनांक 31.03.12 की अवधि का लेजर है। मैं आपको तलाशी एवं जब्ती की कार्यवाही के दौरान आपके सशपथ दर्ज बयान का प्रश्न संख्या 77 दिखा रहा हूँ जिसके उत्तर में आपने कहा था कि.....

''जी हां मेरे को दो दिन से याद करते हुए याद आ रहा है एवं विभाग से सहयोग की इच्छा रखते हुए बताया चाहता हूं कि मैंने मैसर्स दीपनारायण व्यापार प्रा.लि. को चैक दिया था जिसका मुझे इस साल में कैश प्राप्त हो गया जिसे मैंने इस वित्त वर्ष की अघोषित आय के रूप मे विभाग को समर्पित कर दिया।''

कृपया तलाशी एवं जब्ती की कार्यवाही के दौरान आपके सशपथ दर्ज बयान का प्रश्न संख्या 77 के जवाब को एक बार पुनः पढ़कर समझ लेवें कि आपने उपरोक्त प्रश्न संख्या 11 के जवाब में क्या सही उत्तर दिया है। इस संबंध में मैं आपका ध्यान आयकर अधिनियम 1961 के अभियोजन प्रावधानों की तरफ आपका ध्यान आकर्षित करना चाहता हूँ कि गलत बयानी की दशा में आपके विरूद्ध अभियोजन की कार्यवाही प्रारम्भ की जा सकती है। कृपया एक बार पुनः सोचकर बतायें कि आपने मैसर्स दीपनारायण व्यापार प्रा. लि. से कितना रूपया उधार लिया है अथवा आपने चैक देकर उनसे वापस नगद राशि प्राप्त की थी, स्पष्ट करें।

उत्तर– मैंने आपके द्वारा दिखाये गये एनेक्सर AS Exibit.5 के पेज संख्या 37 एवं तलाशी एवं जब्ती की कार्यवाही के दौरान दर्ज मेरे बयानों को अच्छी तरह से पढ़कर समझ लिया है। मैं यहां यह कहना चाहता हूं कि तलाशी एवं जब्ती की कार्यवाही के दौरान विभाग के अधिकारियों द्वारा इस संबंध में मुझसे बार–बार पूछा गया तो मैंने मानसिक रूप से थककर यह जवाब दे दिया था। लेकिन अब मैंने अपनी पूरी लेखा पुस्तकों को देख लिया है और मैं अब यह शपथपूर्वक बयान करना चाहता हूँ कि मैंने मैसर्स दीपनारायण

व्यापार प्रा.लि. चैक से ब्याज पर पैसा लिया था एवं उसका भुगतान भी चैक से ही किया है। मैंने इस कम्पनी के साथ कोई नगद लेन–देन नहीं किया है। जहां तक आयकर प्रावधानों की बात है उसके संबंध में मेरे बयान दर्ज करते वक्त विभाग द्वारा मुझे अवगत करा दिया गया था जो मेरी जानकारी में है। फिर भी मैं पूर्ण रूप से संतुष्ट होकर इस पृष्ठ के बारे में जवाब दे रहा हूं।

In reply to the question No. 34, the assessee has clearly stated that the transaction of loan from all the parties were taken on interest in the F.Y. 2009-10 and these were repaid in the F.Y. 2011-12. Thereafter a specific question was put to the assessee regarding the loan taken from M/s Dipnarayan Vyapar Pvt. Ltd. as question No. 39 and in reply to the same, the assessee stated that the loan was taken about three years back on interest but the assessee was not able to remember the person through whom the loan was taken. Therefore, there was no ambigui y in the reply to question No. 39 except that the assessee was not able to tell the name of the person who helped the assessee in procuring the loan. Since the Investigation Wing was not satisfied with the answers of the assessee as they could not extract the statement which can be used against the assessee, therefore, question were continuously put to the assessee for two days and it is a matter of record that the assessee was grilled up to 1.00 a.m. on the night of 04/4/2013 and again restarted in the morning at 7.50 a.m. and the question No. 77 was again asked specifically regarding loan from M/s Dipnarayan Vyapar Pvt. Ltd. in reply to that the assessee has explained that after trying to remember for continuously for two days and hoping the cooperation from the department, he said that he received cash against the said loan which was declared as undisclosed income for the year of search. The Investigation Wing was still not satisfied with the statement of the assessee and again called the assessee for further investigation on 30/5/2013 and thereafter on 21/6/2013. The assessee was again put the question about the loan taken from M/s Dipnarayan Vyapar Pvt. Ltd., in reply, the assessee explained that on repeated instances of the investigation team and due to exhausted mind, the assessee given an incorrect reply to question No. 77 recorded U/s 132(4)

of the Act on 05/4/2013 and again stated that after verifying the books of account, the said loan was taken on interest and was also repaid both the transactions are through banking channel. Thus, having regard to the background of the circumstances in which statement of the assessee regarding said transaction of loan from M/s Dipnarayan Vyapar Pvt. Ltd. was recorded and finally statement recorded in post search inquiry we are of the view that the assessee finally clarified the issue in the statement recorded U/s 131 of the Act and therefore, there was no admission on the part of the assessee. Except the statement of partner of the assessee, there was nothing incriminating found or seized during the course of sea ch and seizure action, therefore, the statement of the assessee recorded during the search and post search enquiry has to be read together and the outcome of the said statement is that the assessee has never admitted any bogus transaction except the misunderstanding due to continuous grilling by the Investigation Wing and due to mentally exhausted, the assessee given some inconsistent reply to question No. 77 which was subsequently clarified in question No. 12 of the statement recorded by the investigation Wing in the post search enquiry U/s 131 of the Act Even otherwise, all these statements are only regarding one transaction of loan that cannot be applied to the entire transactions of loan taken from 12 parties. Therefore, except the statement of the assessee to question No. 77, which was subsequently clarified in question No. 12, there was nothing in the shape of any material or document much less incriminating material with the Assessing Officer to make the addition to the total income of the assessee. If the statement of the assessee is read in toto then there will be no admission regarding any of the loan transactions being an accommodation entry. Therefore, the question arises whether in absence of any incriminating material, the Assessing Officer can make any addition to the total income of the assessee when the assessment was not abated due to the search and seizure action. The Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (supra) has considered and observed in para 37 and 38 as under:

