

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**IT(SS)A Nos.30 to 36/Ind/2016
Assessment Years: 2001-02 to 2007-08**

Mohd. Atique Shafique Villa, Bunglow No.7 Ahmedabad Palace Road Bhopal (Appellant)	<u>बनाम/</u> Vs.	ACIT-3(1) Bhopal (Revenue)
P.A. No.AGWPA6383N		

**IT(SS)A Nos.37 to 42/Ind/2016
Assessment Years: 2001-02 to 2007-08**

Mohd. Shakeel Shafique Villa, Bunglow No.7 Ahmedabad Palace Road Bhopal (Appellant)	<u>बनाम/</u> Vs.	ACIT-3(1) Bhopal (Revenue)
P.A. No.ARZPS3328P		

IT(SS)A Nos.124 & 125/Ind/2016
Assessment Years: 2005-06 & 2007-08

Mohd. Shafique Shafique Villa, Bunglow No.7 Ahmedabad Palace Road Bhopal (Appellant)	बनाम/ Vs.	ACIT-3(1) Bhopal (Revenue)
P.A. No.ANIPS2739K		

Appellant by	Shri Girish Agrawal & Miss Nisha Lahoti, A.Rs
Respondent by	Smt. Ashima Gupta, D.R.
Date of Hearing:	01.04.2019
Date of Pronouncement:	30.04.2019

आदेश / ORDER

PER BENCH:

This bunch of 15 appeals are against separate orders of the CIT(A)-II, Bhopal dated 29.1.2016, 28.1.2016 & 4.3.2016 for the assessment years 2001-02 to 2007-08. Since common issues are involved, these appeals were heard together and are being disposed of by way of this consolidated order for the sake of convenience and brevity.

2. First we take up IT(SS)A No.30/Ind/2016 pertaining to the assessment year 2002-03. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had failed to follow the directions contained in the combined order dated 31.1.2013 in appeal No.310 to 316/Ind/2012 of ITAT.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the finding of the assessing officer that the appellant was not having any lease hold land with him and that he did not earn agricultural income of Rs.4,42,900/- from such land.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the addition of Rs.4,42,900/- towards income from other sources as made by the assessing officer.*
4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.”*

3. During the course of hearing, the assessee has also filed an additional ground that reads as under:

“On the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153A rws 143(3) without reference to any incriminating material found and seized during the course of conduct of search.”

4. This is second round of litigation. In the earlier round of litigation, matter travelled up to the stage of this

Tribunal and the Tribunal in IT(SS)A Nos.310 to 316/Ind/2012 pertaining to the assessment years 2001-02 to 2007-08 set aside the assessment to file of the A.O. to frame assessment as per the direction given in the order of the Tribunal. Thereby, the A.O. was directed to adopt agricultural income @ Rs.6,000/- per acre in respect of the land owned by the assessee and in respect of agricultural land taken on lease, the A.O. was directed to verify the claim of the assessee and decide accordingly. The A.O. thereafter, computed the agricultural income in respect of agricultural land owned by the assessee in terms of the direction of the Tribunal. However, in respect of agricultural income claimed to have been earned on the land taken on lease for the purpose of carrying out agricultural activities, the same was not found supported by the relevant evidences, therefore, the assessing officer

made addition of Rs.4,72,501/- and also disallowed the rental income of Rs.43,200/-.

5. Aggrieved by this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions and material on record dismissed the claim of the assessee of earning of income in respect of agricultural land taken on lease. Against this, the assessee is in present appeal. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. The submissions of the assessee are reproduced as under:

“Fixed for hearing on 06.02.2019
Before the Hon’ble Income Tax Appellate Tribunal, Indore Bench,
Indore
IT(SS)A No.: 30/Ind/2016to 36/Ind/2016 by the Assessee

In the matter of	: Mohd. Atique, Bhopal
PAN	: AGWPA6383N
Assessment Year	:2001-02 to 2007-08
Status	: Individual
Return	: A.Y. 2001-02 at Rs. 1,68,088 and agriculture income Rs. 6,86,548 on 20.06.2008

A.Y. 2002-03 at Rs. 1,72,005 and agriculture income Rs. 7,45,741 on 20.06.2008

A.Y. 2003-04 at Rs. 2,48,908 and agriculture income Rs. 8,11,511 on 20.06.2008

A.Y. 2004-05 at Rs. 2,06,024 and agriculture income Rs. 9,10,166 on 20.06.2008

A.Y. 2005-06 at Rs. 49,67,512 and agriculture income Rs. 10,81,776 on 20.06.2008

A.Y. 2006-07 at Rs. 4,47,340 and agriculture income Rs.15,43,915 on 20.06.2008

A.Y. 2007-08 at Rs. 1,46,347 and agriculture income Rs. 15,74,930 on 20.06.2008

Assessment Order : u/s 143(3) rws153A and 254 dated 26.03.2014

A.Y. 2001-02 Rs. 6,14,400 (addition of Rs. 4,46,308 as disallowance of agriculture income and rental income)

A.Y. 2002-03 Rs. 6,87,706 (addition of Rs. 5,15,701 as disallowance of agriculture income and rental income)

A.Y. 2003-04 Rs. 8,36,980 (addition of Rs. 5,85,071 as disallowance of agriculture income and rental income)

A.Y. 2004-05 Rs. 9,16,120 (addition of Rs. 7,10,096 as disallowance of agriculture income and rental income)

A.Y. 2005-06 Rs. 57,22,050 (addition of Rs. 7,54,536 as disallowance of agriculture income and rental income)

A.Y. 2006-07 Rs. 14,94,220 (addition of Rs. 10,46,878 as disallowance of agriculture income and rental income)

A.Y. 2007-08 Rs. 28,72,280 (addition of Rs. 27,25,930 as disallowance of agriculture income, rental income and addition of entries in BS-1)

CIT(A) Order :dated 29.01.2016 addition sustained for all the years on account of agriculture income from lease hold land –

A.Y. 2001-02 Rs. 4,04,200

A.Y. 2002-03 Rs. 4,42,900

A.Y. 2003-04 Rs. 4,85,900

A.Y. 2004-05 Rs. 5,50,400

A.Y. 2005-06 Rs. 5,93,400

A.Y. 2006-07 Rs. 7,31,382

A.Y. 2007-08 Rs. 7,86,930 and Rs. 16,02,200 for entries
appearing in one seized document

All other additions deleted for which Department is not
in appeal before the Hon'ble ITAT

Grounds of appeal in all the years are common except for quantum involved and hence a combined submission is being made which may please be considered. In AY 2007-08, there is another ground (no. 04) for addition of Rs. 16,02,200 for entries appearing in one seized document which is not pressed.

A. Additional Grounds of Appeal

For all the years under appeal i.e. A.Y. 2001-02 to 2007-08, assessee has filed additional grounds of appeal through a separate application dated 07.09.2018 which are **legal grounds** going to the root of the matter. Assessee prays that these grounds of appeal may please be admitted in the interest of natural justice and appropriate adjudication of the matter.

1. Instant proceedings are the second round of appeal before the Hon'ble ITAT Bench of Indore after the matter was set aside by the Hon'ble Bench to the file of AO vide order pronounced on **31.01.2013** in appeal nos. **IT(SS)A 310 to 316/Ind/2012**. [refer **PB 375-396**]

The matter was set aside by the Hon'ble Bench owing to additional evidences filed by the assessee which were not considered by the authorities below.

While setting aside the matter to the file of Ld. AO, Hon'ble ITAT noted the following facts in its order at internal **Page 13 Para 10 [PB 381]** –

“In respect of the land taken on lease, the matter is restored back to the file of the Assessing Officer for determining the total land taken on lease after considering the additional evidence filed before CIT(A) as

discussed hereinabove, and after allowing deduction on account of lease rent paid by the assessee thereon, the Assessing Officer is to compute the agricultural income out of such lease hold lands. We direct accordingly. This conclusion is applicable to all the assessment years, under consideration.”[emphasis supplied]

2. The assessment was completed u/s 143(3)rws 153A. Additions made by the Ld. AO relating to agriculture income on lease hold lands is without reference to any incriminating material found during the course of search conducted in the case of the assessee.
3. Search was conducted in the case of Mohd. Shafique, Mohd. Atique and survey in the case of M/s. Ekta Transport Co.Appeals of Mohd. Shafique and Mohd. Atique are in appeal before your Honors.
4. Additional grounds of appeal go to the root of the matter and hence are vital to the disposal of said appeals. Reference to incriminating material is of utmost importance to make addition u/s 153A. Admittance of additional grounds shall help the assessee in getting justice.
5. Reliance is placed on the following decisions for admittance of legal grounds in the instant appeals –
 - a. **Hon’ble Apex Court** in the case of **National Thermal Power Co. Ltd – [1998] 229 ITR 383 – [CLPB 01-02]**
 - b. **Hon’ble ITAT Chennai (TM)** bench in the case of **Hemal Knitting Industries – [2010] 127 ITD 160 – [CLPB 39-45]**
 - c. **Hon’ble ITAT Mumbai** bench in the case of **Anjli Pandit [2017] 88 taxmann.com 657 (Mumbai - Trib.) – Para 3 and 4 – [CLPB 25-38]**
6. Assessee prays that the additional grounds of appeal being **legal grounds on fundamental issue of reference to incriminating material found during the course of search** and goes to the root of matter and hence please be admitted for adjudication of matter.

B. Facts of the case: (AY 2001-02 to 2007-08)

1. The main source of income for assessee is agriculture. In addition to this he is also earning income from the business of transportation, rental income and interest income.[PB 32]
2. **Search and seizure operations** u/s 132 were conducted in the case of Mohd. Shafique group on **21.09.2006** which includes the instant appellant. **Notice u/s 153A was issued on 19.05.2008** for the all the years under appeal.
3. During the proceedings, both in the first round and in the instant second round, **no reference** has been made by the Ld. AO to any **incriminating material found** during the search operations carried out in the case of Mohd. Shafique, Mohd. Atique and survey in the case of M/s. Ekta Transport Company, on the **basis of which addition** is made in the impugned years towards agriculture income from leasehold land.
4. Assessee is in second round of appeal before the Hon'ble ITAT Indore Bench after the matter was set aside to the file of Ld. AO vide order pronounced on **31 01.2013** in appeal numbers **IT(SS)A 310 to 316/Ind/2012** owing to land related khasra documents which were filed before Ld. CIT(A).[internal Page 13PB 381]
5. During the first round of appellate proceedings before Ld. CIT(A), assessee has submitted Khasra documents and lease agreements as an evidence to prove the agriculture income earned during all the years under appeal. [PB 13, 23-28, 51-57]
6. Appellant produced three owners from whom agriculture land was taken on lease, of which statement of only Mohd. Laeek was recorded by the Ld. AO.[PB 225 and AO Page 5]

7. Ld. CIT(A) failed to admit the evidences filed and hence the matter was set aside to the file of Ld. AO by the Hon'ble Bench of ITAT to allow agriculture income @ Rs. 6,000 per bigha.

Hon'ble ITAT made a factual statement in the said order that the assessee is owning agricultural land and also some land was taken on lease. **[PB 378 back side internal page 8]**

Further, in respect of agriculture income from leasehold land, directions were given to determine total land taken on lease and compute agriculture income after allowing deduction of lease rentals paid. **[PB 381 para 10]**

8. During the set aside proceedings before Ld. AO, agriculture income on self-owned land was computed @ Rs. 6000 per acre instead of bigha and balance was added. For the addition of agriculture income from leasehold land, the same was sustained for all the years in appeal.
9. In the second round of appeal before Ld. CIT(A), addition made by the Ld. AO on account of self-owned land was deleted by applying the finding given by Hon'ble ITAT of Rs. 6,000 per bigha. Addition of agriculture income on land taken on lease was sustained.
10. In A.Y. 2007-08, in addition to the above mentioned income sustained for agriculture income on land taken on lease, addition of Rs. 16,02,200 was sustained relating to one seized document vide BS-1.
11. Aggrieved assessee is in appeal before Your Honors.

C. Submission: (A.Y. 2001-02 to 2007-08)

1. Hon'ble ITAT Bench of Indore vide order dated 31.01.2013 in appeal nos. IT(SS)A 310 to 316/IND/2012 stated –

Para 6 - “.....However, the fact remains that the assessee is owning agricultural land and also some land was taken on lease.....”
[emphasis supplied] [PB 378 back side internal page 8]

Para 10-“.....In respect of the land taken on lease, the matter is restored to the file of the Assessing Officer for determining the total land taken on lease after considering the additional evidence filed before Ld. CIT(A) as discussed hereinabove, and after allowing deduction on account of lease rent paid by the assessee thereon, the Assessing Officer is to compute the agricultural income out of such lease hold lands. We direct accordingly. This conclusion is applicable to all the assessment years, under consideration ” [emphasis supplied][PB 381 internal page 13]

From the above extracts of the order of Hon’ble Bench, the fact that agricultural activity has been carried out by assessee both on owned land and lease hold land is undisputed. As per the directions, it is evident that Ld. AO was directed to determine the land taken on lease and to compute the agriculture income after allowing deduction of lease rentals paid therefor.

2. **Without prejudice to additional grounds** in the three years under appeal challenging the validity of additions made without reference to any incriminating material found during the course of search, in the assessments made by invoking section 153A –

Extracts from the assessment orders dated 31.12.2008 for all the years under appeal i.e. A.Y. 2001-02 to 2007-08 have been reproduced by the Ld. AO in the impugned assessment order. [PB 312,319,326,333,340,347,354]

These extracts very categorically states the facts about absence of any incriminating material found during the course of search relating to addition made for the agriculture income from leasehold land.

One such impugned assessment order for **AY 2007-08** may be referred at **Page 6** which states –

1.Apart from the above **not a single page of agriculture activity were found during search and seizure action.** In addition to above **not a single instrument regarding agriculture activity were found.**
2. **Following facts is important** to mention regarding the claim of agriculture income by assessee :
3. 2.Even **during the search & seizure action, no details of agriculture activity were found.**
4. In the **cash book submitted by the assessee**.....
5. **5. Even at the time of search no such document has been found.**
6. 6. The lease agreement **submitted by the assessee**.....
7. 13. None of the agriculture receipts **appearing in cash book** are.....

It is evident from above **facts already on record** that Ld. AO has given a factual and categorical finding about non-existence of any incriminating material found during the course of search relating to agriculture income.

3. In the set aside proceedings, both before Ld. AO and Ld. CIT(A) no reference has been made to any incriminating material found during the course of search operations on the basis of which addition has been sustained for the agriculture income on leasehold land.
4. In the statement of assessee recorded u/s 132 on 21.09.2006, a specific question was raised vide **Question No. 8** which further emphasizes the fact that no documents relating to the agriculture land taken on lease were found. Relevant extract –**[PB 34]**

प्र. 8. कृपया प्रश्न: सोचकर बतायें कि आपके द्वारा यदि किराया (वराई) से लेकर जमीन पर खेती की जा रही है तो उससे संबंधित कोई भी दस्तावेज या अन्य पत्र आपके यहाँ से जमा नहीं प्राप्त हुए।

The above question by the officer recording statement during the course of search further corroborates the fact that no documents relating to agriculture land taken on lease were found during the course of search. No addition ought to have been made in absence of any incriminating material found during the course of search relating to agriculture income.

5. In search assessment, any undisclosed income, which can ultimately be added, is only to the extent of any unrecorded assets / material found or any incriminating documents found as representing undisclosed income earned.

Reliance is placed on following judicial precedents of the **Hon'ble Jurisdictional Indore Bench of ITAT** which in turn has followed / referred decisions of various Hon'ble High Courts— no addition warranted in absence of incriminating material –

- a. **Kamal Kishore Kotwani** IT(SS)A No. 186 to 190/Ind/2016 dated 04.07.2018 [CLPB 03-13]
- b. **Kamta Prasad Dwivedi** IT(SS)A No. 182 to 185/Ind/2016 dated 19.09.2018 [CLPB 14-24]
- c. **Jay Dee Securities & Finance Ltd.**[2017] 88 taxmann.com 626 (Delhi - Trib.) dated 17.04.2017 [CLPB 46-49]

6. In the hearing fixed on 03.10.2018 Hon'ble Bench gave a direction to Ld. CIT(DR) to submit report of Assessing Officer in the case of Mohd. Atique and Mohd. Shafique relating to incriminating material.

Vide letter dated 01.02.2019, Ld. CIT(DR) provided the copies of page 262 and 263 & 274 to 278.

It is pertinent to mention here that page 262 and 263 has already been considered by the Hon'ble Co-ordinate Bench vide order dated 31.01.2013 at PB 377 internal page 6 para 6.

Page 262 and 263 is format of affidavit of Mhd. Atique to obtain license for use of Revolver. Content of which has been reproduced by Ld. AO in assessment order. Ld. AO failed to reproduce verbatim version of content of seized document page 262 and 263. These documents have following discrepancies –

- it is an incomplete document
- it is not signed
- it has several over-writing, scribbling and cutting.

Point no.2 of this seized documents states – Details of moveable and immovable properties along with agricultural land.

Page 274 to 278 is the Partnership Deed for the business run under the name and style of M/s. S T Developers. Assessee i.e. Mohd. Atique is not a party to this deed and hence the document neither belongs to nor pertains to him.

From the above, it is evidently established that there is no incriminating material found and seized during the conduct of search relating to the addition in respect of agricultural income from leasehold land.

7. **Without prejudice to the above submission**,it is submitted thatHon'ble Indore Bench of ITAT noted the fact that**assessee is owning agricultural land and also some land was taken on lease**andgave a very specific direction at para 10 [**internal page 13 PB 381**] to Ld. AO to compute the lease hold land held by assessee. It was also directed to compute the agriculture earnings from the leasehold land after allowing deduction of lease rentals paid. Assessee submitted the details of the lease hold land

held by assessee during the first round of proceedings before Ld. AO.[**PB 311 and 312**].

Assessee prays that direction may accordingly be given to the Ld. AO and relief may please be granted.

Considering the above facts, circumstances of the case, submissions made, documents on record and judicial precedence, appeal of the assessee may please be allowed by deleting the additions made by the Ld. AO and sustained by the Ld. CIT(A).

Submitted

Authorised Representative

6. Ld. D.R. opposed these submissions and supported the orders of the authorities below. Ld. Counsel for the assessee has taken us through various documents filed in support of claim of land taken on lease. However, no evidence with regard to the carrying out activities has been filed.

7. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The effective ground in this

appeal on merit is with regard to the disallowance of claim of agricultural income earned from the lands taken on lease. We find that the assessee has filed confirmation and copy of lease agreement with one Mr. Aman Ulla Khan enclosed at paper book page Nos.51 to 57 and Shri Narayan Singh Meena. It is stated in the agreement that land was given to the assessee. Ld. Counsel for the assessee has also taken us through the revenue records to buttress the contention that in fact agricultural activities were being carried out and the assessee in fact had earned agricultural income there from. He submitted that the A.O. submitted that the authorities below are not justified in rejecting the claim of the assessee. He contended that moreover, there is no incriminating material whatsoever was found during the search as such the addition is not on the basis of any incriminating material. We find that in

earlier round, this Tribunal in IT(SS)A Nos.310 to 316/Ind/2012 dated 31.1.2013 had directed the A.O. as under:

10. *In view of the above discussion and the documentary evidence placed on record with regard to the land owned by the assessee, we direct the Assessing Officer to allow agricultural income @ Rs.6000/- per bigha. The Assessing Officer is directed to work out the actual holding of land by the assessee and his family members and to compute the agricultural income thereon by multiplying with Rs.6000/- per bigha per annum. In respect of the land taken on lease, the matter is restored back to the file of the Assessing Officer for determining the total land taken on lease after considering the additional evidence filed before CIT(A) as discussed hereinabove, and after allowing deduction on account of lease rent paid by the assessee thereon, the Assessing Officer is to compute the agricultural income out of such lease hold lands. We direct accordingly. This inclusion is applicable to all the assessment years, under consideration.”*

8. The A.O. in pursuance of the aforesaid direction verified the contention of assessee however, he rejected the claim of the assessee in respect of the land taken on lease on the following grounds:

“As far as additional evidences regarding lease hold land are concerned, the assessee has filed the copies of Khasra and lease agreement in some cases. The submission of the assessee was duly considered, copies of Khasras and lease agreements were perused but the contention of the assessee regarding agriculture income from lease hold land is not found acceptable because of the following reasons:-

- *The copies of khasra produced by the assessee as additional evidences proves that land is owned by the persons whose name are written in the khasra. Under column 4 of form P-II khasra, where the name of the lease holder is usually written, the name of the assessee is not appearing meaning thereby the land has not been given on lease as per Government records.*
- *In some cases, the assessee has furnished lease agreements with the farmers from whom the said land has been claimed to be taken on Batai. These agreements are made on plain paper with no stamp on them and it appears that they have been signed in one hand writing. Therefore the genuineness of such agreements has not been established.*
- *During the assessment proceedings and the set aside proceedings also the assessee was required to furnish any proof of agriculture activities being done on the said land or any proof of sale of yield. The assessee has failed to furnish any documentary evidence such as bills/vouchers of seeds and fertilizers, transport expenses, agriculture equipments, irrigation facilities etc. The assessee did not furnish any proof of sale of agriculture produce also.*
- *Merely existence of agriculture land does not establish that actually any income has been generated on it by the assessee.”*

9. The Ld. CIT(A) affirmed the aforesaid finding by observing as under:

“7.4(b) So far as the claim of the appellant of having land on lease is concerned, the additional evidence produced in this regards during the set-aside proceedings does not prove the claim in any way. The name of the assessee is not appearing under column 4 of form P-II Khasra. Thus, it cannot be held that he had taken land on lease or that he was the cultivator on these lands. The order of the A.O. rejecting the assessee’s claim of deriving agricultural income from the lease hold land, in the absence of the assessee’s name appearing under column 4 of form P-II khasra, is upheld.

Regarding the second additional evidence filed, the A.O. is held to be justified in holding that the lease deeds on plain paper filed as additional evidence cannot be accepted as good evidence to

prove the claim of agricultural income being earned from lease hold land.

In view of the above, the addition of Rs.4,42,900/- on account of rejection of the assessee's claim of agricultural income from lease hold land is upheld."

10. From the aforementioned finding of the authorities below, it is clear that both the authorities did not accept the claim of the assessee on the basis that the assessee failed to support the carrying out of agricultural activities on the claimed lease hold land. Undisputedly, the assessee did not even furnish any proof of agricultural activities was being carried out at the said lease hold land. The assessee could not support the earning of agricultural income on the lease hold land by furnishing credible evidence. When the assessee has claimed to have been carrying out agricultural activity at such a large scale, the normal corollary would be that assessee might have incurred huge expenses in the form of purchase of seed, tilling/cultivation of land, electricity bills and

transportation of the agricultural produce and above all proof of sale of agricultural produce. In our considered view, the evidences so furnished by the assessee in support of his claim are not sufficient to come to a conclusion that the assessee has been carrying out any agricultural activity at the lease hold land and earning agricultural income there from. Therefore, the finding of fact as arrived at by the authorities below cannot be disturbed. This ground of the assessee's appeal is dismissed.

11. Now coming to the additional ground of the assessee's appeal that reads as under:

“On the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153A rws 143(3) without reference to any incriminating material found and seized during the course of conduct of search.”

12. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. The written submissions of the assessee are as under:

Fixed for hearing on 14.02.2019

**Before the Hon'ble Income Tax Appellate Tribunal, Indore Bench,
Indore**

IT(SS)A No.: 30/Ind/2016 to 36/Ind/2016 by the Assessee

In the matter of : **Mohd. Atique, Bhopal**
PAN : AGWPA6383N
Assessment Year : 2001-02 to 2007-08
Status : Individual

May it please Your Honors,

In the course of hearing held on 06.02.2019, Hon'ble Bench was kind in giving an opportunity to the Ld. CIT(DR) to make her submission on the case laws relating to the additional grounds filed by the assessee.

2. A written submission on the additional grounds along with relevant judicial decisions is already on record. This further submission may please be considered in continuation to the earlier submission already on record.
3. Assessee vide application dated 04.09.2018 filed on 07.09.2018 raised additional grounds of appeal. These additional grounds of appeal go to the root of the matter and are vital to the disposal of the said appeals. Their admittance shall help appellant in getting justice.
4. **Rule 11** of the Income Tax (Appellate Tribunal) Rules, 1963 reads –
“The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule :

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.”

Tribunal is under statutory obligation not only to entertain plea but also to decide the same after providing sufficient opportunity of being heard to the other side.