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment hall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07.On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

Thus, the Hon'ble High Court has ruled that the Assessing Officer while making the assessment U/s 153A of the Act can make the addition only on the basis of

some incriminating material unearthed during the course of search or requisition of documents, which were not produced or not already disclosed or made known in the course of original assessment. In the case in hand, all the transactions were duly recorded in the books of account. Even the loans were already paid during the F.Y. 2011-12 and therefore, these transactions were disclosed and known in the course of original assessment/return of income. Hence in absence of any incriminating material, the Assessing Officer cannot make any addition to the total income of the assessee. In the subsequent decision, the Hon'ble Delhi High Court in the case of Pr.CIT Vs. Meeta Gutgutia (supra) has held in para 57 to 72 as under:

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in *Anil Kumar Bhatia* (*supra*) and *Chetan Das Lachman Das* (*supra*). Incidentally, both these decisions were discussed threadbare in the decision of this Court in *Kabul Chawla* (*supra*). As far as *Anil Kumar Bhatia* (*supra*) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as *Chetan Das Lachman Das* (*supra*) is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. In *Kabul Chawla* (*supra*), the Court discussed the decision in *Filatex India Ltd.* (*supra*) as well as the above two decisions and observed as under:

"31. What distinguishes the decisions both in *CIT* v. *Chetan Das Lachman Das* (*supra*), and *Filatex India Ltd.* v. *CIT-IV* (*supra*) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two . decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (*Pr. Commissioner of Income Tax* v. *Kurele Paper Mills P. Ltd.*), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In *Kabul Chawla* (*supra*), the Court referred to the decision of the Rajasthan High Court in *Jai Steel (India)* v. *Asstt. CIT* [2013] 36 taxmann.com 523/219 Taxman 223. The said part of the decision in *Kabul Chawla* (*supra*) in paras 33 and 34 reads as under:

'33. The decision of the Rajasthan High Court in *Jai Steel (India), Jodhpur* v. *ACIT* (*supra*) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

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

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

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

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

34. The argument of the Revenue that the AO was free to disturb income *de hors* the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on

the incriminating material found during the course of search or requisition of documents."'

60. In *Kabul Chawla* (*supra*), the Court also took note of the decision of the Bombay High Court in *CIT* v. *Continental Warehousing Corpn (Nhava Sheva) Ltd.* [2015] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 (Bom.) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in *Kabul Chawla* (*supra*) as under:

"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not

already disclosed or made known in the course of original assessment."

61. It appears that a number of High Courts have concurred with the decision of this Court in *Kabul Chawla*(*supra*) beginning with the Gujarat High Court in *Saumya Construction (P.) Ltd.* (*supra*). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in *Kabul Chawla* (*supra*), of the Rajasthan High Court in *Jai Steel (India)* (*supra*) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:

'15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153.

the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of *Jai Steel (India)* v. *Asst. CIT* (*supra*), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of *Jai Steel (India)* v. *Asst. CIT* (*supra*). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of *CIT* v. *Jayaben Ratilal Sorathia* (*supra*) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.'

62. Subsequently, in *Devangi alias Rupa* (*supra*), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in *Saumya Construction (P.) Ltd.* (*supra*) and of this Court in *Kabul Chawla* (*supra*). As far as Karnataka High Court is concerned, it has in *IBC Knowledge Park (P.) Ltd.*(*supra*) followed the decision of this Court in *Kabul Chawla* (*supra*) and held that there had to be incriminating material *qua* each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in *Salasar Stock*

Broking Ltd. (*supra*), too, followed the decision of this Court in *Kabul Chawla* (*supra*). In *Gurinder Singh Bawa* (*supra*), the Bombay High Court held that:

"6. . . . . once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in *Mahesh Kumar Gupta* (*supra*) and *Ram Avtar Verma* (*supra*) followed the decision in *Kabul Chawla* (*supra*). The decision of this Court in *Kurele Paper Mills (P.) Ltd.* (*supra*) which was referred to in *Kabul Chawla* (*supra*) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in *Smt. Dayawanti Gupta* (*supra*). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessees there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answe was

"We and our family firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sa es of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. Therefore, there was a clear admission by the Assessees in *Smt. Dayawanti Gupta* (*supra*) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in *Smt. Dayawanti Gupta* (*supra*) was confronted with certain documents seized during the search. The answer was categorical and reads thus:

"Ans:- I hereby admit that these papers also contend details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s. Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As

already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In *Smt. Dayawanti Gupta* (*supra*), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In *Smt. Dayawanti Gupta* (*supra*), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT (A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. In para 23 of the decision in *Smt. Dayawanti Gupta* (*supra*), it was observed as under:

"23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee "

69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material *qua* the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in *Smt. Dayawanti Gupta* (*supra*), therefore, do not detract from the settled legal position in *Kabul Chawla* (*supra*) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material *qua* each of those AYs.

Conclusion

72. To conclude:

(*i*) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified

in invoking Section 153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04?