5. There are direct decisions which deal with the subject matter of this submission relating to admission of additional ground in the second round of appellate proceedings before the Hon’ble Tribunal. These are in addition to and in continuation of the case law paper book already on record. A Case Law Paper Book – Volume 2 is furnished with this submission.
 - a) **Hon’ble Bombay High Court** in the case of **Inventors Industrial Corpn. Ltd** – [1992] 194 ITR 548 – **HEAD NOTE** – *“Section 251 of the Income-tax Act, 1961 – Commissioner (Appeals) – Powers of – Assessment year 1958-59 – Whether a ground by which jurisdiction to make assessment itself is challenged can be urged before any authority for first time – Held, yes – Whether, therefore, assessee was entitled to challenge jurisdiction of Income-tax Officer to initiate reassessment proceedings before Appellate Assistant Commissioner in second round of proceedings even though he had not raised it earlier before Income-tax Officer or in earlier appeal before AAC – Held, yes”* [emphasis supplied]
 - b) **Hon’ble ITAT Bench of Kolkata ‘A’** in the case of **Peerless Gen. Fin. & Inv. Co. Ltd.** – [2008] 21 SOT 440 – **HEAD NOTE** - *Section 253 of the Income-tax Act, 1961 - Appellate Tribunal - Appeals to - Assessment year 1994-95 - Whether jurisdictional provision, which is mandatory, can be taken up in second round of litigation and an assessee can raise issue relating to validity of order in second round of litigation even if same was not raised in first round - Held, yes”* [emphasis supplied]
 - c) **Hon’ble Bombay High Court (Full Bench)** in the case of **Ahmedabad Electricity Co. Ltd.** – [1993] 6 Taxman 27 – **HEAD NOTE** – *“Section 254 of the*

*Income-tax Act, 1961 - Appellate Tribunal - Powers of - Assessment years 1962-63 to 1971-72 - During assessment assessee did not claim deduction of amounts transferred to 'reserve' as per Electric Supply Act, 1948, either before ITO or AAC - Later, on basis of a High Court decision holding such amounts as deductible on revenue account assessee claimed deduction of same before Tribunal by way of additional ground while appeal was pending before Tribunal - Tribunal refused to permit assessee to raise such additional ground - Whether phrase 'pass such order thereon' occurring in section 254(1) confers widest possible jurisdiction on Tribunal including jurisdiction to permit any additional ground of appeal if in its discretion and for good reasons it thinks it necessary and permissible to do so - Held, yes - **Whether Tribunal had jurisdiction to permit additional grounds to be raised before it even though these might not have arisen from AAC's order, so long as these grounds were in respect of subject-matter of entire tax proceedings - Held, yes**" [emphasis supplied]*

- d) **Hon'ble Gujarat High Court** in the case of **P.V. Doshi** – [1978] 113 ITR 22 – HELD – “.....*as the Tribunal had failed to notice this material distinction between a mere procedural provision which could be waived and such jurisdictional provision or a mandatory provision enacted in public interest which could not be waived, because by consent no jurisdiction could be conferred on the authority unless the conditions precedent were first fulfilled. The Tribunal's view was clearly erroneous that the matter became final when the Tribunal passed the earlier remand order so that this point of jurisdiction got finally settled, which could not be agitated unless the assessee had come in the reference to the High Court at this stage. The Tribunal's view was also incorrect that in restoring the case to the file of the ITO by the earlier order, the only point left open was in respect of addition on merits and that the legal or jurisdictional aspect whether the re-assessment proceedings were legally initiated was not kept open. Even the Tribunal's view was erroneous that even though this point went to the root of the jurisdiction and was a pure question of law, merely because the point was initially raised and not pressed when the matter was taken up before the AAC, it could be waived and it could not be reagitated.*” [emphasis supplied]

- e) **Hon'ble Apex Court** in the case of **S. Nelliappan** – [1967] 66 ITR 722 – HEAD NOTE – “*Section 254 of the Income-tax Act, 1961 [Corresponding to section 33(4) of the Income-tax Act, 1922] - Appellate Tribunal - Power of - **Whether in hearing an appeal Tribunal may give leave to assessee to urge grounds not set forth in memorandum of appeal, and in deciding appeal Tribunal is not restricted to grounds set forth in memorandum of appeal or taken by leave of Tribunal - Held, yes***” [emphasis supplied]
- f) The legal and jurisdictional issue raised in the instant additional grounds by the appellant was dealt by the **Hon'ble Delhi High Court** in the case of **Kabul Chawla** – [2016] 380 ITR 573 - Para 2 – ‘*The issue that the Court proposes to address in these appeals is the same that was considered by the ITAT viz., ‘Whether the additions made to the income of the Respondent Assessee for the said AYs under Section 2(22)e of the Income Tax Act, 1961 (‘Act’) were not sustainable because no **incriminating material concerning such additions** were found during the course of search and further no assessments for such years were pending on the date of search?’* [emphasis supplied]
6. The above judicial precedents adequately fortify the case of the appellant. Addition made towards agriculture income on leasehold agriculture land in absence of incriminating material relating to such addition found and seized during the course of search and also without following the direction given by the Hon'ble Coordinate Bench to ascertain the leasehold agriculture land and compute agriculture income thereon after deducting lease rent, ought to be deleted.

Submitted

Authorised Representative”

13. Ld. D.R. opposed these submissions and pointed out that even in earlier ground of litigation, the assessee had taken a legal ground, which was rejected by this Tribunal. Further, Ld. D.R. submitted that in the present case, this Tribunal cannot travel beyond the directions given vide order dated 31.1.2013 in IT(SS)A No.310 to 316/Ind/2012.

14. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. Admittedly, in this case, original assessment was framed way back in the year 2008. The issue of addition and framing of the assessment had travelled up to the stage of this Tribunal. The assessee was having sufficient time and opportunity to raise this ground. In our considered view at a such belated stage, coupled with the fact where this Tribunal had set aside the assessment with certain directions to the A.O., at this stage

it would not be open to the assessee to agitate the issue of legality of assessment so framed. Moreover, the legal ground was also raised, which was rejected by the Tribunal. Therefore, considering the totality of the facts, we are of the view that case laws as relied by the Ld. Counsel for the assessee are not applicable to the facts and circumstances of the present case. Hence, the additional ground raised by the assessee is rejected. Appeal of the assessee is dismissed.

15. Now we take up IT(SS)A No.31/Ind/2016 pertaining to the assessment year 2001-02. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had failed to follow the directions contained in the combined order dated 31.1.2013 in appeal No.310 to 316/Ind/2012 of ITAT.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the finding of the assessing officer that the appellant was not having any lease hold land with him and*

that he did not earn agricultural income of Rs.4,04,200/- from such land.

3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the addition of Rs.4,04,200/- towards income from other sources as made by the assessing officer.*
4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.”*

16. Since similar grounds were raised by the assessee in the appeal IT(SS)A No.30/Ind/2016 except difference in figures, this appeal of the assessee is also dismissed based on the findings given in para 14 above in IT(SS)A No.30/Ind/2016.

17. Now we take up IT(SS)A No.32/Ind/2016 pertaining to the assessment year 2003-04. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had failed to follow the directions contained in the combined order dated 31.1.2013 in appeal No.310 to 316/Ind/2012 of ITAT.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the finding of the assessing officer*

that the appellant was not having any lease hold land with him and that he did not earn agricultural income of Rs.4,85,900/- from such land.

3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the addition of Rs.4,85,900/- towards income from other sources as made by the assessing officer.*
4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.”*

18. Since similar grounds were raised by the assessee in the appeal IT(SS)A No.30/Ind/2016 except difference in figures, this appeal of the assessee is also dismissed based on the findings given in para 14 above in IT(SS)A No.30/Ind/2016.

19. Now we take up IT(SS)A No.33/Ind/2016 pertaining to the assessment year 2004-05. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had failed to follow the directions contained in the combined order dated 31.1.2013 in appeal No.310 to 316/Ind/2012 of ITAT.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the finding of the assessing officer that the appellant was not having any lease hold land with him and that he did not earn agricultural income of Rs.5,50,400/- from such land.*

3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the addition of Rs.5,50,400/- towards income from other sources as made by the assessing officer.*
4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.”*

20. Since similar grounds were raised by the assessee in the appeal IT(SS)A No.30/Ind/2016 except difference in figures, this appeal of the assessee is also dismissed based on the findings given in para 14 above in IT(SS)A No.30/Ind/2016.

21. Now we take up IT(SS)A No.34/Ind/2016 pertaining to the assessment year 2005-06. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had failed to follow the directions contained in the combined order dated 31.1.2013 in appeal No.310 to 316/Ind/2012 of ITAT.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the finding of the assessing officer that the appellant was not having any lease hold land with him and that he did not earn agricultural income of Rs.5,93,400/- from such land.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the addition of Rs.5,93,400/- towards income from other sources as made by the assessing officer.*

4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.*”

22. Since similar grounds were raised by the assessee in the appeal IT(SS)A No.30/Ind/2016 except difference in figures, this appeal of the assessee is also dismissed based on the findings given in para 14 above in IT(SS)A No.30/Ind/2016.

23. Now we take up IT(SS)A No.35/Ind/2016 pertaining to the assessment year 2006-07. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had failed to follow the directions contained in the combined order dated 31.1.2013 in appeal No.310 to 316/Ind/2012 of ITAT*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the finding of the assessing officer that the appellant was not having any lease hold land with him and that he did not earn agricultural income of Rs.5,93,400/- from such land.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the addition of Rs.5,93,400/- towards income from other sources as made by the assessing officer.*
4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.*”

24. Since similar grounds were raised by the assessee in the appeal IT(SS)A No.30/Ind/2016 except difference in figures, this appeal of the assessee is also dismissed based on the findings given in para 14 above in IT(SS)A No.30/Ind/2016.

25. Now we take up IT(SS)A No.36/Ind/2016 pertaining to the assessment year 2007-08. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had failed to follow the directions contained in the combined order dated 31.1.2013 in appeal No.310 to 316/Ind/2012 of ITAT.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the finding of the assessing officer that the appellant was not having any lease hold land with him and that he did not earn agricultural income of Rs.7,86,930/- from such land.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the addition of Rs.7,86,930/- towards income from other sources as made by the assessing officer.*
4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.”*

26. Since similar grounds were raised by the assessee in the appeal IT(SS)A No.30/Ind/2016 except difference in figures, this appeal of the assessee is also dismissed based on the findings given in para 14 above in IT(SS)A No.30/Ind/2016.

27. Now we take up the appeal filed by Md. Shakeel in IT(SS)A No.37 to 42/Ind/2016 against different orders of the Ld. CIT(A) dated 28.1.2016 & 29.2.2016 respectively pertaining to the assessment years 2001-02 to 2007-08. First we take up the appeal pertaining to the assessment year 2001-02 i.e. IT(SS)A No.37/Ind/2016. The assessee has raised following grounds of appeal:

1. *“On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.5,00,000/- towards opening cash balance as on 1.4.2000.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, where he had estimated the net profit at 8% on the gross receipts of*

Rs.87,54,054/- and in confirming the addition of Rs.6,52,324/- as made by the assessing officer.

3. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.”*

28. The assessee has also filed an additional grounds that reads as under:

The appeal in the above case was filed vide **appeal no. IT(SS)A 37/Ind/2016**. The appellant craves leave to add following grounds of appeal:

1. On the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153C rws 143(3) which is against the provisions of law, being unreasonable, unjustified, without jurisdiction, invalid and void *ab initio*, more particularly **owing to first proviso to section 153C** which provides that **reference to the date of initiation of the search** under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A **shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person.**
2. Without prejudice, on the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153C rws 143(3) **without reference to any incriminating material found and seized from the searched persons** during the conduct of their search.
3. Without prejudice, on the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153C rws 143(3) **without reference to satisfaction recorded by the Assessing Officer of the searched persons and without supplying a copy of the said satisfaction to the appellant** from the file of searched persons in whose case assessments were completed under section 153A.
4. Without prejudice, on the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153C rws 143(3) more particularly when **provisions of section 292C applies on person from whom the seized material is found in the possession or control of, in the course of a search under section 132 or survey under section 133A and not the other person.**

29. The facts in brief are that the second round of litigation. In the earlier round of litigation, matter came up to this Tribunal and this Tribunal vide its order dated 31.1.2013 in IT(SS)A No.288 to 294/Ind/2012 was pleased to restore the assessment to the file of the A.O for decision afresh. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. The submissions of the assessee for all the assessment years are as under:

"Fixed for hearing on 06.02.2019
Before the Hon'ble Income Tax Appellate Tribunal, Indore Bench,
Indore
IT(SS) No.: 37/Ind/2016 to 42/Ind/2016 by the Assessee

In the matter of	: Mohd. Shakeel, Bhopal
PAN	:ARZPS3328P
Assessment Year	:2001-02 to 2004-05, 2006-07 to 2007-08
Status	:Individual
Return	:A.Y. 2001-02 at Rs. 1,56,000 and agriculture income Rs. 21,000 on 25.09.2008 A.Y. 2002-03 at Rs. 1,57,100 and agriculture income Rs. 21,000 on 25.09.2008

A.Y. 2003-04 at Rs. 2,01,600 and agriculture income Rs. 21,000 on 25.09.2008

A.Y. 2004-05 at Rs. 2,30,000 and agriculture income Rs. 22,000 on 25.09.2008

A.Y. 2006-07 at Rs. 2,66,728 and agriculture income Rs. 82,000 on 25.09.2008

A.Y. 2007-08 at Rs. 1,86,185 and agriculture income Rs. 87,000 on 25.09.2008

Assessment Order : u/s 143(3) rws153C and 254 dated 25.03.2014

Particulars	2001-02	2002-03	2003-04	2004-05	2006-07	2007-08
Assessed Income	13,29,320	2,77,390	3,54,735	2,77,390	10,72,560	6,10,185
Total Addition made	11,73,320	1,20,190	1,53,135		8,05,833	4,24,000
Details of additions made						
Opening cash balance	500,000					
Agriculture income	21,000	21,000	21,000	22,000	82,000	87,000
Estimation of income @ 8%	6,52,324	99,190	1,32,135	77,337	5,96,000	7,23,833
Unsecured Loan						3,37,000

CIT(A) Order : dated 28.01.2016 relief in all years for addition towards agriculture income granted and balance additions sustained for all the years i.e. A.Y. 2001-02 to 2004-05, 2006-07 to 2007-08.

A.Y. 2001-02 to 2004-05 and A.Y. 2006-07: Grounds of appeal in all the years under appeal **except for A.Y. 2007-08** are common, differences relating to quantum involved and hence a combined submission is being made which may please be considered.

A.Y. 2001-02: In addition to above mentioned common grounds of appeal, another ground of appeal specifically only for A.Y. 2001-02 relates to addition of opening cash balance.

A.Y. 2007-08: The only ground of appeal for this year is related to addition made for unsecured loans (which are squared up in the same year).

A. Additional Grounds of Appeal

For all the six years under appeal i.e. A.Y. 2001-02 to 2004-05, 2006-07 to 2007-08, assessee has filed additional grounds of appeal through a separate application dated 07.09.2018 which are **legal grounds on fundamental issue of jurisdiction** going to the root of the matter. Assessee prays that these grounds of appeal may please be admitted in the interest of natural justice and proper adjudication of the matter.

7. Instant proceedings are the second round of appeal before the Hon'ble ITAT Bench of Indore after the matter was set aside by the Hon'ble Bench to the file of AO vide order pronounced on **03.09.2012** in appeal nos. **IT(SS)A 288 to 294/Ind/2012**.

The matter was set aside by the Hon'ble Bench owing to additional evidences filed by the assessee which were not considered by the authorities below.

While setting aside the matter to the file of Ld. AO, Hon'ble ITAT noted the following facts in its order at internal **Page 5[PB 126]** –

*“On the issue as to why these documents could not be filed before the learned Assessing Officer, it was explained by the learned counsel that the **search took place on 21.09.2006** and **notice u/s 153C was issued on 16.09.2008** approximately after two years of the search. The return was*

*claimed to be filed on 16.09.2008. It was also pointed that the **questionnaire was issued on 11.10.2008**, therefore, the assessment was to be completed by 31.12.2008.”[emphasis supplied]*

8. Search was conducted in the case of Mohd. Shafique, Mohd. Atique and survey in the case of M/s. Ekta Transport Co. Cases of Mohd. Shafique and Mohd. Atique are in appeal before your Honors along with the instant case.
9. In the instant case, the matter relates to **fundamental issue of jurisdiction** as the impugned assessments for the assessee were completed u/s 153C rws 143(3).

Recording of satisfaction in the file of searched person is of vital importance. It is only on the basis of satisfaction recorded in the case of searched persons that proceedings u/s 153C could have been initiated in the case of assessee.

10. Assessee filed a **reminder application for the supply of certified true copy of satisfaction recorded** in the case of searched persons to the office of Ld. CIT(A) – 2, Bhopal as well as to the office of Ld. ACIT – 3(1), Bhopal on **02-03 August 2018** which was in continuation to the **erstwhile pending application** dated **16.08.2012**. [PB 55]

Another **reminder** dated **25.08.2018** was filed before the ACIT – 3(1), Bhopal for supply of required satisfaction recorded in the case of searched persons. Till date, copies of the required satisfaction note recorded in the cases of searched persons havenotbeen provided to the assessee. [copy annexed to this submission at Page 16-17]

Assessee has also filed an **application under the Right to Information Act, 2005 (RTI)** on 17.09.2018 requesting to provide the status of above referred pending applications and also to make available certified true copy of the satisfaction note recorded in the case of searched persons viz. Mohd. Atique andMohd.Shafique. [copy annexed to this submission at Page 12]

11. As per the law enshrined in section 153C which relates to assessment of income of any other person, it is the 'satisfaction' of the Assessing Officer of the person searched which is sine qua non for acquiring the jurisdiction u/s 153C. Only when 'satisfaction' has been recorded by the Assessing Officer of the person searched who alone is required under the law to record such satisfaction, even though 'satisfaction' has been recorded by the Ld. Assessing Officer of the assessee and therefore, in terms of law enshrined in section 153C such a recording of satisfaction does not clothe the Assessing Officer with the jurisdiction to initiate proceedings u/s 153C and consequently to frame any assessment u/s 153C rws 143(3). In the instant case, Ld. AO of the assessee issued notice u/s 153C for the impugned assessment years on 16.09.2008.

In other words, at the **first stage**, the AO of the person who has been searched must arrive at a satisfaction that the assets or documents seized does not belong to the searched person but to some 'other person'; in the **second stage**, that is, after such satisfaction is arrived by the AO of person searched, then he is required to transfer or hand over the assets or documents to the AO having jurisdiction over the 'other person'; and **lastly**, the AO of 'other person' shall commence the proceedings under section 153C and consequently pass assessment /reassessment order in the manner provide u/s 153A. If such a procedure is not followed then needless to say that jurisdiction to proceed u/s 153C cannot be acquired by the AO of 'other person', i.e., other than the person searched.

12. Reliance is placed on following judicial precedence of the **Jurisdictional High Court of Madhya Pradesh** in the case of **Mechmen [2015] 60 taxmann.com 484 – Para 15**

13. These additional grounds go to the root of matter and are vital to the disposal of said appeals. Their admittance shall help the assessee in getting justice. Reliance is placed on the following decisions for admittance of legal grounds in the instant appeals –

- d. **Hon'ble Apex Court** in the case of **National Thermal Power Co. Ltd – [1998] 229 ITR 383**
- e. **Hon'ble ITAT bench of Chennai (TM)** in the case of **Hemal Knitting Industries – [2010] 127 ITD 160**

14. Assessee prays that the additional grounds of appeal being **legal grounds on fundamental issue of jurisdiction** and go the root of matter and hence please be admitted for adjudication of matter.

B. Facts of the case: (A.Y. 2001-02 to 2004-05, 2006-07 to 2007-08)

12. Assessee is earning income from the business of plying of trucks, house property and agriculture. For the income earned from plying of trucks returns were filed u/s 44AE.

13. **Search and seizure operations** u/s 132 were conducted in the case of Mohd. Shafique group on **21.09.2006**. **Notice u/s 153C was issued on 19.05.2008** for the all the years under appeal.

14. Assessee had filed an **application on 16.08.2012 before Ld. CIT(A)** to provide **certified true copy of satisfaction recorded** in the case of searched persons before issue of notice u/s 153C. **Reminder applications** were again filed on **02.08.2018 and 25.08.2018**.

It was only after such a continuous and rigours follow up that certified copy of satisfaction note recorded by AO in the case of assessee i.e. Mohd. Shakeel was provided through letter dated 18.12.2018. Application under RTI was filed on 17.09.2018 which is also pending for disposal in this respect. **[PB 55& annexure to this submission at Page 21-22]**

15. On perusal of the certified copy of satisfaction note following is evident –

- a. **Heading** – Mohd. Shakeel

- b. **Start of the satisfaction note** – “....documents seized or requisitioned *belongs or belong to the assessee*” i.e. Mohd. Shakeel
- c. **Towards the end of satisfaction note** – “Therefore the *proceedings u/s 153C against the assessee is initiated* and his income is assessed or re-assessed in according to the provisions of section 153A.”

All the above noted points as evident from the certified copy of satisfaction note recorded by AO in the case of assessee i.e. MohdShakeelconclude that the satisfaction note provided is from the file of assessee and not from the file of searched persons i.e. Mohd. Atique and Mohd.Shafique.

16. During the proceedings both in the first round and in the instant second round, the documents referred for making addition by rejecting the income offered u/s 44AE are not related to the assessee. These documents are of Bombay Transport Company (Prop. NavedBhai). Thus, **no reference** has been made by Ld. AO to any **incriminating material found** during the search of Mohd. Atique and Mohd. Shafique, which belongs to the assessee on the **basis of** which **addition** made been made in all the impugned years. In the set aside proceedings, Ld. AO sustained the additions made by the then Ld. AO for all the years under consideration.
17. Further, for **A Y. 2004-05 and A.Y. 2006-07**: Bombay Transport Company (Prop. NavedBhai) had entered into transport contract with M.P. State Civil Supplies Corporation Limited, receipts of which amount to Rs. 74,50,000 and Rs. 90,47,916 respectively. Ld. AO applying the provisions of section 292C made an addition of @ 8% on total contract receipts which amounts to Rs. 5,96,000 and Rs. 7,23,833 respectively. This transport contract is in the name of Bombay Transport Company (Prop. NavedBhai). M.P. State Civil Supplies Corporation Limited confirmed that it has made payments to Bombay Transport Company. **[PB 99,107]**
18. Ld. AO took the deposits in the bank accounts of Mohd. Shafique and Co. for the purpose of applying NP rate of 8% to arrive at addition of income in the hands of the assessee. Important fact is that Mohd.

Shafique and Co. is a proprietary concern of father of the assessee viz. Mohd. Shafique in whose case search was conducted and assessment was made u/s 153A. In his assessments, deposits in the bank accounts of Mohd. Shafique and Co. have been considered for applying the 8% NP rate and making the respective assessments.

19. Assessee is in second round of appeal before the Hon'ble ITAT Indore Bench after the matter was set aside to the file of Ld. AO vide order pronounced on **03.09.2012** in appeal numbers **IT(SS)A 288 to 294/Ind/2012**.
20. In the first round of proceedings before Ld AO, assessee submitted Statement of Affairs as at 31st March 2000 and Statement of Affairs and Receipts and Payment Account as at 31st March 2001 to explain the opening cash balance of Rs. 5,00,000. Also, return filed u/s 44AE for plying of trucks was not accepted by stating that books of accounts are not maintained and produced bills and vouchers of expenses are also not produced. Therefore a rate of 8% was applied on the receipts appearing in bank account for A.Y. 2001-02 to 2004-05 and 2006-07 and additions were made to returned income of each year. For the addition made u/s 68 of Rs 3,37,000 in A.Y. 2007-08, it was submitted that the loan was availed and repaid in the same year. Ld. AO erred in not considering the facts and the available documents in proper perspective. **[PB 69-113]**
21. In the first round of proceedings before Ld. CIT(A), the additions as made by Ld. AO were sustained. On appeal before Hon'ble Indore Bench of ITAT, the matter was set aside to the file of Ld. AO. **[PB 114-123, 124-129]**
22. In the remand proceedings, addition made on account of agriculture income for each of the year under appeal were deleted by Ld. CIT(A) by applying the findings given by the Hon'ble Bench to consider agriculture income @ Rs. 6,000 per bigha and the remaining additions were sustained.

23. Aggrieved, assessee is in appeal before Your Honors.

Submission:(A.Y. 2001-02 to 2004-05, 2006-07 to 2007-08)

1. Assessee had filed an **application on 16.08.2012 before Ld. CIT(A)** to provide **certified true copy of satisfaction recorded** in the case of searched persons before issue of notice u/s 153C. **Reminder applications** were again filed on **02.08.2018 and 25.08.2018**.