(*ii*) Question (ii) is answered in the affirmative i.e., in favour of the Assessee and against the Revenue. It is held that with reference to AY 2004-05, the ITAT was correct in confirming the orders of the CIT (A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchise commission in the sum of Rs. 88 lakhs and rent payment for the sum of Rs. 13.79 lakhs?

The said decision of Hon'ble High Court was challenged by the revenue before the Hon'ble Supreme Court, however, the SLP of the revenue was dismissed vide order dated 02/7/2018 reported supra. Thus, the Hon'ble High Court has reiterated its view as taken in the case of CIT Vs. Kabul Chawla (supra) and specifically held that once the assessment has attained the finality i.e. is not pending then the same cannot be subject to tax in proceedings U/s 153A of the Act except some incriminating material are gathered in course of search or during the proceedings U/s 153A of the Act. The Hon'ble Jurisdictional High court in the case of Jai Steel (India) Vs ACIT (supra) has also considered this issue in para 22 to 26 as under:

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

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

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

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

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

23. The reliance placed by the counsel for the appellant on the case of *Anil Kumar Bhatia* (*supra*) also does not help the case of the assessee. The relevant extract of the said judgment reads as under:—

"19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the 'total income' of the six assessment years in question in separate assessment orders. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, *the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note to the undisclosed income, if any, unearthed during the search.*For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub-section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.

21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub-section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year

in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub-Section (1) of Section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition. The position thus emerging is that the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in case where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the stric provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. *Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income.* In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made." (Emphasis supplied)

24. The said judgment also in no uncertain terms holds that the reassessment of the total income of the completed assessments have to be made taking note of the undisclosed income, if any, unearthed during the search and the income that escaped assessments are required to be clubbed together with the total income determined in the original assessment and assessed as the total income. The observations made in the judgment contrasting the provisions of determination of undisclosed income under Chapter XIVB with determination of total income under Sections 153A to 153C of the Act have to be read in the context of second proviso only, which deals with the pending assessment/reassessment proceedings. The further observations made in the context of de novo assessment proceedings also have to be read in context that irrespective of the fact whether any incriminating material is found during the course of search, the notice and consequential assessment under Section 153A have to be undertaken.

25. The argument of the learned counsel that the AO is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under Section 153A of the Act is also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition. The provisions of Sections 153A to 153C cannot be interpreted to be a further innings for the AO and/or assessee beyond provisions of Sections 139 (return of income), 139(5) (revised return of income), 147 (income escaping assessment) and 263 (revision of orders) of the Act.

26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

Thus, the Hon'ble High Court has held that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents. The ld. CIT(A) has decided this issue in para 7 to 7.7 as under

"7. I have perused the order of the AO and submissions made in this regard. I have also gone through the various case laws cited by the AR. For the sake of convenience the legal ground is adjudicated 1st as it goes to the root of the matter.

7.2 In support of the additional ground taken/ contention raised detailed written submission are made wherein the appellant has challenged the legal validity of the addition made in the order framed u/s 143(3)/153A. It is submitted that such additions cannot be made as they are not relatable to any incriminating seized material found during the course of search. The appellant has cited following judgments in support of the contention taken:

1) Jay Steel limited vs. ACIT (88 DTR 1) [Raj HC]

2) Kabul Chawla vs. ACIT 380 ITR 573 (Del HC)

3) Continental warehousing Corporation 374 ITR 645 etc.

7.3 I have perused the order of the AO and submissions made in this regard. Perusal of assessment order passed u/s 143(3)/153A shows that all the additions made by the AO are not relatable to any seized material. I also find that for the A.Yr the assessment stood completed on the date of search.

7.4 The issue of additions made by the AO in the assessment u/s 143(3)/153A without any reference to incriminating seized material was considered by the

Hon'ble Rajasthan High court in the case of ***Jai Steel limited vs. ACIT (88 DTR 1).*** *The Hon'ble court was of the view in case of completed assessments no addition can be made if no incriminating seized material is found during the course of search. The relevant observation of the judgment is reproduced below:*

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

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

(b) Regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of in riminating material and just In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or 13 D B. INCOME TAX APPEAL NO.53/2011 Jai Steel (India), Jodhpur vs. Assistant Commissioner of income Tax, Jodhpur (Along with other 16 similar matters) reassessment can be made."

7.5 Similar view point was expressed by the Hon'ble Delhi High court in the case of ***Kabul Chawla vs ACIT 380 ITR 573 (Del HC).*** *The relevant observation of Hon'ble court could be seen in para 37 & 38 of order, same is reproduced below:*

Para 37. On a conspectus of Section 153A (1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the Aos as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will

be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. *Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously assessment has to be made under this Section only on the basis of seized material."*

v. *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*

vi. *Insofar as pending assessments are concerned the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*

vii *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07.0n the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

7.6 The issue of additions made by the AO while framing the assessment u/s 143(3)/153A, if no incriminating material is found during the course of search was considered by Hon'ble Gujarat High court in the case of Soumya construction PL Vs CIT 387 ITR 529. In its order dated 14/03/2016 Hon'ble court has categorically stated that, in cases of completed assessment, if no incriminating material is found then no additions can be made in the assessment framed u/s 153A of the act. The relevant para no. 18 8s 19 of the court order can be referred to.

Similar view of also taken in the following judgments, including by Hon'ble Jaipur ITAT Hon'ble ITAT Jaipur in many cases:

a. Continental warehousing Corporation 374 ITR 645
b. PCIT vs. Meeta Gutgutia 152 DTR 153
c. Vijay Kumar D Agarwal V/s DCIT in IT(SS)A Nos. 153,154,155 & 156/Ahd/2012
d. Ratan Kumar Sharma vs. DCIT ITA 797 & 798 /Jaipur/2014
e. Vikram Goyal vs. DCIT ITA 174/Jaipur/2017 etc
f. Jadau Jewellers & Manufacturer PL Vs ACIT (686/Jaipur/2014)
g. Prateek Kothari Vs. ACIT (312/Jaipur/2015.