It was only after such a continuous and rigours follow up that certified copy of satisfaction note recorded by AO in the case of assessee i.e. Mohd. Shakeel was provided through letter dated 18.12.2018. Application under RTI was filed on 17.09.2018 which is also pending for disposal in this respect. **[PB 55& annexure to this submission]**

2. On perusal of the certified copy of satisfaction note following is evident –
 - a. **Heading** – Mohd. Shakeel
 - b. **Start of the satisfaction note** – “....documents seized or requisitioned *belongs or belong to the assessee*” i.e. Mohd. Shakeel
 - c. **Towards the end of satisfaction note** – “Therefore the *proceedings u/s 153C against the assessee is initiated* and his income is assessed or re-assessed in according to the provisions of section 153A.”
3. All the above noted points as evident from the certified copy of satisfaction note recorded by AO in the case of assessee i.e. MohdShakeel conclude that the satisfaction note provided is from the file of assessee and not from the file of searched persons i.e. Mohd. Atique and Mohd. Shafique.
4. For invoking provisions of Section 153C of the Act, recording of satisfaction is a must by –
 - a. The AO of the searched person **and**

- b. The AO of the person whose documents are found in the search conducted of the person referred in (a) above.
5. It is a well settled law that the satisfaction has to be recorded by both Assessing Officers, namely of the searched person and of the person whose documents are found in the course of search. This position in law holds good even in a case where AO is common, both for the searched person and the other person.
6. Reliance is placed on the following judicial precedents –
- a. **Hon’ble Jurisdictional High Court of Madhya Pradesh** in the case of **Mechmen – [2015] 60 taxmann.com 484** – order pronounced on 10.07.2015 – Para 15–“.....*Even for the purpose of Section 153C, the Assessing Officer before handing over the items to the Assessing Officer having jurisdiction must be "satisfied" that the items belongs or belong to the person other than the person referred to in Section 153A. That satisfaction of the concerned Assessing Officer is a sine qua non. The consequences flowing from the action to be taken on the basis of such information handed over to the Assessing Officer having jurisdiction, for the assessee, who is a person other than the person referred to in Section 153A, is drastic of assessment or reassessment of his income falling within six assessment years.*”[emphasis supplied]
- b. **Hon’ble Bombay High Court** in the case of **Ingram Micro (India) Exports (P.) Ltd – [2015] 60 taxmann.com 57** – order pronounced on 29.04.2015 – HELD – Para 4
- c. **Hon’ble Indore Bench of ITAT** in the case of **AmitPande – IT(SS)A No. 88 and 90 to 94/IND/2008** – order pronounced on 28.07.2011 – internal page 27

In the instant case, assessee has raised additional ground in all the years under appeal challenging the validity of the assessments made by invoking section 153C of the Act.

7. Without prejudice to additional ground in all the years under appeal challenging the validity of the assessments made by invoking section 153C –

a. **Para 2 of Assessment Order for A.Y. 2001-02 dated 31.12.2008 – [PB 72]**

“Assessee has shown opening cash balance of Rs. 5,00,000/- during the assessment proceedings in the order sheet entry dated 14.10.2008 assessee was asked to support above opening cash balance with supporting evidence.....”

b. **For A.Y. 2001-02 to 2004-05, Ld. AO has stated as under for the addition made by estimating income @ 8% vide order dated 31.12.2008 – [PB 73, 79, 91, 97]**

“In the order sheet entry dated 05.12.2008 assessee was asked to furnish following detail:

During the year under consideration following amount has been received in the bank a/c. of Mohd. Shafique and Co.

Deposits	Total Deposits in Bank of India Safia College	State Bank of India TT Nagar
A.Y. 2001-02	-	87,54,054
A Y. 2002-03	6,000	18,33,879
A.Y. 2003-04	2,36,000	24,65,691
A.Y. 2004-05	3,16,010	17,00,714
A.Y. 2006-07	95,562	2,07,587
A.Y. 2007-08	1,00,000	-

Kindly give the details of all above credits in your books of accounts....”

c. **For A.Y. 2004-05 and 2006-07, Ld. AO has stated as under for estimating income @ 8% - [PB 99 and 107]**

“Information were called from M.P. State Civil Supplies Corpn. Ltd. were in the F.Y. 2003-04 & 2005-06, contract payment of Rs. 74,50,000/- &Rs. 90,47,916/- were made to Bombay Transport Company. Therefore, in absence of Books of Accounts 8% of above receipts will be taxable in the hands of assessee.....”

d. Para 2 of Assessment Order for A.Y. 2007-08 dated 31.12.2008 – [PB 112]

“In the relevant assessment year assessee has shown unsecured loans of Rs. 17,000/- from Saad Abdullah. In the order sheet entry dated 24.10.2008 assessee was asked to furnish bank statement of Saad Abdullah and also his return of income and physical production is sought.....”

e. Para 3 of Assessment Order for A.Y. 2007-08 dated 31.12.2008 – [PB 112]

“In the relevant assessment year assessee has shown Advances from following persons:

S.No.	Name of Person	Amount Received	Squared Up During the year
01	Memboob Khan	1,00,000/-	Yes
02	Rashid Vahid	1,00,000/-	Yes
03	S. Mahmood Ali	1,20,000/-	Yes

“In the order sheet entry dated 10.12.2008 assessee was asked to furnish bank statement of Memboob Khan, Rashid Vahid & S. Mahmood Ali and also his return of income and physical production is sought.....”

It is evident from above that Ld. AO in the first round of proceedings has not referred to any incriminating material found during

the course of search in the case of Mohd. Atique and Mohd.Shafique, which belonged to the assessee.

In search assessments, any undisclosed income, which can ultimately be added, is only to the extent of any undisclosed income earned, represented by any incriminating documents/material found during the course of search proceedings.

8. Ld. CIT(A) in first round of proceedings vide order dated 21.03.2012 has also made no reference to any incriminating material found during the search and seizure operations carried out in the case of Mohd. Atique and Mohd. Shafique. **[Para 6.3, 7.1 and 7.2 – PB 119, Para 8.1 - PB 120, Para 10.2 – PB 123]**
9. In the set aside proceedings also, Ld. AO has not made any reference to incriminating material found during the course of search operations in the case of Mohd. Atique and Mohd. Shafique which is belonged to the assessee.
 - a. **Assessment Order dated 25.03.2014 page 2 para 5 –**

“.....notice u/s 142(1) of Income Tax Act, 1961 dated 13.03.2014 was a so served upon the assessee by the notice server and following queries were raised :-

“The respective queries are as under:-

 2. ***Please furnish the sources of opening cash balance of Rs. 5,00,000/ with documentary evidences which are available with you during A.Y. 2001-02.***
 3. ***Please furnish the proof of identity, genuineness and creditworthiness of the advances of Rs. 3,20,000/- as appearing in your books of accounts for A.Y. 2007-08...”***

Above mentioned extracts from orders of Ld. AO and Ld. CIT(A) during the set aside proceedings further corroborate the fact that no reference has been made to any incriminating material found during search and seizure operations carried in the case of Mohd. Atique and Mohd.Shafique. **Details sought by the Ld. AO are from the books of account of the assessee.**

10. Reliance is placed on following judicial precedents of the **Hon'ble Indore Bench of ITAT** - no addition warranted in absence of incriminating material –

- a. **Kamal Kishore Kotwani** IT(SS)A No. 186 to 190/IND/2016 dated 04.07.2018
- b. **Kamta Prasad Dwivedi** IT(SS)A No. 183 to 185/IND/2016 dated 19.09.2018
- c. **Jay Dee Securities & Finance Ltd** 88 taxmann.com 626 (Delhi- Trib.) dated 17.04.2017

11. First proviso to Section 153C reads –

*“Provided that in case of such other person, the reference to the **date of initiation of the search** under [section 132](#) or making of requisition under [section 132A](#) in the second proviso to sub-section (1) of [section 153A](#) shall be construed as reference to the **date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person** :”*

In the instant case, search in the case of Mohd. Atique and Mohd Shafique was conducted on 21.09.2006. Notice u/s 153C was issued to assessee on 19.05.2008. Considering the date of issue of notice u/s 153C as date on which relevant documents or books of accounts or assets seized or requisitioned were handed over by the AO of searched persons to AO having jurisdiction over assessee, the relevant six assessment years are as under –

Year No.	A.Y.	Abated/Unabated year	Year under Appeal	Addition made
9	2009-10	N.A.	NA	No assessment

8	2008-09	N.A.	NA	No assessment
7	2007-08	Unabated	Yes	3,37,000
6	2006-07	Unabated	Yes	7,23,833
5	2005-06	Unabated	No	-
4	2004-05	Unabated	Yes	6,73,337
3	2003-04	Unabated	Yes	1,32,135
2	2002-03	Out of purview of assessments as per proviso to section 153C	Yes	99,190
1	2001-02		Yes	11,52,324

12. Reliance is placed on following judicial precedent wherein it is established that the six assessment years shall be calculated from the date of issue of notice u/s 153C - **Hon'ble Delhi High Court** in the case of **Sarwar Agency (P.) Ltd – [2017] 85 taxmann.com 269 – order pronounced on 17.08.2017**

13. Further, once the factum of absence of recording satisfaction in the case of searched persons for invoking provisions of section 153C, is accepted, the entire proceedings invoked u/s 153C for all the seven years will stand invalid and bad in law irrespective of the fact whether the covered years got abated or not.

14. **Without prejudice to above**, assessee submits that statement of affairs as on 31st March 2000 and 31st March 2001 were submitted before Ld. AO during the first round of proceedings. It was also submitted that the business of transportation is being carried on by him since the year

1991. In addition to this he is also earning agricultural income. The fact that assessee is residing with his parents cannot be ignored.

The allegation of Ld. AO that the documentary evidences submitted were prepared after search is vague. Ld. AO also failed to bring on record any material to negate the evidences that support availability of opening cash balance. Thus, the premise of Ld. AO to make the addition is based on surmises and conjectures. [PB 119, 28]

15. Reference may please be made to the order of **Hon'ble Indore Bench of ITAT** in the case of **Mohd. Shafique – IT(SS)A No. 295 to 299/IND/2012** – order pronounced on **31.01.2013 – Para 43** – *“As discussed hereinabove, the assessee had agricultural land since 40 years and also having substantial income from operation of trucks. The assessee was also having income from house property since last many years. Even though the Assessing Officer has not accepted the income from house property but the same was assessed as income from other sources by declining deduction claimed u/s 24 but the fact remains that the assessee has declared income which was assessed by the Assessing Officer under different heads. All these facts indicate that the assessee could have cash in hand of Rs. 5 lacs as on 1. 4.2001. Accordingly, the Assessing Officer is directed to delete the addition of Rs. 5 lacs as opening cash balance.”*[emphasis supplied] [PB 39]

Finding given by the Hon'ble Bench in the case of father of the assessee in his search assessment finds a direct application in the case of the assessee himself also.

In the instant case, assessee is earning income from business of transportation since the year 1991. Apart from this assessee is also earning income from agricultural activity. To substantiate his claim statement of affairs as on 31st March 2000 and 31st March 2001 were submitted before Ld. AO during the first round of proceedings. Accordingly, addition made towards opening cash balance ought to be deleted.

16. For the additions made on the basis that no books are maintained and bills and vouchers of expenses were not produced, the income was estimated by Ld. AO @ 8% on the deposits in bank accounts of Mohd. Shafique and Co which in fact is the proprietary concern of his father in whose assessment the same have been considered for making additions on similar footing.

Ld. AO grossly erred in taking deposits in the account of concern of father of the assessee for the purpose of applying NP rate of 8% and making additions in the hands of the assessee u/s 153C rws 143(3).

17. The documents on the basis of which addition is made are related to Bombay Transport Company who had entered into a transport contract with M.P. State Civil Supplies Corporation Limited. The income from this contract is earned by Bombay Transport Company. Assessee has supplied its trucks on hire to Bombay Transport Company as noted by the Ld. While dealing this issue in the order.

18. **Again without prejudice**, no adverse presumption either under section 132(4A) or section 292C could be drawn against the assessee, he not being the person searched.

Reliance is placed on the decision of the **Hon'ble High Court of Delhi** in the case of **CIT vs. Anil Khandelwal [2015] 93 CCH 0042 (Del.)** including following other judicial pronouncements –

- a) Smt. BommanaSwarnaRekha vs. ACIT (2005) TTJ 885 (Visakha)
- b) Straptex (India) (P) Ltd. vs. DCIT (2003) 79 TTJ 228 (Mum)
- c) Rama Traders vs. First ITO (1988) 32 TTJ 483 (Pat)
- d) Jaya S. Shetty vs. ACIT (1999) 64 TTJ 551 (Mum)
- e) Ashwani Kumar vs. ITO (1992) 42 TTJ 644 (Del)
- f) ShethAkshayPushpavadan vs. DCIT (2010) 130 TTJ 42 (Ahd) (Uo)
- g) ACIT vs. Kishore LalBalwantRai&Ors. (2007) 17 SOT 380 (Chd)

It is submitted that by any stretch of imagination, the assessee cannot be put to shoulder the responsibility of a document, **if any**,

which was not found in its control or possession, or for that matter, it was not prepared by it or by anyone on his instructions. Under the provisions of section 292C of the Act, **if any** material belonging to the assessee was found and seized from the persons searched, these ought to be presumed to be belonging to the searched person only.

19.Ld. AO asked the assessee to furnish details of amount received in bank account of **Mohd. Shafique and Co.** Assessee submits that Mohd. Shafique and Co. is the proprietorship concern of Mohd. Shafique, father of the assessee. This fact is also stated by Mohd. Shafique in his statement recorded u/s 132 on 26.09.2006 in response to Q.8. **[PB 64]**

20.For the additions made in A.Y. 2007-08 :

Para 3 of the Assessment Order dated 31.12.2008 – [PB 112]

“In the relevant assessment year assessee has shown Advances from following persons:

S.No.	Name of Person	Amount Received	Squared Up During the year
01	Memboob Khan	1,00,000/-	Yes
02	Rashid Vahid	1,00,000/-	Yes
03	S Mahmood Ali	1,20,000/-	Yes

In the order sheet entry dated 10.12.2008 assessee was asked to furnish bank statement.....”

Bank statement was submitted before Ld. AO during the first round of proceedings. Referring to this statement, it is evident that amount received from the above mentioned three persons was returned through banking channel. Details of which are as under - **[PB 46, 50, 51, 52]**

Sr.No.	Name of person	Date of repayment	Instrument No.	Amount repaid (Rs.)
1	Memboob Khan	06.02.2007 [PB 52]	268100	1,00,000
2	Rashid Vahid	27.12.2006 [PB 51]	268096	50,000
2	Rashid Vahid	27.12.2006	268095	50,000

		[PB 51]		
3	S. Mahmood Ali	26.06.2006 [PB 50]	268093	1,20,000

21. Assessee submits that these amounts were received by him in the impugned year A.Y. 2007-08 and were also repaid in the same year. This fact is evident from Statement of Affairs as on 31st March 2006 in which there is no amounting outstanding as payable to any of the above mentioned persons. Accordingly, it is prayed that no addition is called for u/s 68. **[PB 50]**

Considering the above facts, circumstances of the case, submissions made, documents on record and judicial precedence, appeal of the assessee ought to be allowed by deleting additions in respective years.

Submitted

Authorised Representative

Fixed for hearing on 14.02.2019

**Before the Hon'ble Income Tax Appellate Tribunal, Indore Bench,
Indore**

IT(SS)A No.: 37/Ind/2016to42/Ind/2016 by the Assessee

In the matter of : **Mohd. Shakeel, Bhopal**
PAN : ARZPS3328P
Assessment Year : 2001-02 to 2004-05, 2006-07 and 2007-08
Status : Individual

May it please Your Honors,

In the course of hearing held on 06.02.2019, Hon'ble Bench was kind in giving an opportunity to the Ld. CIT(DR) to make her submission on the case laws relating to the additional grounds filed by the assessee.

2. A written submission on the additional grounds along with relevant judicial decisions is already on record. **This further submission may please be considered in continuation to the earlier submission already on record which specifically deals with admission of additional ground challenging the legal and jurisdictional issue for the first time in the second round of appellate proceedings before the Tribunal.**
3. Assessee vide application dated 04.09.2018 filed on 07.09.2018 raised additional grounds of appeal. These additional grounds of appeal go the root of the matter and are vital to the disposal of the said appeals. Their admittance shall help appellant in getting justice.
4. **Rule 11** of the Income Tax (Appellate Tribunal) Rules, 1963 reads –
“The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule :
Provided that the Tribunal shall not rest its decision on any other ground unless the par y who may be affected thereby has had a sufficient opportunity of being heard on that ground.”

Tribunal is under statutory obligation not only to entertain plea but also to decide the same after providing sufficient opportunity of being heard to the other side.

5. There are direct decisions which deal with the subject matter of this submission relating to admission of additional ground in the second round of appellate proceedings before the Hon'ble Tribunal. These are in addition to and in continuation of the case law paper book already on record. A Case

Law Paper Book – Volume 2 has been furnished with the similar submission made in the appeals of Mohd. Atique.

- g) **Hon'ble Bombay High Court** in the case of **Inventors Industrial Corpn. Ltd** – [1992] 194 ITR 548 – **HEAD NOTE** – “*Section 251 of the Income-tax Act, 1961 – Commissioner (Appeals) – Powers of – Assessment year 1958-59 – Whether a ground by which jurisdiction to make assessment itself is challenged can be urged before any authority for first time – Held, yes – Whether, therefore, assessee was entitled to challenge jurisdiction of Income-tax Officer to initiate reassessment proceedings before Appellate Assistant Commissioner in second round of proceedings even though he had not raised it earlier before Income-tax Officer or in earlier appeal before AAC – Held, yes*” [emphasis supplied]
- h) **Hon'ble ITAT Bench of Kolkata 'A'** in the case of **Peerless Gen. Fin. & Inv. Co. Ltd.** – [2008] 21 SOT 440 – **HEAD NOTE** - *Section 253 of the Income-tax Act, 1961 - Appellate Tribunal - Appeals to - Assessment year 1994-95 - Whether jurisdictional provision, which is mandatory, can be taken up in second round of litigation and an assessee can raise issue relating to validity of order in second round of litigation even if same was not raised in first round - Held, yes*” [emphasis supplied]
- i) **Hon'ble Bombay High Court (Full Bench)** in the case of **Ahmedabad Electricity Co. Ltd.** – [1993] 6 Taxman 27 – **HEAD NOTE** – “*Section 254 of the Income-tax Act, 1961 - Appellate Tribunal - Powers of - Assessment years 1962-63 to 1971-72 - During assessment assessee did not claim deduction of amounts transferred to 'reserve' as per Electric Supply Act, 1948, either before ITO or AAC - Later, on basis of a High Court decision holding such amounts as deductible on revenue account assessee claimed deduction of same before Tribunal by way of additional ground while appeal was pending before Tribunal - Tribunal refused to permit assessee to raise such additional ground - Whether phrase 'pass such order thereon' occurring in section 254(1) confers widest possible jurisdiction on Tribunal including jurisdiction to permit any additional ground of appeal if in its discretion and for good reasons it thinks it necessary and permissible to do so - Held, yes - Whether Tribunal had jurisdiction to permit additional grounds to be*

raised before it even though these might not have arisen from AAC's order, so long as these grounds were in respect of subject-matter of entire tax proceedings - Held, yes" [emphasis supplied]

- j) **Hon'ble Gujarat High Court** in the case of **P.V. Doshi** – [1978] 113 ITR 22 – HELD – “.....*as the Tribunal had failed to notice this material distinction between a mere procedural provision which could be waived and such jurisdictional provision or a mandatory provision enacted in public interest which could not be waived, because by consent no jurisdiction could be conferred on the authority unless the conditions precedent were first fulfilled. The Tribunal's view was clearly erroneous that the matter became final when the Tribunal passed the earlier remand order so that this point of jurisdiction got finally settled, which could not be agitated unless the assessee had come in the reference to the High Court at this stage. The Tribunal's view was also incorrect that in restoring the case to the file of the ITO by the earlier order, the only point left open was in respect of addition on merits and that the legal or jurisdictional aspect whether the re-assessment proceedings were legally initiated was not kept open. Even the Tribunal's view was erroneous that even though this point went to the root of the jurisdiction and was a pure question of law, merely because the point was initially raised and not pressed when the matter was taken up before the AAC, it could be waived and it could not be reagitated.*” [emphasis supplied]
- k) **Hon'ble Apex Court** in the case of **S. Nelliappan** – [1967] 66 ITR 722 – HEAD NOTE – “*Section 254 of the Income-tax Act, 1961 [Corresponding to section 33(4) of the Income-tax Act, 1922] - Appellate Tribunal - Power of - Whether in hearing an appeal Tribunal may give leave to assessee to urge grounds not set forth in memorandum of appeal, and in deciding appeal Tribunal is not restricted to grounds set forth in memorandum of appeal or taken by leave of Tribunal - Held, yes*” [emphasis supplied]
- l) The legal and jurisdictional issue raised in the instant additional grounds by the appellant was dealt by the **Hon'ble Delhi High Court** in the case of **Kabul Chawla** – [2016] 380 ITR 573 - Para 2 – ‘*The issue that the Court proposes to address in these appeals is the same that was considered by the*

*ITAT viz., 'Whether the additions made to the income of the Respondent Assessee for the said AYs under Section 2(22)e of the Income Tax Act, 1961 ('Act') were not sustainable because no **incriminating material concerning such additions** were found during the course of search and further no assessments for such years were pending on the date of search?' [emphasis supplied]*

6. The above judicial precedents adequately fortify the case of the appellant. Addition made in absence of incriminating material relating to such addition found and seized during the course of search of Mohd. Atique and Mohd. Shafique, assessee being 'other person' and assessed under section 153C, ought to be deleted.

The above issue of admittance of additional legal ground raised for the first time before Hon'ble Tribunal in second round of appellate proceedings is also raised in the case of searched persons namely, Mohd. Atique and Mohd. Shafique. The ratio of submission made in the case of searched persons applies with equal force in the instant case also, without prejudice to the other legal grounds of appeal.

Submitted

Authorised Representative

30. Ld. D.R. opposed these submissions and supported the order of the authorities below.

31. We have heard the rival contentions, perused the materials available on record and gone through the orders of the authorities below. In this appeal also, the assessee

has filed an additional ground. The parties have adopted same argument as were in ITA No.30/Ind/2016. For the same reasoning additional ground by the assessee are dismissed. Ground No.1 of the assessee's appeal is against confirming the addition of Rs.5 lakhs by not allowing the claim of opening cash balance as on 1.4.2000. Ld. Counsel for the assessee vehemently argued that the authorities below were not justified in allowing the cash balance. He submitted that the assessee has been engaged in business as well as earning agricultural income. Therefore, it cannot be presumed that he was not having any opening cash balance.

32. On the contrary, Ld. D.R. opposed these submissions and supported the order of the authorities below. He submitted that the assessee ought to have given supporting evidence in support of the contention. He submitted that

the assessee was not filing any return of income. It was only when search was conducted the assessee has filed the return for first time in respect of assessment under consideration.

33. We have heard the rival contentions, perused the materials available on record and gone through the orders of the authorities below. Assessing officer had made addition on the basis that the assessee could not submit any piece of evidence in support of this contention. The explanation before the authorities below was that the assessee was having a business of transport, which he did not disclose in his return of income was sufficient for having balance of Rs.5 lakhs as on 1.4.2000. It is undisputed fact that the revenue has assessed business income from transport business by applying a net profit @ 8%. Therefore, it cannot be presumed that assessee was

not having opening cash balance. Considering the totality of the facts, we delete this addition.

34. Now coming to ground No.2 of the assessee's appeal is against confirming addition of Rs.6,52,324/- which was made by applying the net profit on the gross receipts @ 8%. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. He submitted that authorities below were not justified in estimating the profit @ 8%. He submitted that the assessee was having only two trucks which he was plying with Bombay Transport company. Therefore, assessing officer should not have estimated net profit @ 8%.

35. On the contrary, Ld. D.R. opposed these submissions and supported the order of the authorities below and he submitted that the assessee has not given any material to suggest that the assessee was having lesser net receipt.

36. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. We find that the A.O. has estimated the profit without comparing with similarly situated persons. We find that the Tribunal in one of the cases has taken a view of net receipt @ 5.5%. We therefore taking a consistent view direct the A.O. to adopt the net profit @ 5.5% and re-compute the addition accordingly.

37. Ground No.3 is general in nature and needs no separate adjudication.

38. Now we take up IT(SS)A No.38/Ind/2016 pertaining to the assessment year 2002-03. The assessee has raised following grounds of appeal:

- 1. On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, where he had estimated the net profit at 8% on the gross receipts of Rs.18,39,879/- and in confirming the addition of Rs.99,190/- as made by the assessing officer.*
- 2. The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.*

39. Since similar ground was raised by the assessee in the appeal in ground No.2 of IT(SS)A No.37/Ind/2016, except difference in figures, this appeal of the assessee is also partly allowed based on the findings given in paras 34 & 35 above in IT(SS)A No.37/Ind/2016. The A.O. is directed to re-compute the net profit.

40. Now we take up IT(SS)A No.39/Ind/2016 pertaining to the assessment year 2003-04. The assessee has raised following grounds of appeal:

- 1. On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, where he had estimated the net profit at 8% on the gross receipts of Rs.27,01,691/- and in confirming the addition of Rs.1,32,135/- as made by the assessing officer.*
- 2. The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.*

41. Since similar ground was raised by the assessee in the appeal in ground No.2 of IT(SS)A No.37/Ind/2016, except difference in figures, this appeal of the assessee is also partly allowed based on the findings given in paras 34 & 35

above in IT(SS)A No.37/Ind/2016. The A.O. is hereby directed to re-compute the net profit.