7.7 Considering the above I am of the view that as the additions made by AO are without any reference to the seized material, they are not legally tenable. The same are therefore directed to be deleted. The legal ground taken by the appellant is thus allowed. The appellant succeeds on legal ground."

In view of the above facts and circumstances as well as in the light of binding precedents as discussed in the forgoing paragraphs, we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue."

Accordingly, in view of binding precedents as well as the decision of this Tribunal, we hold that in the absence of any incriminating material the addition made by the AO under section 2(22)(e) is not sustainable in law. The same is liable to be deleted.

10. Since we have decided the legal issue in favour of the assessee, therefore, we do not propose to go into the merits of the issue whether the amount received by the assessee is loan or advance or it is an advance salary as claimed by the assessee.

11. In the result, the appeal of the assessee is allowed.

For the Assessment Year : 2013-14 :

12. The assessee has raised the following grounds of appeal :-

1) The ld. CIT (A) has erred on facts and in law in confirming the addition of Rs. 26,089/- on account of undisclosed interest income, being difference between the interest income of Rs. 2,31,814/- shown in the statement of affair and interest income of Rs. 2,05,725/- declared in the return filed u/s 153A on the basis of interest income reflected in Form No. 26AS.

2) The ld. CIT (A) has erred on facts and in law in confirming the addition of Rs.67,35,153/- u/s 2(22)(e) of the Act in the assessment framed u/s 153A even when the assessment proceedings for the year under consideration has not abated and no incriminating material relating to the same was found in search and thus, the addition so made is illegal and bad in law

2.1) The ld. CIT (A) has erred on facts and in law in upholding the finding of AO that amount of Rs. 40,80,000/- given by M/s. Bhatia Corporation Pvt. Ltd. in business expediency to assessee for investment in share capital of its group company M/s. Bhatia Colonizers Pvt. Ltd is in the nature of loan or advance, thereby confirming the addition of same u/s 2(22)(e) of the IT Act.

2.2) The ld. CIT (A) has erred on facts and in law in upholding the finding of AO that advance of Rs. 32,55,153/- received from M/s. Bhatia Corporation Pvt. Ltd. against the salary of Rs. 6 lacs is in the nature of loan or advance, thereby confirming the addition of Rs. 26,55,153/- u/s 2(22)(e) of the IT Act.

3) The assessee craves to amend, alter and modify any of the grounds of appeal.

4) The appropriate cost be awarded to the assessee.

Ground No. 1 is regarding the addition made by the AO on account of difference in the interest income declared in the return of income and in the statement of affairs.

13. We have heard the ld. A/R as well as the ld. D/R and considered the relevant material on record. This issue is common to the issue raised by the assessee for the

assessment year 2012-13. In view of our finding for the assessment year 2012-13, we find that the addition made by the AO to the extent of Rs. 26,089/- is also covered under the excess amount of interest offered to tax for the assessment years 2015-16 and 16-17. Therefore, the addition to the extent of the additional/extra income offered to tax is not sustainable being subjected to double taxation. Accordingly, the addition on account of interest income is deleted.

Ground No. 2 is regarding the addition made on account of deemed dividend under section 2(22)(e) of the IT Act.

14. The AO has noted that assessee has received unsecured loan of Rs. 40,80,000/- as well as an advance of Rs. 32,55,153/ from M/s. Bhatia Corporation Pvt. Ltd. in which the assessee is holding 26.58% shares. The AO after allowing Rs. 6,00,000/- as salary of the assessee for the year under consideration has made an addition of Rs. 67,35,153/- under section 2(22)(e) of the Act. The ld. CIT (A) has confirmed the addition made by the AO.

15. Before us, the ld. A/R of the assessee has submitted that the loan of Rs. 40,80,000/- was given by M/s. Bhatia Corporation Pvt. Ltd. in the business expediency for investment in the share capital of the group company M/s. Bhatia Colonizers Pvt. Ltd. Therefore, it was not a loan or advance taken by the assessee for his own use or purpose but due to the business expediency the said amount was required to be infused or induced as capital in the group company for availing the finances from the financial Institution/Banks. The ld. A/R has also objected to the addition made by the AO on the ground that the original return of income filed on 20th December, 2013 was not pending as on the date of search. The time limit for issuing the notice under section 143(2) expired on 30th September, 2014, therefore

the assessment proceedings were not pending as on the date of search on 03.03.2016. He has reiterated his contention as raised for the assessment year 2012-13.

16. On the other hand, the ld. D/R has also reiterated his contention as raised for the assessment year 2012-13.

17. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the original return of income was filed by the assessee on 20th December, 2013. The assessment for the year under consideration was not pending as on the date of search on 03.03.2016 as the limitation for issuing the notice under section 143(2) expired on 30th September, 2014. Accordingly, when the assessment proceedings were not pending as on the date of search then the issue raised by the assessee is identical as for the assessment year 2012-13. We have already considered this issue for the assessment year 2012-13 and in view of our finding on this issue, the same is decided in favour of the assessee and against the revenue. The addition made by the AO in the absence of any incriminating material is liable to be deleted.

19. Since we have deleted the addition on legal ground, therefore, we do not propose to go into the merits of the issue whether it was the amount received by the assessee from the company falls in the ambit of loan or advance in terms of section 2(22)(e) of the Act or not.

For the assessment year 2014-15 : (Revenue)

20. The revenue has raised the following grounds of appeal :-

1) Whether on the facts and in the circumstances of the case the CIT (A) was justified in deleting the addition of Rs. 85,37,400/- made by the AO u/s 2(24)(iv) of the IT Act.