42. Now we take up IT(SS)A No.40/Ind/2016 pertaining to the assessment year 2004-05. The assessee has raised following grounds of appeal:

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, where he had estimated the net profit at 8% on the gross receipts of Rs.20,16,724/- and in confirming the addition of Rs.77,337/- as made by the assessing officer.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had given a finding that the appellant was the owner of the concern M/s Bombay Transport company, which in fact belongs to Shri Naved Bhai.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he included the income of M/s. Bombay Transport Company in the hands of the appellant.*
4. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the income of M/s. Bombay Transport Company at Rs.5,96,000/- which resulted by the application of N.P. rate of 8% on the Transportation receipts of Rs.74,50,000/-.*
5. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.*

43. Ground No.1 of the assessee's appeal is against confirming addition of Rs.77,337/- which was made by applying the net profit on the gross receipts @ 8%. These grounds are similar to the ground raised by the assessee in the appeal in ground No.2 of IT(SS)A No.37/Ind/2016, except difference in figures, these grounds of the assessee are also partly allowed based on the in IT(SS)A No.37/Ind/2016. The A.O. is directed to re-compute the net profit.

44. Ground Nos.2, 3 & 4 are in respect of the claim of the assessee that the income related to Bombay Transport Company is attributed to the assessee. Ld. Counsel for the assessee reiterated the submissions as made in the written synopsis. It is contended that the business income related to Bombay Transport Company is added in the income of the assessee.

45. Ld. D.R. opposed these submissions and submitted that this income relates to the assessee. Therefore, the addition has rightly been made in the hands of the assessee.

46. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. We find that Ld. CIT(A) has given finding in para 9.1 of his order which reads as under:

9.1 *The A.O. has made this addition on the basis of seized documents pages 1 to 34 of Annexure A-2 which showed that a transport contract was obtained from MP State Civil Supplies Corporation Ltd. in the name of Bombay Transport Company. The appellant claimed said that M/s. Bombay Transport Co. was a proprietary concern owned by one Naved Bhai. However, he failed to produce Shri Naved Bhai before the A.O. Information was called from MP State Civil Supplies Corporation Ltd. which confirmed payment of Rs.74,50,000/- and Rs.90,47,913/- to Bombay Transport Co. in the F.Y. 2003-04 and 2005-06 respectively. In view of the non-production Shri Naved Bhai or any other evidence in this regards, the A.O. held that the contract had been executed by the appellant and estimating net profit on the same @ 8% made an addition of Rs.5,96,000/- in A.Y. 2004-05 and of Rs.7,23,873/- in A.Y. 2005-06 in the hands of the assessee.*

A.Y.	Contract Receipts from MP State Civil Supplies Corp. Ltd.	Net Profit @ 8%
2004-05	Rs.74,50,000/-	Rs.5,96,000/-
2006-07	Rs.90,47,916/-	Rs.7,23,873/-

47. From the above, it is evident that addition was sustained solely on the ground that of non-production of one Mr. Naved Bhai, Proprietor of Bombay Transport Company. After considering totality of the facts, we set aside the order of the authorities below and restore this issue to the Assessing Officer to decide it afresh. The assessee is directed to produce the proprietor of the Bombay Transport Company before the A.O. and furnish such details which are necessary to prove that it is related to Bombay Transport Company. After verifying the details and examining the proprietor of Bombay Transport Company, the A.O. would decide the issue afresh. Thus, ground nos.2, 3 & 4 of the assessee's appeal are allowed for statistical purposes.

48. Ground No.5 is general in nature and needs no separate adjudication.

49. Now we take up IT(SS)A No.41/Ind/2016 pertaining to the assessment year 2006-07. The assessee has raised following grounds of appeal:

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he had given a finding that the appellant was the owner of the concern M/s. Bombay Transport Company which in fact belong to Shri Naved Bhai.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the assessing officer, wherein he included the income of M/s. Bombay Transport Company in the hands of the appellant.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the income of M/s. Bombay Transport company at Rs.7,23,873/- which resulted by the application of N.P. rate of 8% on the Transportation receipts of Rs.90,47,916/-.*
4. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.*

50. Ground Nos.1,2 & 3 are in respect of the claim of the assessee that the income related to Bombay Transport Company is attributed to the assessee.

51. Since similar grounds were raised in the appeal of the assessee in ground Nos.2, 3 & 4 in IT (SS)A No.40/Ind/2016 for the A.Y. 2004-05, which were

adjudicated above, these grounds of the assessee are also partly allowed for statistical purposes based on the findings given above in IT(SS)A No.40/Ind/2016.

52. Now we take up IT(SS)A No.42/Ind/2016 pertaining to the assessment year 2007-08. The assessee has raised following grounds of appeal:

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition made by the assessing officer by not accepting the unsecured temporary loans (squared up during the accounting year) as below:-*

a. Syed Abdullah	Rs. 17,000.00
b. Memboob Khan	Rs.1,00,000.00
c. Rashid Vahid	Rs.1,00,000.00
d. S. Mahmood Ali	<u>Rs.1,20,000.00</u>
	Rs.3,37,000.00
2. *The appellant craves leave to add, to alter and/or to modify the grounds of appeal on or before the date of hearing.*

53. This solitary ground is on account of unsecured temporary loans. Ld. Counsel for the assessee submitted that all the details were filed before the authorities below. He drew our attention to paper book pages 50, 51 & 52. It

is stated that amount was repaid during the year under consideration.

54. Ld. D.R. opposed these submissions and submitted that no evidences were placed before the A.O. and therefore he supported the orders of the authorities below.

55. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The assessing officer has not given any finding whether these amounts were repaid during the year under consideration despite the matter was restored to the A.O. The assessee has placed on record proof of returning of amount through banking channel which is not rebutted by the revenue, therefore, we direct the A.O. to delete this addition. Ground raised in this appeal is allowed. Appeal of the assessee in the assessment year 2007-08 is allowed.

56. Now we take up IT(SS)A Nos.124 & 125/Ind/2016 in the case of Md. Shafique. These two appeals by the assessee are against order of CIT(A)-2, Bhopal dated 4.3.2016 pertaining to the assessment years 2005-06 & 2007-08. First we take up IT(SS)A No.124/Ind/2016 pertaining to the A.Y. 2005-06. The assessee has raised following grounds of appeal:

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding that the credit of Rs.2,00,000/- in the name of Anees Ahmed was not explainable and in confirming the addition of Rs.2,00,000/- towards the same in the hands of the appellant.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding that the provisions of sec.44 AE did not apply to the appellant as the appellant was carrying the transport business in the name of Mohd. Shafique & Co.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding that in estimating the Net Profit at 8% of the gross receipts of Rs.1,43,91,687/- and in confirming the addition of Rs.1,51,334/- in the hands of the appellant.*
4. *The appellant craves leave to add, to alter an/or to modify the grounds of appeal on or before the date of hearing.*

57. During the course of proceedings, the assessee has also taken an additional ground that reads as under:

1. *On the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153A r.w.s. 143(3) without reference to any incriminating material found and seized during the course of conduct of search.*

58. Briefly stated facts are that a search and seizure operation was carried out u/s 143(2)(1) of the Act in the case of Md. Shafique group on 21.9.2006. Thereafter, a notice u/s 153A of the Act was issued on 19.5.2008. In response thereto, the assessee filed a return of income declaring an income of Rs.12,38,946/- and also claimed agricultural income of Rs.68,682/-. The assessment u/s 153A r.w.s. 143(3) of the Act was framed vide order dated 31.12.2008. The assessing officer while framing the assessment made various additions on account of disallowance of agricultural income at Rs.68,682/-, disallowance of rental income of Rs.65,520/- and addition on account of unexplained cash credit of Rs.2 lakhs. Further, the A.O. made addition of Rs.97,000/- and

Rs.1,54,334/- in respect of the business receipts and substantive addition of Rs.97,000/- in the case of Farida Sultana. Aggrieved by this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions partly allowed the appeal. Thereby, the application of net profit @ 8% on the gross receipts was sustained and the addition of Rs.97,000/- was deleted. Further, addition of Rs.2 lakhs treating as a cash credit was upheld. Aggrieved against this order, the assessee is in present appeal.

59. First we take up the additional ground of the assessee.

The additional ground of the assessee reads as under:

1. *On the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in making the addition and passing the impugned assessment order under section 153A r.w.s. 143(3) without reference to any incriminating material found and seized during the course of conduct of search.*

60. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions which reads as under:

Fixed for hearing on 14.02.2019

**Before the Hon'ble Income Tax Appellate Tribunal, Indore Bench,
Indore**
IT(SS)A No.: 124/Ind/2016 and 125/Ind/2016 by the Assessee

In the matter of : **Mohd. Shafique, Bhopal**
PAN : ANIPS2739K
Assessment Year : 2005-06 and 2007-08
Status : Individual

—
May it please Your Honors,

In the course of hearing held on 06.02.2019, Hon'ble Bench was kind in giving an opportunity to the Ld. CIT(DR) to make her submission on the case laws relating to the additional grounds filed by the assessee.

7. A written submission on the additional grounds along with relevant judicial decisions is already on record. This further submission may please be considered in continuation to the earlier submission already on record.
8. Assessee vide application dated 04.09.2018 filed on 07.09.2018 raised additional grounds of appeal. These additional grounds of appeal go the

root of the matter and are vital to the disposal of the said appeals. Their admittance shall help appellant in getting justice.

9. **Rule 11** of the Income Tax (Appellate Tribunal) Rules, 1963 reads –
“The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule :

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.”

Tribunal is under statutory obligation not only to entertain plea but also to decide the same after providing sufficient opportunity of being heard to the other side.

10. There are direct decisions which deal with the subject matter of this submission relating to admission of additional ground in the second round of appellate proceedings before the Hon’ble Tribunal. These are in addition to and in continuation of the case law paper book already on record. A Case Law Paper Book – Volume 2 has been furnished with the similar submission made in the appeals of Mohd. Atique.

- m) **Hon’ble Bombay High Court** in the case of **Inventors Industrial Corpn. Ltd** – [1992] 194 ITR 548 – **HEAD NOTE** – ***“Section 251 of the Income-tax Act, 1961 – Commissioner (Appeals) – Powers of – Assessment year 1958-59 – Whether a ground by which jurisdiction to make assessment itself is challenged can be urged before any authority for first time – Held, yes – Whether, therefore, assessee was entitled to challenge jurisdiction of Income-tax Officer to initiate reassessment proceedings before Appellate Assistant Commissioner in second round of proceedings even though he had not raised it earlier before Income-tax Officer or in earlier appeal before AAC – Held, yes”*** [emphasis supplied]

- n) **Hon'ble ITAT Bench of Kolkata 'A'** in the case of **Peerless Gen. Fin. & Inv. Co. Ltd.** – [2008] 21 SOT 440 – HEAD NOTE - *Section 253 of the Income-tax Act, 1961 - Appellate Tribunal - Appeals to - Assessment year 1994-95 - Whether jurisdictional provision, which is mandatory, can be taken up in second round of litigation and an assessee can raise issue relating to validity of order in second round of litigation even if same was not raised in first round - Held, yes*” [emphasis supplied]
- o) **Hon'ble Bombay High Court (Full Bench)** in the case of **Ahmedabad Electricity Co. Ltd.** – [1993] 6 Taxman 27 – HEAD NOTE – “*Section 254 of the Income-tax Act, 1961 - Appellate Tribunal - Powers of - Assessment years 1962-63 to 1971-72 - During assessment assessee did not claim deduction of amounts transferred to 'reserve' as per Electric Supply Act, 1948, either before ITO or AAC - Later, on basis of a High Court decision holding such amounts as deductible on revenue account assessee claimed deduction of same before Tribunal by way of additional ground while appeal was pending before Tribunal - Tribunal refused to permit assessee to raise such additional ground - Whether phrase 'pass such order thereon' occurring in section 254(1) confers widest possible jurisdiction on Tribunal including jurisdiction to permit any additional ground of appeal if in its discretion and for good reasons it thinks it necessary and permissible to do so - Held, yes - Whether Tribunal had jurisdiction to permit additional grounds to be raised before it even though these might not have arisen from AAC's order, so long as these grounds were in respect of subject-matter of entire tax proceedings - Held, yes*” [emphasis supplied]
- p) **Hon'ble Gujarat High Court** in the case of **P.V. Doshi** – [1978] 113 ITR 22 – HELD – “*.....as the Tribunal had failed to notice this material distinction between a mere procedural provision which could be waived and such jurisdictional provision or a mandatory provision enacted in public interest which could not be waived, because by consent no jurisdiction could be conferred on the authority unless the conditions precedent were first fulfilled. The Tribunal's view was clearly erroneous that the matter became final when the Tribunal passed the earlier remand order so that this point of jurisdiction got finally settled, which could not be agitated unless the assessee had come in the reference to the High Court at*