2) Whether on the facts and circumstances of the case and in law, the CIT (A) was justified in observing that the price determined by the Sub Registrar represents fair market value of the property despite the fact that undisputable evidences indicating sale of property by M/s. Bhatia Colonizers P. Ltd at a value substantially higher from the registered value were found during the course of search.

3) Whether on the facts and circumstances of the case in law, the CIT (A) was justified in deleting the addition of Rs. 3,42,002/- made by AO u/s 2(22) of the IT Act holding that the said advance was an advance against salary income and not in the nature of loan or advance falling under the provisions of section 2(22)(e).

4) Whether on the facts and circumstances of the case and in law, the CIT (A) was justified is not directing the AO to tax the income of Rs. 3,42,002/- as salary income after holding that the said sum was in the nature of advance of salary not chargeable to tax u/s 2(22)(e) of the IT Act when the provisions of section 15 of the IT Act clearly for charging of the advance salary.

5) The applicant crave, leave or reserving the right to amend, modify, alter add or forego any ground( ) of appeal at any time before or during the hearing of this appeal

Ground Nos. 1 & 2 are regarding the addition made by the AO under section 2(24)(iv) of the Act was deleted by the ld. CIT (A).

21. The assessee has purchased a Villa at Plot No. A-35 measuring 2,400 sq. ft. from M/s. Bhatia Colonizers Pvt. Ltd. for Rs. 90 lacs. The AO observed that in the search and seizure certain incriminating materials were found indicating that plot no. D-12, E-13 and E-16 measuring 4,600 sq. ft. was sold for Rs. 75,80,000/- but in the books of M/s. Bhatia Colonizers Pvt. Ltd. the same is recorded at Rs. 38,90,000/-. Thus there is an unrecorded consideration of 94.86% of the recorded consideration. The AO applied the same ratio in respect of the Villa purchased by the assessee and

consequently held that the assessee has received benefit/perquisite from the company to the extent of Rs. 85,37,400/- being 94.86% of Rs. 90,00,000/-. The AO accordingly made an addition of this amount under section 2(24)(iv) of the Act. On appeal, the ld. CIT (A) deleted the addition by considering the purchase consideration declared by the assessee as fair market value of the property even in terms of the stamp duty valuation as well as the rates detected as per the seized material.

22. Before us, the ld. D/R has submitted that once an incriminating material is found during the course of search indicating unrecorded consideration on sale of plot of land by M/s. Bhatia Colonizers Pvt. Ltd. then the proposition of the unrecorded consideration as detected in the seized material was rightly applied by the AO in the case of assessee for determining the benefit/perquisite received on account of less consideration paid by the assessee. He has relied upon the orders of the AO.

23. On the other hand, the ld. A/R has submitted that the consideration paid by the assessee is more than he fair market value of the property and further the rate per sq. ft. as found in the seized material is also less than the consideration declared by the assessee. He has supported the order of the ld. CIT (A) and submitted that the ld. CIT (A) has duly considered the purchase consideration which is more than the consideration indicated as per the seized documents, therefore, even applying the rate as per the seized documents though in respect of some different plots of land, no addition is justified.

24. We have considered the rival submissions as well as the relevant material on record. We note that the AO has taken the unrecorded consideration found in the seized material in respect of plot no. D-12, E-13 and E-16 and then worked out the

proportion/ratio of recorded consideration in the books of M/s. Bhatia Colonizers Pvt. Ltd and the value recorded in the seized document. Therefore, the AO arrived at unrecorded consideration in respect of the plot nos. D-12, E-13 and E-16 at 94.86% of the recorded consideration. This ratio was applied by the AO in the case of the assessee for considering the FMV of the property. However, applying the ratio without considering the consideration in terms of the rates is highly arbitrary and without application of mind. The assessee has purchased the Villa measuring 2400 sq. ft and constructed area 4875 sq. ft for a consideration of Rs. 90 lacs. The cost of construction was estimated by the ld. CIT (A) at Rs. 900/- per sq. ft. and after reducing the cost of construction from the total purchase consideration, the sale price of plot of land comes to Rs. 46,12,500/- Thus the average rate considered per sq. ft comes to Rs. 1922/- at which the assessee has purchased the plot of land in question. The AO has applied the rate as per the seized material in respect of three plots of land, the details of which are as under :-

Plot No.	Type	Size in Sq. Ft	Value as per seized documents	Value recorded in books	Average sale price as per seized document.
D-12	Plot	1000	15,50,000/-	6,50,000/-	1550/-
D-13	Plot	1800	30,15,000/-	16,20,000/-	1675/-
D-16	Plot	1800	30,15,000/-	16,20,000/-	1675/-
	Total	4600	75,80,000/-	38,90,000/-	1648/-

Therefore, as per the seized documents, the total sale consideration in terms of per sq. ft. rate for these three plots is ranging from Rs. 1,550/- to Rs. 1,675/- and the average of these three plots comes to Rs. 1,648/- per sq. ft. If the said rate is compared with the rate of the assessee's plot at Rs. 1,922/- then the declared purchase consideration of the assessee is even more than the consideration found

recorded in the seized material. The AO without considering the fact of the rate declared in the case of the assessee has applied the ratio of recorded and unrecorded value in case of sale of other plots wherein the recorded consideration was very less, if it is taken in terms of per sq. ft. It is clear that for the plot D-12, the rate per sq. ft. as recorded is Rs. 650/- and as per seized document it is Rs. 1550/- whereas in the case of assessee the recorded consideration itself is Rs. 1922/- per sq. ft. Hence the ratio applied by the AO without considering the relevant facts is not justified. The ld. CIT (Appeals) has considered this issue in para 4.3 to 4.3.5 as under :-