*this stage. The Tribunal's view was also incorrect that in restoring the case to the file of the ITO by the earlier order, the only point left open was in respect of addition on merits and that the legal or jurisdictional aspect whether the re-assessment proceedings were legally initiated was not kept open. **Even the Tribunal's view was erroneous that even though this point went to the root of the jurisdiction and was a pure question of law, merely because the point was initially raised and not pressed when the matter was taken up before the AAC, it could be waived and it could not be reagitated.***" [emphasis supplied]

- q) **Hon'ble Apex Court** in the case of **S. Nelliappan** – [1967] 66 ITR 722 – HEAD NOTE – “Section 254 of the Income-tax Act, 1961 [Corresponding to section 33(4) of the Income-tax Act, 1922] - Appellate Tribunal - Power of - **Whether in hearing an appeal Tribunal may give leave to assessee to urge grounds not set forth in memorandum of appeal, and in deciding appeal Tribunal is not restricted to grounds set forth in memorandum of appeal or taken by leave of Tribunal - Held, yes**” [emphasis supplied]
- r) The legal and jurisdictional issue raised in the instant additional grounds by the appellant was dealt by the **Hon'ble Delhi High Court** in the case of **Kabul Chawla** – [2016] 380 ITR 573 - Para 2 – ‘The issue that the Court proposes to address in these appeals is the same that was considered by the ITAT viz., ‘Whether the additions made to the income of the Respondent Assessee for the said AYs under Section 2(22)e of the Income Tax Act, 1961 (‘Act’) were not sustainable because no incriminating material concerning such additions were found during the course of search and further no assessments for such years were pending on the date of search?’ [emphasis supplied]
11. The above judicial precedents adequately fortify the case of the appellant. Addition made in absence of incriminating material relating to such addition found and seized during the course of search, ought to be deleted.

Submitted

Authorised Representative

Fixed for hearing on 06.02.2019
Before the Hon'ble Income Tax Appellate Tribunal, Indore Bench,
Indore
IT(SS)A No.: 124/Ind/2016 by the Assessee

In the matter of : **Mohd. Shafique, Bhopal**
PAN : ANIPS2739K
Assessment Year : 2005-06
Status : Individual

Return : at Rs.12,38,946 and agriculture income Rs. 68,682 on 20.06.2008

Assessment Order : u/s 143(3) rws 153A dated 31.03.2008 at Rs.15,73,150 (addition for agriculture income Rs. 68,682 & rental income Rs. 65,520; unexplained cash credit of Rs. 2,00,000; substantive addition of Rs. 97,000; net profit @ 8% Rs. 1,51,334)

CIT(A) Order : dated 04.03.2016 relief granted for all the other additions except for additions of unexplained cash credit of Rs. 2,00,000 and net profit @ 8% Rs. 1,51,334

D. Facts of the case:

24. The main source of income for assessee is agriculture. In addition to this he is also earning income from the business of transportation, rental income and interest income.

25. **Search and seizure operations** u/s 132 were conducted in the case of Mohd. Shafique group on **21.09.2006** including the assessee himself.

26. In the assessment proceedings, Ld. AO asked assessee to submit copy of bank statement and return of income of Anees Ahmed from whom he had received loan of Rs. 2,00,000. Assessee could obtain the confirmation letter of Anees Ahmed only after the completion of assessment proceedings. Hence, it was filed as additional evidence before Ld. CIT(A).

Ld. CIT(A) did not admit this additional evidence and proceeded to sustain the addition made by Ld. AO.

27. Ld. AO referred to Annexure- A2 page no. 1 to 34 (Books of accounts of Bombay Transport Company proprietor Naved Bhai) and Annexure -2 page 31 **impounded** from office of M/s. Ekta Transport Company. For the addition made net profit is estimated @ 8% and after giving benefit of income as filed in return, balance of Rs. 1,51,334 was added. Ld. CIT(A) sustained the addition so made by Ld. AO.

28. Aggrieved assessee is in appeal before Your Honors.

E. Submission:

a. Ground No. 01 - Addition of Rs. 2,00,000 received from Anees Ahmed

8. **Para 3 of assessment order u/s 153A rws 143(3), dated 31.12.2008 –**

“In the year under consideration assessee society has received loan of Rs. 2,00,000/- from Anees Ahmed. In the order sheet entry dated 10.10.2008 assessee was asked to submit copy of Bank Statement and Return of Income of Anees Ahmed.”

9. **Para 9.4 of CIT(A) order dated 04.03.2016 –**

“As the appellant has not furnished any explanation or documentary evidence regarding the credit worthiness of Shri Anees Ahmed or the

genuineness of transaction even during the appellate proceedings, the addition made by the A.O. is upheld.”

10. Assessee submits that he is not required to maintain books of account and has not maintained the books of account. To invoke provisions of section 68 maintenance of books of accounts is a mandatory condition.

In the instant case, since no books of accounts are maintained as assessee is not required to maintain them, no addition is warranted u/s 68 of the Act. However, assessee has submitted confirmation letter of Anees Ahmed as additional evidence which was not accepted and Ld. CIT(A) who proceeded to sustain the addition made by Ld. AO. **[PB 9A]**

11. Assessee prays that the addition made may please be deleted.

b. Ground No. 02 - Rejecting the application of provisions of s. 44AE – Not Pressed

c. Ground No. 03 - Addition by estimating net profit @ 8% at Rs. 1,51,334

1. Hon'ble Jurisdictional Bench of ITAT Indore in the case of assessee vide order dated 31.01.2013 in **IT(SS)A No. 295 to 299/IND/2012** has, at internal page 27 and 29 stated - **[PB 33 backside and 34]**

“.....The profit rate of 8% is applicable in case of contract receipts but here is a case of transportation. From the net profit declared on truck operation, we find that the assessee has shown net profit rate of 3.8% and 5.1% in the A.Ys. 2003-04 and 2004-05, respectively.....Keeping in view the nature of the assessee's business, more than four times increase in turnover/receipts vis-à-vis better net profit rate shown by the assessee as compared to immediately preceding year, we think it appropriate to apply rate of 5.5% in the A.Y. 2004-05. Accordingly, the Assessing Officer is directed to re-work out the profit from transport business in the A.Y. 2004-05 by applying NP rate of 5.5% in place of NP rate of 8% applied by him. We direct accordingly.”

2. Assessee prays that income from truck plying has been reported in the return at **Rs. 10,00,000 which comes to 6.95%** of the total gross receipts of Rs. 1,43,91,687. **[PB 01 and 14]**
3. Considering the finding given by the Hon'ble ITAT in assessee's own case for the immediately preceding year i.e. AY 2004-05 for applying NP of 5.5% instead of 8%, the NP rate of 6.95% already returned by the assessee is ought to be retained and accepted. The addition made of Rs. 1,51,334 by applying 8% by the Ld. AO and sustained by Ld. CIT(A) be deleted.

d. Direction given by Hon'ble Bench in the hearing fixed on 03.10.2018

1. In the hearing fixed on 03.10.2018 Hon'ble Bench gave a direction to Ld. CIT(DR) to submit report of Assessing Officer in the case of Mohd. Atique and Mohd. Shafique.

Vide letter dated 01.02.2019, Ld. CIT(DR) provided the copies of page 262 and 263 & 274 to 278.

It is pertinent to mention here that page 262 and 263 & 274 to 278 are not related to assessee i.e. Mohd. Shafique.

Page 262 and 263 is the affidavit of Mohd. Atique to obtain license for use of Revolver. and has already been considered by the Hon'ble Co-ordinate Bench vide order dated 31.01.2013 at PB 377 internal page 6 para 6.

Page 274 to 278 is the partnership deed for the business run under the name and style of M/s. S T Developers. Assessee i.e. Mohd. Shafique is not a party to this deed

Both the above referred documents neither belongs to nor pertains to assessee i.e. Mohd. Shafique.

Considering the above facts, circumstances of the case, submissions made, documents on record and judicial precedence, appeal of the assessee may please be allowed by deleting the additions made by the Ld. AO and sustained by the Ld. CIT(A).

Submitted.

Authorised Representative

61. Ld. D.R. opposed these submissions and supported the orders of the authorities below. Identical ground was raised in Ground No.1 of additional grounds in IT(SS)A No.37/Ind/2016. For the same reasoning, additional ground raised in this appeal is dismissed.

62. Now coming to ground No.1 of the assessee's appeal, it is against sustaining addition of Rs.2 lakhs. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. Ld. Counsel submitted that it is stated that a confirmation letter was received from Anees Ahmed post assessment. However, the same was placed before the Ld. CIT(A), which was not considered by him.

He submitted that in the interest of justice, the Ld. CIT(A) ought to have admitted this.

63. Per contra, Ld. D.R. opposed these submissions and supported the order of the Ld. CIT(A) and the assessment order.

64. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. It was incumbent upon the assessee to prove genuineness of the transactions, identity and creditworthiness of the creditors. The assessee has failed to discharge onus as placed on him to prove. Therefore, we do not see any infirmity in the order of the Ld. CIT(A) and the same is hereby affirmed.

65. Ground Nos.2 & 3 are inter-related. The similar ground was raised in IT (SS)A No.37/Ind/2016. Since the parties have adopted the same argument taking a

consistent view, we direct the A.O. to compute net profit @ 5.5%.

66. Now we take up IT(SS)A No.125/Ind/2016 for the A.Y. 2007-08. The only effective ground is ground No.1, which reads as under:

- 1. On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of assessing officer that the appellant deposited Rs.45,000/- in the bank a/cs of Fareeda Sultan and treating the same as unexplainable and confirming the addition of Rs.45,000/- towards the same in the hands of the appellant.*

67. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions which reads as under:

Submission:

- 1. In the case of Fareeda Sultana, wife of assessee, she submitted that the amounts were deposited by her out of her savings of the last many years. Her husband (assessee i.e. Mohd. Shafique) used to give her money for household expenses out of which she saved some money every month. It is out of these savings that the amount of Rs.45,000/- was deposited.*
 - 2. In view of the above it is submitted that the addition made may please be deleted.*
- In the hearing fixed on 3.10.2018 Hon'ble Bench gave a direction to Ld. CIT(DR) to submit report of Assessing Officer in the case of Mohd. Atique and Mohd. Shafique.*
- Vide letter dated 1.2.2019, Ld. CIT(DR) provided the copies of page 262 and 263 & 274 to 278.*

It is pertinent to mention here that page 262 and 263 & 274 to 278 are not related to assessee i.e. Mohd. Shafique.

Page 262 and 263 is the affidavit of Mohd. Atique to obtain license for use of Revolver and has already been considered by the Hon'ble Coordinate Bench vide order dated 31.1.2013 at PAPER BOOK 377 internal page 6 para 6.

Page 274 to 278 is the partnership deed for the business run under the name and style of M/s. ST Developers. Assessee i.e. Mohd. Shafique is not a party to this deed.

Both the above referred documents neither belongs to nor pertains to assessee i.e. Mohd. Shafique.

Considering the above facts, circumstances of the case, submissions made and documents on record, appeal of the assessee may please be allowed by deleting the addition made by the Ld. A.O. and sustained by the Ld. CIT(A).

Submitted

Authorised representative.

68. Ld. D.R. opposed these submissions.

69. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. We find that the money credited to in the account of wife of the assessee amounting to Rs.45,000/- has been added to the income of the assessee.

In our view, the A.O. was not justified to make addition in the hands of the assessee. Without considering the fact that such a small amount could be saving from the gifts, etc. therefore, we direct the A.O. to delete this addition.

70. Appeal filed by the assessee in IT(SS)A No.125/Ind/2016 is allowed.

71. In the result, the appeals filed by the assessee in IT(SS)A Nos.30 to 36/Ind/2016 are partly allowed, the appeals filed by the assessee in IT(SS)A Nos.37 to 39/Ind/2016 are partly allowed, the appeals filed by the assessee in IT(SS)A Nos.40 to 42/Ind/2016 are partly allowed for statistical purposes, the appeal filed by the assessee in IT(SS)A No.124/Ind/2016 is partly allowed and the appeal filed by the assessee in IT(SS)A No.125/Ind/2016 is allowed.

Order was pronounced in the open court on 30.04.2019.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 30/04/2019
VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard
file.

By order

Assistant Registrar, Indore

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