> " 4.3. I have considered the facts of the case, gone through the assessment order and the submission of the appellant.
>
> 4.3.1. The only dispute in this issue is whether assessee has obtained any benefit by selling the plot to the assessee for Rs. 90,00,000/-. AO made the addition by applying the provisions of section 2(24)(iv) by holding that assessee has purchased the villa from the company at lower price than the market price.
>
> 4.3.2. I find that section 2(24)(iv) is a deeming fiction and the deeming fiction needs to be construed strictly. For making addition under this section the assessee must have obtained some benefit. The various cases relied by the AR also supports this view.
>
> 4.3.3. However no such benefit is actually obtained. The AO in the assessment order has accepted that there is no evidence of actual record of 'On Money' and therefore no benefit is actually obtained.
>
> 4.3.4. I further found that the sale of the villa to the assessee is at a price more than the price determined by the sub registrar. This represents fair market value as recognized u/s 50C and 43CA.

Further the assessee has also filed comparative case of villa sold to other parties at a price lower than to the assessee which proves that no extra benefit is given to the assessee.

4.3.5. The AO for holding that assessee has obtained extra benefit compared the three cases wherein on money evidence was found in search. The rate per sq. ft. of these three plots including on money works out to Rs. 1648/- per sq. ft. whereas the villas sold to the assessee is at 1922/- per sq. ft. Thus infect the villas is sold to the assessee at a higher price than the others and therefore it can't be said that there is any benefit given to the assessee."

In view of the above facts as discussed above, we do not find any error or illegality in the order of ld. CIT (A) in deleting the addition made by the AO under section 2(24)(iv) of the IT Act.

Ground Nos. 3 & 4 are regarding the addition made by the AO under section 2(22)(e) was deleted by the ld. CIT (A) by holding that the said advance was against the salary income and not in the nature of loan or advances falling under the provisions of section 2(22)(e) of the Act.

25. The ld. D/R has submitted that the assessee has taken the advance of Rs. 9,42,002/- as against the total salary of Rs. 6,00,000/-, therefore, the AO has rightly taken the difference amount of Rs. 3,42,002/- as loan/advance falling under the definition of deemed dividend under section 2(22)(e) of the Act. He has relied upon the order of the AO.

26. On the other hand, the ld. A/R of the assessee has submitted that the ld. CIT (A) has considered the fact that when the assessee is entitled for the salary of Rs. 6,00,000/- for the year under consideration then the total amount taken by the assessee of Rs. 9,42,002/- cannot be considered as loan or advance. Apart from supporting the order of the ld. CIT (A) on merit, the ld. A/R has also supported the order of the ld. CIT (A) on the issue that the addition was made by the AO without any incriminating material found or seized during the course of search indicating any undisclosed income on account of deemed dividend. He has raised this objection under Rule 27 of the ITAT Rules and submitted that the ld. CIT (A) has decided the issue of validity of addition made by the AO for want of incriminating material against the assessee. Thus the ld. A/R has submitted that the appeal of the revenue is not sustainable/maintainable when the assessee succeeds in the objection of addition made without any incriminating material. He has reiterated his contention as raised for this issue for the assessment year 2012-13.

27. The ld. D/R has repl ed to the objection raised by the assessee under Rule 27 of the ITAT Rules and submitted that there was incriminating material based on which the AO has made the addition in respect of deemed perquisite/benefit under section 2(24)(iv) of the Act. He has reiterated his contention as raised for the assessment year 2012-13 on this issue.

28. We have considered the rival submissions as well as the relevant material on record. Since the assessee has invoked the provisions of rule 27 of the ITAT Rules to support the order of the ld. CIT (A) and against the appeal of the revenue on this issue, we, therefore, decide the objection raised by the assessee first. There is no dispute that as per Rule 27 of the ITAT Rules, a party who has not decided to file

the appeal can support the order of the ld. CIT (A) on an issue which was decided against the said party and consequently the appeal filed by the other party can be objected. The objection raised under rule 27 of ITAT Rules by the assessee on the issue of validity of addition made under section 2(22)(e) if succeeded then the result would be failure of the appeal of the revenue but would not disturb the finding of the ld. CIT (A) on this issue for the year under consideration. Since the assessee has not filed any appeal or cross objection, therefore, the objection raised under rule 27 of the ITAT Rules shall have the effect of defeating the appeal of the revenue but cannot reverse the order of the ld. CIT (A). As we find that the return of income for the year under consideration was filed under section 139 on 23rd March, 2015, the time limit for issuing the notice under section 143(2) expired on 30th September, 2015 and, therefore, the assessment was not pending on the date of search on 03.03.2016. An identical issue has been considered by us for the assessment year 2012-13 and in view of ou finding the addition made by the AO under section 2(22)(e) without any incriminating material either found or seized during the course of search is not sustainable in law. Accordingly the assessee succeeds in the objection raised under rule 27 of the ITAT Rules on this issue and consequently the appeal of the revenue in respect of ground nos. 3 & 4 fails. Hence the order of ld. CIT (A) is upheld.

29. In the result, appeal of the revenue is dismissed.

For the Assessment Year : 2016-17 :

30. Cross appeals are filed wherein the assessee and revenue have raised the following grounds :-

ITA No. 597/JP/2018 (Assessee) :

1. The ld. CIT (A) has erred on facts and in law in upholding the finding of AO that amount of Rs. 53,20,000/- given by M/s. Bhatia Corporation Pvt. Ltd. in business expediency to assessee for investment in its share capital is in the nature of loan or advance, thereby confirming the addition of same u/s 2(22)(e) of the IT Act.

2. The assessee craves to amend, alter and modify any of the grounds of appeal.

3. The appropriate cost be awarded to the assessee.

ITA No. 790/JP/2018 (Revenue) :

1. Whether on the facts and circumstances of the case in law, the CIT (A) was justified in deleting the addition of Rs 1,02,00,000/- made by the AO u/s 2(22)(e) of the IT Act holding that the received amount of Rs. 1,02,00,000/- from M/s. Bhatia Corporation Pvt. Ltd. on 31.03.2015 to them, falling under the provisions of section 2(22)(e).

2. Whether on the acts and circumstances of the case and in law, the CIT (A) was justified in not directing the AO to tax the income of Rs. 5,85,625/- as withdrawn by the assessee against salary from M/s. Bhatia Corporation Pvt. Ltd after holding that he said sum was in the nature of advance of salary not chargeable to tax u/s 2(22)(e) of the I.T. Act when the provisions of section 15 of the IT Act clearly provide for charging of advance salary.

3. The applicant crave, leave or reserving the right to amend modify, alter add or forego any ground (s) of appeal at any time before or during the hearing of this appeal.

Ground No. 1 of the assessee's appeal is regarding the addition made by the AO under section 2(22)(e) of the Act which was confirmed by the ld. CIT (A) to the extent of Rs. 53,20,000/-.

31. During the course of assessment proceedings, the AO noted that there are three entries of Rs. 53,20,000/-, 1,02,00,000/- and Rs. 5,85,625/- as advances given to the assessee by M/s. Bhatia Corporation Pvt. Ltd. The AO accordingly made the

addition of the entire three amounts under section 2(22)(e) of the Act. On appeal, the ld. CIT (A) has sustained the addition to the extent of Rs. 53,20,000/- and deleted the balance addition. Therefore, both the assessee and the revenue have filed these cross appeals.

32. Before us, the ld. A/R has submitted that the provisions of section 2(22)(e) applies to any payment by the company to substantial shareholder by way of advance/loan but where the payment is made for business consideration, the same is not covered by deeming fiction of section 2(22)(e) of the Act. The deeming provision of the Statute has to be construed strictly and consequently all three conditions should be satisfied being (i) there should be a payment, (ii) payment should be of a sum and (iii) such payment should be by way of loan or advance. In the case of the assessee, the amount of Rs. 53,20,000/- given by the company to the assessee is not a gratuitous payment as to hold that same is in the nature of loan or advance. The ld. A/R has pointed out that during the year M/s. Bhatia Corporation Pvt. Ltd. approached the bank for renewal of loan facility. The bank renewed the loan subject to the condition that the company has to raise paid up capital to the tune of Rs. 4 crore. He has referred the Loan Sanction Letter of the bank and submitted that the loan was sanctioned subject to the conditions. The promoter in the interest of the company agreed to the conditions of the bank and accordingly the amount taken from the company was remitted on the same day in the share capital of M/s. Bhatia Corporation Pvt. Ltd. Consequently, the capital of the company was increased from Rs. 11 crores to Rs. 15 crores to satisfy the condition put by the bank for renewal of the loan. Thus the ld. A/R has submitted that this amount was given for business consideration and commercial expediency of

the company for infusion of the capital as required by the bank and it was not for the personal use of the assessee director. In support of his contention, he has relied upon the decision of Hon'ble Calcutta High Court in case of Pradip Kumar Malhotra vs. CIT, 338 ITR 538 (Cal. HC) as well as following decisions :-

Sarat Chand Bhavaraju vs. ITO
164 ITD 562 (Visakhapatnam Trib.)

Bagmane Constructions Pvt. Ltd. vs. CIT & Anr.
231 Taxman 260 (Kar. HC)

M/s. KG Petrochem Ltd. vs. ACIT
2016 ITL 1457 (Jaipur Trib.)

33. On the other hand, the ld. D/R has submitted that it is not an amount handed over to the assessee for any trading purposes or business purposes of the company but the assessee has availed the loan/advance from the company to invest in the share of the same company. Therefore, this is the investment in the individual and personal capacity of the assessee. Further, the assessee is paying interest on the said loan amount as per the ledger account of the assessee. The assessee as well as the company treated this amount as loan and assessee is also paying interest on the same. Therefore, this is nothing but loan taken by the assessee from the company for the purpose of investment made in the shares of the same company. He has relied upon the orders of the authorities below.

34. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the assessee received Rs. 53,20,000/- from M/s. Bhatia Corporation Pvt. Ltd. and the said money was utilized by the assessee for

investment in the shares of the same company. Therefore, the amount received from the company was converted into the investment and the ownership of the investment is with the assessee. The assessee took the benefit of acquiring the shares of the same company by utilizing the fund of the company taken for this purpose. Though the ld. A/R has vehemently contended that this investment was for the business consideration of the same company as the renewal of the loan was sanctioned by the bank subject to infusion of more capital and to satisfy the said conditions, the director, promoter of the company have taken the money from the company to infuse to share capital of the said company, therefore, the amount was utilized for the business of the company and not for personal use of the assessee. However, even if the amount was utilized for increase of the share capital, the ownership of the shares have now transferred to the assessee without paying anything from the assessee's own fund We further note that in the ledger account as well as in the balance sheet the assessee is showing this amount under current liabilities and also paying the interest @ 12%. Therefore, when the treatment of the said amount received by the assessee from the company is loan and also paying the interest on the said amount to the company then merely because the assessee has invested in the shares of the said company will not change the character of the transaction of loan received from the company. The ld. CIT (A) has decided this issue in para 2.3.4 to 2.3.6 as under :-

> " 2.3.4. Thus, from the above distinguishing, it is amply clear that in the instant case it is gratuitous loan or advance given by a company to the appellant belonging to those classes

of shareholders would come within the purview of s. 2(22)(e).

2.3.5. The law is clear that once the loan/advance has been given to the substantial shareholders, the same has to be treated as deemed dividend unless the same falls in exceptional circumstances as enumerated in the various case laws and CBDT circular. It may be mentioned that transaction made by the appellant does not fall in any way in to trade advance/commercial transactions described in CBDT in Circular No 19/2017 dated 12 June 2017 and therefore, the said circular cannot help the appellant to take out the transaction from the ambit of the word 'advance' in section 2(22)(e) of the Act.

2.3.6. Therefore, considering all the facts, the addition of Rs. 53,20,000/ made by the AO by treating the advance taken by the assessee from the company as deemed dividend is confirmed."

The decisions relied upon by the assessee are not applicable in the facts of the present case as this is neither the amount given by the company for trading or business purposes of the said company but this amount was given to the assessee for making the investment in the shares of the company though the said investment was required for taking the loan from the bank. It was the duty of the promoters as a shareholder of the said company to infuse more capital in the said company, therefore the fund of the said company used by the assessee is nothing but the loan/advance in terms of section 2(22)(e) of the Act. Accordingly, we do not find any error or illegality in the order of the ld. CIT (A) qua this issue.

In revenue's appeal ground nos. 1 & 2 are regarding additions of Rs. 1,02,00,000/- and Rs. 5,85,625/- were made by the AO which were deleted by the ld. CIT (A).

35. We have heard the ld. D/R as well as the ld. A/R and considered the material on record. We find from the record that an amount of Rs. 1,02,00,000/- was received by the assessee through cheque encashed on 24th April, 2015 and equal amount was also debited from the assessee's bank account and credited in the account of the company on the same date. Therefore, it was only a contra entry in the bank account of the assessee as well as the company and there is no real or substantial payment from either of the party. The amount was not even remained with the assessee for a day but it is only an entry in the account through contra cheque deposited in the accounts of the assessee as well as the company. Therefore, it appears that only for some window dressing or accounting purpose the cheques were exchanged by the parties and the funds were never moved from one account to another accoun but the same remained as it is. As regards the addition of Rs. 5,85,625/ , the ld. CIT (A) has deleted this amount treating the same as advance salary. The relevant finding of the ld. CIT (A) is in para 2.3.7 to 2.3.8 are as under :-

> " 2.3.7. So far as addition of Rs. 5,85,625/- is concerned, I found force in the argument of the A/R that this is not a loan or advance for the purpose of section 2(22)(e) but simply an advance against the salary income. The total salary of the assessee from the company for the year is Rs. 6,00,000/- whereas the advance over and above the salary is only Rs. 5,85,625/-. The various case laws referred by the assessee

and the CBDT circular also supports her case. Therefore, the addition of Rs. 5,85,625/- made by the AO is deleted.

2.3.8. So far an amount of Rs. 1,02,00,000/- dated 24.04.2015 is concerned, I find that the A/R in assessment proceeding as well as in appellant proceeding explained that this is only the reversal of the entry. No advance is given to the assessee. I have gone through the bank account No. 662110100011774 of the appellant with Bank of India and it is seen that the assessee has first given a cheque of Rs. 1,02,00,000/- to the company and on the same date company has repaid the amount of Rs. 1,02,00,000/-. Thus there is no loan or advance by the company to the assessee. Considering all these facts and factual position of the case, the addition of Rs. 1,02,00,000/- made by the AO is not sustainable within meaning of section 2(22)(e) of the Income Tax Act, 1961 and hence the same is deleted."

So far as the addition of Rs. 1,02,00,000/ is concerned, we find from the record that there is no actual movement of the fund from either party and, therefore, there is no payment of any amount either by the company to the assessee or by the assessee to the company but it was only a paper transaction of exchanging the cheques of equal amount by the parties. Therefore, to that extent, we do not find any error or illegality in the order of the ld. CIT (A) when the actual movement of fund has not happened which can be termed as the loan or advance as per provisions of section 2(22)(e) of the Act.

35.1. As regards the addition of Rs. 5,85,625/-, we note that the AO has already reduced the salary of Rs. 6,00,000/- from the total amount of Rs. 11,85,625/- taken by the assessee from the company. Therefore, once the AO has already given the credit of salary of Rs. 6,00,000/- for the year under consideration, the balance

amount in excess of the entitlement of the salary will be regarded as loan or advance in terms of section 2(22)(e) of the Act. We further note that in the books of account as well as in the ledger the assessee has shown this amount as loan and also paid the interest on the outstanding. Therefore, having regard to the facts and circumstances and particularly the treatment by the assessee as well as by the company in the books of account, the excess drawl of Rs. 5,85,625/- would be treated as loan or advance under section 2(22)(e) of the Act. Accordingly, the order of the ld. CIT (A) qua this issue is set aside and the order of the AO is restored.

36. Resultantly, assessee's appeal is dismissed and revenue's appeal is partly allowed.

37. In the result, assessee's appeals in ITA No. 1284/JP/2018 and 596/JP/2018 are allowed while appeal in ITA No. 597/JP/2018 is dismissed and the Revenue's appeal in ITA No. 789/JP/2018 is dismissed while appeal in ITA No. 790/JP/2018 is partly allowed.

Order is pronounced in the open court on 25/04/2019.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल रॉव)
(VIKRAM SINGH YADAV)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

Jaipur
Dated:- 25/04/2019.
Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Smt. Reema Harish Bhatia, Kota.
2. The Respondent – The DCIT, Central Circle, Kota.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 1284 (4)/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar