IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
and
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

(THROUGH VIDEO CONFERENCE)

ITA Nos.968, 969, 970 & 971/Del./2021
(ASSESSMENT YEARS : 2009-10, 2010-11, 2011-12 & 2012-13)

Shri Om Prakash Jakhotia, 3 – 6, 323, Basheerbagh, Hyderabad – 500 029 (Telangana).	vs.	ACIT, CC – 26, New Delhi.
(PAN : ABSPJ3944P)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Ajay Wadhwa, Advocate
Ms. Bharti Sharma, Advcoate
Ms. Vanshika Taneja, Advocate
REVENUE BY : Ms. Sarita Kumari, CIT DR

Date of Hearing : 13.01.2022
Date of Order : 21.02.2022

O R D E R

PER AMIT SHUKLA, JM :

The aforesaid captioned appeals have been filed by the above named assessee, Sh. Om Prakash Jakhotia against the orders passed by Ld. Commissioner of Income-tax (Appeals)-29, New Delhi dated 09.06.2021 for the quantum of assessment passed under section 153A/143(3) for the AYs 2009-10 to 2011-12 and under section143(3) for the Assessment Year 2012-13. Since common issues are permeating through all the appeals arising out of identical set of facts

pertaining to the same search, therefore, same were heard together and are being disposed off by way of this common order.

2. For the sake of ready reference, the assessment year wise grounds of appeal filed by the assessee are reproduced hereunder:

A.Y: 2012-13-ITA No. 971/DEL/2021:

1. ***"That the order passed by the Ld. Commissioner of Income Tax (Appeals) (herein after referred to as "the Ld. CIT (A)") dated 09.06.2021 is erroneous and bad in law and on facts.***
2. ***That the Ld. Assessing Officer (herein after referred to as "the Ld. AO") as well as Ld. CIT (A) have failed to appreciate the legal position that where the assessee had failed to file any return of income under any of the provisions of section 139 of the Income Tax Act, 1961 (here in after referred to as "the Act") and had also failed even in terms of the notice issued under section 142(1), then the provisions of section 144 are attracted and the Ld. AO has the power to pass an order to the best of his judgment. In such scenario, the assessment order passed under section 143(3) of the Act is illegal and void ab initio.***

3. ***The Ld. CIT (A) has erred in rejecting the retraction filed by the assessee vide affidavit dated 29.10.2013 in respect of the disclosure of Rs. 21.50 crores purportedly made by him without appreciating the fact that, inter alia, the disclosure made was not voluntary;***

the assessee was not carrying out any business activity in his individual name and therefore, the disclosure in his name was not valid; the Hon'ble Delhi High Court quashed the settlement order and directed the Ld. AO to make assessment afresh without giving their opinion on any issue and that the disclosure was obtained in contravention of CBDT circular dated 10.03.2003.

4. That the Ld. CIT (A) has erred in law in sustaining the following additions aggregating Rs. 5,80,60,969/-, out of the total addition of cash receipts of Rs. 17,05,06,699/- made by the ld. AO as undisclosed income of the assessee:

A. On account of Capital Receipts:

i. Fresh cash loans received of Rs. 1,51,10,465/- as per seized diary A/OPJ/03;

ii. Cash received from chit funds of Rs. 49,91,828/-;

iii. Debtors and other advances of Rs. 2,09,56,215/-.

B. On account of Revenue Receipts: Profit of Rs. 1,70,02,461/- being 15 % of the total cash receipts of Rs. 11,21,83,571- other than the receipts relating to cash loans.

4.1 The Ld. CIT (A) has sustained the aforesaid additions without appreciating the fact that during the course of assessment proceedings, the Ld. AO failed to raise any query or examine the loans inspite of the assessee's offer to provide the same; the presumption under section 132(4A) read with section 292C of the Act was ignored inspite of the fact that the cash loans were

capital receipts on which interest had also been paid; multiple additions were made without applying the telescoping theory, and the source of cash was taxed and so also the utilization; Ld. CIT (A) has failed to appreciate that opening balances of debtors/receivables cannot be the income for the impugned year.

4.2 The Ld. CIT (A) has failed to appreciate the fact that there is an actual loss as per the reconciliation statement prepared after computation of the receipts and payments on the basis of the seized diary A/OPJ/03 and where comprehensive evidence is found during the course of search, estimation cannot be restored to and both the sides, i.e., receipts and payments have to be considered for the purpose of determination of income.

4.3 That the Ld. CIT (A) has erred in making the entire addition on the account of the seized diary A/OPJ/03 in the hands of the assessee inspite of the fact that the assessee had no business activity in his individual name ever since inception and hence the income has been assessed in the hands of an incorrect person.

5. That the Ld. CIT (A) has erred in law and on facts in sustaining the addition of Rs. 35,59,500/- on account of cash found during the course of search.

6. That the Ld. CIT (A) has erred in law and on facts in sustaining the addition of Rs. 56,43,300/- made by the ld. AO on account of investment made in immovable property on the basis of AIR details inspite of the fact that the Form 26AS was filed by the assessee for the

impugned assessment year wherein the AIR information column was blank and it did not have any information relating to the alleged immovable property.

7. ***That the Ld. CIT (A) has erred in law and on facts in sustaining the addition of Rs. 13,17,000/- made by the Ld. AO on account of cash deposited in the saving bank account on the basis of AIR details inspite of the fact that the Form 26AS was filed by the assessee for the impugned assessment year wherein the AIR information column was blank and it did not have any information relating to alleged cash deposited in any saving bank account of the assessee.***
8. ***That the penalty proceedings initiated by the Ld. AO under section 271AAA and 271F of the Act were invalid and bad in law and thus ought to have been dropped.***
9. ***That the interest under section 234A of Rs. 3,23,41,875/- levied by the Ld. AO for not filing of the return is legally incorrect as there was no legal requirement of filing the return of income for making settlement application under section 245C of the Act and hence the settlement application filed on 31.10.2013 ought to have been treated as return and accordingly the interest levied for 30 months was totally unjustified, uncalled for and ought to have been deleted.***
10. ***That the interest under section 234B of Rs. 9,70,25,626/- levied by the Ld. AO for short fall in the***

payment of advance tax for 90 months is legally incorrect as under sub section 2A of this section, interest is chargeable from 1st day of April of such assessment year and upto the date of making the settlement application.

11. The appellant craves leave to alter, amend or any other grounds of appeal either before or during the course of hearing."

A.Y: 2011-12-ITA No. 970/DEL/2021:

1. "That the order passed by the Ld. Commissioner of Income Tax (Appeals) (herein after referred to as "the Ld. CIT (A)") dated 09.06.2021 is erroneous and bad in law and on facts.

2. That the search conducted u/s 132 of the Act on the assessee was not a valid search since none of the circumstances provided under clauses (a) to (c) of sub-section (1) of section 132 is fulfilled in the case of the assessee.

3. That the Ld. CIT (A) has erred in law and on facts in rejecting the ground of the assessee that the notice issued u/s 153A dated 30.04.2013 is defective, incorrect and shows lack of application of mind and since this a jurisdictional defect, the proceedings initiated and the assessment order passed u/s 153A are invalid and void ab initio.

4. The Ld. CIT (A) has erred in rejecting the retraction filed by the assessee vide affidavit dated 29.10.2013 in respect of the disclosure of Rs. 21.50 crores

purportedly made by him without appreciating the fact that the disclosure made was not voluntary; the assessee was not carrying out any business activity in his individual name and therefore, the disclosure in his name was not valid; the Hon'ble Delhi High Court quashed the settlement order and directed the Ld. AO to make assessment afresh without giving their opinion on any issue and that the disclosure was obtained in contravention of CBDT circular dated 10.03.2003.

5. That the Ld. CIT(A) has erred in law and on facts in sustaining the addition of Rs. 4,92,00,000/- being share capital and share premium invested by Varad Vinayak Properties Private Limited into the Jakhotia Plastics Private Limited, in the hands of the assessee as his unexplained income or cash.

5.1 That the Ld. CIT (A) has failed to appreciate that there was no incriminating material found during the course of search which suggested that Rs. 4.92 crores was unaccounted income of the assessee. He has also failed to appreciate that the statements recorded during search do not themselves constitute incriminating material and no addition can solely be made on the basis of retracted statement unless there is some incriminating material.

6. That the Ld. CIT (A) has erred in law in sustaining the addition of opening credit balance of Rs. 11,96,75,000/- as on 01.04.2011 mentioned in the seized dairy A/OPJ/03 made by the Ld. AO under

section 69A of the Act, inspite of the fact that no document or diary was seized in respect of the impugned assessment year and merely the opening credit balances as on 01.04.2011 were presumed to be loans received during the impugned year and taxed; the presumption under section 132(4A) read with section 292C that the loan is a capital receipt not assessable to tax, was not considered; the telescoping theory that the opening credit balances have to be reduced by the debit balances was not allowed.

6.1 The Ld. CIT (A) has erred in confirming the addition under section 69A of the Act inspite of the fact that no money, bullion, jewellery or other valuable article or thing was found and therefore the provisions of section 69A cannot be triggered.

6.2 The Ld. CIT (A) failed to appreciate the fact that the assessee never carried out any business activity in his individual name and the notings found in the seized dairy A/OPJ/03 pertain to business activities of the companies which cannot be taxed in his hands.

7. That the Ld. CIT (A) has erred in law in sustaining the addition of Rs. 25,20,000/- on account of kickbacks paid to Dalmia Cement, in the hands of the assessee without there being any incriminating material found during the course of search.

7.1 That the Ld. CIT (A) as well as the Ld. AO have failed to appreciate the fact that the assessee, Shri Om Prakash Jakhotia was not carrying out any business activity in

his individual name and has never shown any business income in his return of income and therefore, under no stretch of imagination, Rs. 25,20,000/- can be considered as unaccounted income of the assessee.

7.2 Without prejudice to the above, the amount of alleged kickbacks computed by the Ld. AO and then sustained by the Ld. CIT (A) is incorrect.

8. That the penalty proceedings initiated by the Ld. AO under section 271(1)(c) and 271F of the Act were invalid and bad in law and thus ought to have been dropped.

9. That the interest under section 234A of Rs. 5,85,74,495/- levied for not filing of the return was legally incorrect as there was no legal requirement of filing the return of income for making settlement application under section 245C of the Act and hence the settlement application filed on 31.10.2013 is to be treated as return and accordingly the interest levied for 99 months is totally unjustified uncalled for and deserves to be deleted.

10. That the interest under section 234B of Rs. 6,03,49,480/- levied for short fall in payment of advance tax for 102 months was legally incorrect as under sub section 2A of this section interest is chargeable from 1st day of April of such assessment year and upto the date of making the settlement application.

11. The appellant craves leave to alter, amend or any other grounds of appeal either before or during the course of hearing."

A.Y: 2010-11-ITA No. 969/DEL/2021:

1. "That the order passed by the Ld. Commissioner of Income Tax (Appeals) (herein after referred to as "the CIT(A)") dated 09.06.2021 is erroneous and bad in law and on facts.

2. That the search conducted u/s 132 of the Act on the assessee was not a valid search since none of the circumstances provided under clauses (a) to (c) of sub-section (1) of section 132 is fulfilled in the case of the assessee.

3. That the ld. CIT(A) has erred in law and on facts in rejecting the ground of the assessee that the notice issued u/s 153A dated 30.04.2013 is defective, incorrect and shows lack of application of mind and since this a jurisdictional defect, the proceedings initiated and the assessment order passed u/s 153A are invalid and void ab initio.

4. That the ld. CIT(A) has erred in rejecting the retraction filed by the assessee vide his affidavit dated 29.10.2013 in respect of disclosure of Rs. 21.50 crores made by him through his statements recorded u/s 132(4) dated 20.01.2012 and u/s 131(1) of the Act dated 08.05.2012.

4.1 That the ld. CIT(A) has failed to appreciate that disclosure made was not voluntary and was incorrect

as it was obtained forcefully under coercion and without referring to the assessee the seized documents and without allowing him to consult his tax consultant. The disclosure was not voluntary and was incorrect, can be evident from the fact that the assessee was not carrying any business activity in his individual name and Rs. 5 crores was surrendered to make up for other irregularities which cannot be termed as income under real income concept.

4.2 That the ld. CIT(A) has erred in placing reliance on the order of the Hon'ble Delhi High Court dated 15.04.2019 without appreciating the facts and the ratio decidendi therein. Also the Hon'ble Delhi High Court directed the Assessing Officer to make the assessments afresh in accordance with law.

4.3 That the ld. AO as well as the ld. CIT(A) have failed to appreciate that the disclosure obtained was in contravention of the CBDT Circular dated 10.03.2003 which prohibited the officers from seeking any admission of any disclosure during the course of search without any incriminating material.

5. That the ld. CIT(A) has erred in law in sustaining the addition of opening credit balances of Rs. 1,10,00,000/- as on 01.04.2011 mentioned in the seized diary, A/OPJ/03, made by the ld. AO u/s 69A of the Act.

5.1 The ld. CIT(A) has failed to consider that no records /diary was seized for the F.Y 2009-10 i.e. A.Y 2010-11 and therefore, the opening credit balances as on

01.04.2011 in the seized diary A/OPJ/03 ought to have been treated as such and cannot, in any stretch of imagination, be considered to have been received during the impugned assessment year as per the presumption under section 132(4A) read with section 292C of the Act.

5.2 Without prejudice to the above, the ld. CIT(A) has also failed to appreciate that the opening balances represented loans against which interest was being paid and also claimed expenditure in the seized diary and therefore, such loans being pure capital receipts not assessable to tax, ought to have been treated as such and should not have been considered as income as per the presumption u/s 132(4A) read with section 292C of the Act. Also the burden lies entirely on the department to rebut that presumption by establishing that it is undisclosed income of the assessee for the impugned assessment year.

5.3 That the ld. AO failed to raise any query or examine the opening credit balances (loans) even though the assessee repeatedly offered to provide the same by way of written submissions.

5.4 That the ld. CIT(A) has also failed to appreciate that the seized diary, A/OPJ/03 did not contain any money, bullion, jewellery or other valuable article or thing therefore the provisions of section 69A of the Act cannot be applied to the impugned addition.

5.5 That the ld. CIT(A) as well as the ld. AO have failed to appreciate the fact that the assessee, Shri Om Prakash Jakhotia was not carrying out any business activity in his individual name and has never shown any business income in his return of income. There was no evidence found during search that the assessee had himself in his individual capacity taken any loans or carried out any business activity.

6. That the ld. CIT(A) has erred in law in sustaining the addition of Rs. 25,20,000/- on account of kickbacks paid to Dalmia Cement, in the hands of the assessee.

6.1 That the ld. CIT(A) has failed to appreciate that there was no incriminating material found during the course of search which suggested that Rs. 25,20,000/- was paid by the assessee as kick-backs to the Dalmia Cement. He has also failed to appreciate that the statements recorded during search do not themselves constitute incriminating material and no addition can solely be made on the basis of retracted statement unless there is some incriminating material.

6.2 That the ld. CIT(A) as well as the ld. AO have failed to appreciate the fact that the assessee, Shri Om Prakash Jakhotia was not carrying out any business activity in his individual name and has never shown any business income in his return of income and therefore, under no stretch of imagination, Rs. 25,20,000/- can be considered as unaccounted income of the assessee.

6.3 Without prejudice to the above, the amount of alleged kickbacks computed by the ld. AO and then sustained by the ld. CIT(A) is incorrect.

7. That the penalty proceedings initiated by the ld. AO under section 271(1)(c) of the Act were invalid and bad in law and thus ought to have been dropped.

8. That the interest under section 234B of Rs. 4748889 levied for short fall in payment of advance tax for 114 months was legally incorrect as under sub section 2A of this section interest is chargeable from 1st day of April of such assessment year and upto the date of making the settlement application.

9. The appellant craves leave to alter, amend or any other grounds of appeal either before or during the course of hearing."

A.Y: 2009-10-ITA No. 968/DEL/2021:

1. "That the order passed by the Ld. Commissioner of Income Tax (Appeals) (herein after referred to as "the CIT(A)") dated 09.06.2021 is erroneous and bad in law and on facts.

2. That the search conducted u/s 132 of the Act on the assessee was not a valid search since none of the circumstances provided under clauses (a) to (c) of sub-section (1) of section 132 is fulfilled in the case of the assessee.

3. That the ld. CIT(A) has erred in law and on facts in rejecting the ground of the assessee that the notice issued u/s 153A dated 30.04.2013 is defective,

incorrect and shows lack of application of mind and since this a jurisdictional defect, the proceedings initiated and the assessment order passed u/s 153A are invalid and void ab initio.

4. That the ld. CIT(A) has erred in rejecting the retraction filed by the assessee vide his affidavit dated 29.10.2013 in respect of disclosure of Rs. 21.50 crores made by him through his statements recorded u/s 132(4) dated 20.01.2012 and u/s 131(1) of the Act dated 08.05.2012.

4.1 That the ld. CIT(A) has failed to appreciate that disclosure made was not voluntary and was incorrect as it was obtained forcefully under coercion and without referring to the assessee the seized documents and without allowing him to consult his tax consultant. The disclosure was not voluntary and was incorrect, can be evident from the fact that the assessee was not carrying any business activity in his individual name and Rs. 5 crores was surrendered to make up for other irregularities which cannot be termed as income under real income concept.

4.2 That the ld. CIT(A) has erred in placing reliance on the order of the Hon'ble Delhi High Court dated 15.04.2019 without appreciating the facts and the ratio decidendi therein. Also the Hon'ble Delhi High Court directed the Assessing Officer to make the assessments afresh in accordance with law.

4.3 That the ld. AO as well as the ld. CIT(A) have failed to appreciate that the disclosure obtained was in contravention of the CBDT Circular dated 10.03.2003 which prohibited the officers from seeking any admission of any disclosure during the course of search without any incriminating material.

5. That the ld. CIT(A) has erred in law in sustaining the addition of opening credit balances of Rs. 8,00,000/- as on 01.04.2011 mentioned in the seized diary, A/OPJ/03, made by the ld. AO u/s 69A of the Act.

5.1 The ld. CIT(A) has failed to consider that no records /diary was seized for the F.Y 2008-08 i.e. A.Y 2009-10 and therefore, the opening credit balances as on 01.04.2011 in the seized diary A/OPJ/03 ought to have been treated as such and cannot, in any stretch of imagination, be considered to have been received during the impugned assessment year as per the presumption under section 132(4A) read with section 292C of the Act.

5.2 Without prejudice to the above, the ld. CIT(A) has also failed to appreciate that the opening balances represented loans against which interest was being paid and also claimed expenditure in the seized diary and therefore, such loans being pure capital receipts not assessable to tax, ought to have been treated as such and should not have been considered as income as per the presumption u/s 132(4A) read with section 292C of the Act. Also the burden lies entirely on the

department to rebut that presumption by establishing that it is undisclosed income of the assessee for the impugned assessment year.

5.3 That the ld. AO failed to raise any query or examine the opening credit balances (loans) even though the assessee repeatedly offered to provide the same by way of written submissions.

5.4 That the ld. CIT(A) has also failed to appreciate that the seized diary, A/OPJ/03 did not contain any money, bullion, jewellery or other valuable article or thing ,therefore the provisions of section 69A of the Act cannot be applied to the impugned addition.

5.5 That the ld. CIT(A) as well as the ld. AO have failed to appreciate the fact that the assessee, Shri Om Prakash Jakhotia was not carrying out any business activity in his individual name and has never shown any business income in his return of income. There was no evidence found during search that the assesse had himself in his individual capacity taken any loans or carried out any business activity.

6. That the penalty proceedings initiated by the ld. AO under section 271(1)(c) and 271F of the Act were invalid and bad in law and thus ought to have been dropped.

7. That the total tax demand including interest under section 234A and 234B had been raised amounting to Rs. 557080. The ld. AO did give credit for tax and interest paid on the income disclosed before the

Settlement Commission. Interest charged under section 234B was not correct. The same should have been charged only upto the date of filing the settlement application in view of sub section 2A of section 234B of the Act.

8. That the interest under section 234A had been charged at Rs. 201623 stating that no return was filed in response to the notice under section 153A of the Act dated 21.04.2013. It may be mentioned that for filing settlement application under section 245C 1 of the Act, there was no requirement to file the return of income for A.Y. 2009 10. The settlement application filed on 31.10.2013 disclosing income of Rs. 4,07,600 for A.Y. 2009 10 should have been treated as the date of filing of return of income and the interest, if any, should have been charged accordingly.

9. The appellant craves leave to alter, amend or any other grounds of appeal either before or during the course of hearing

3. The ld. counsel, Mr. Ajay Wadhwa, Advocate on behalf of the assessee also filed an application dated 15.11.2021 requesting for admission of additional grounds under Rule 11 of the ITAT Rules, 1963 in respect of the Assessment Year 2009-10 and the Assessment Year 2011-12 which reads as under:

"There are four appeals filled in the case of the captioned assessee before your honours, i.e., for A.Y. 2009-10 to 2012-13. In respect of A.Y. 2012-13, the assessment of

which was passed under section 143(3), a ground of appeal had been taken wherein, it was contended that no return of income had been filed and therefore assessment ought to have been made under section 144 instead of section 143(3) of the Act. This is a jurisdictional issue which goes to the root of the matter and this ground has already been taken in appeal before your honours.

2. ***While perusing the assessment orders for the earlier assessment years, i.e., A.Y. 2009-10 and A.Y. 2011-12, it was found that in these assessment years also, no return of income had been filed by the assessee both under section 139 or under section 153A of the Act. Hence, the assessment ought to have been made under section 153A read with section 144 but instead, the assessment was made under 153A read with section 143(3) of the Act.***
3. ***It is humbly prayed that where no return is filed, no assessment under section 143(3) can conceivably be made. It has necessarily to be made under section 144 of the Act. It also comes out that the assessment order does not reflect the trappings of an ex-parte order under section 144 in as much as, no show cause notice for an ex-parte assessment proceedings, etc. has been given.***
4. ***Your Honour will appreciate that the procedure and consequences of an order under section 143(3) and under section 144 are entirely different and, therefore,***

the assessment orders for A.Y. 2009-10 and A.Y. 2011-12 suffer from the vice of jurisdictional incurable defect.

5. The fact of filing of the returned income having not been filed is manifest from the assessment order and therefore, the legal ground sought to be taken is obvious, patent and apparent from record and therefore, may kindly be allowed in view of the judgment of the Hon'ble Supreme Court in the case of NTPC vs Commissioner of Income Tax, 229 ITR 383 (SC). The additional ground sought to be taken are as under:

"That the Ld. AO as well as ld. CIT(A) have failed to appreciate the legal position that where the assessee has not filed the return of income under any of the provisions of section 139 and also failed to file the return under section 153A, then the provisions of section 144 are to be invoked and the Assessing Officer has to proceed in accordance with the procedure as per section 144 of the Act and to pass the assessment order to the best of his judgment. In such a case, the assessment order passed under section 153A read with section 143(3) of the Act suffers from incurable jurisdictional infirmity particularly when the Act itself provides for completion of assessment under section 153A read with section 144 of the Act."

It is humbly prayed that the above-stated additional ground of appeal be admitted and adjudicated upon by the Hon'ble Tribunal."

4. Similar additional ground has been raised by the assessee for the A.Y 2011-12 vide an application for additional ground dated 15.11.2021 which is not reproduced here for the sake of brevity.

Brief Facts of the case:

5. A search and seizure operation u/s 132(1) of the Income tax Act, 1961 (here in after referred to as "the Act") was carried out on 20.01.2012 at the residential premises of the assessee at 3-6-323, Jakhotia House, Basheerbagh Hyderabad-500029 and also at the business premises of M/s Jakhotia Plastics Private Limited and Jakhotia Polymers Private Limited located at the same address. The assessee is a director in these two companies which are engaged in the manufacturing of High Density Poly Propylene (HDPP) bags/PPE woven sacks bags which are supplied to cement and sugar companies.

6. The assessee derives income from salary, rental income and interest income from two partnership firms namely, M/s Jakhotia Filling Station and M/s Jakhotia Transport Company. This fact has also been confirmed by the Assessing Officer at page 3 of his order for the AY2012-13.The ld. AR of the assessee stated that the assessee does not have any business income nor has he declared any business income in his returns of income in the past. He stated that the assessee is a director, promoter or shareholder or partner in the following group concerns which had their registered offices in the same building of Jakhotia House but at different floors which were not covered in the search:-

i. **Raghuram Synthetics Pvt. Ltd - AAECR5536P**

ii. **Jakhotia Enterprises- Partnership Concern-AAGFJ3074R**

iii. **Jakhotia Polyfibre Pvt Ltd -AABCJ7246D**

iv. **Jakhotia Polysacks Pvt Ltd -AABCJ9725F**

v. **Jakhotia Spinning Mills Pvt Ltd-AACCJ6417B**

vi. **Revathi Synthetics Pvt Ltd-AAACR9639P**

These group companies were also engaged in the manufacturing of PPE woven sacks bags except Jakhotia Enterprises which was engaged in manufacturing of ready mix concrete.

7 From the above searched premises, two diaries namely A/OPJ/03 consisting of 1-317 pages and A/OPJ/01 consisting of 1-58 pages were found and seized. These seized diaries pertained to the F.Y 2011-12 up to the date of search i.e. 20.01.2012 only. The said seized diaries contained various ledger accounts depicting numerous debit and credit entries of cash sales & purchases of raw material and bags, waste sales, loans, commission on sale expenses, sales expenses, advertisement expenses, factory wages, office salary and other cash expenses, investment in property and chit funds etc. On the basis of these seized diaries, various additions were made by the Assessing Officer in the hands of the assessee in the A.Ys 2009-10 to 2012-13 which are discussed in subsequent paras of this order.

8 During the course of search, statement of the assessee was recorded u/s 132(4) of the Act on 20.01.2012 wherein, he made a disclosure of income of Rs. 21.50 crores. He also confirmed the said disclosure in his post search statement recorded u/s 131 of the Act dated 08.05.2012. The break -up of the said disclosure is as under:

(Amt. in Rs. lacs)

Particulars	**F.Y. 2010-11**	**F.Y. 2011-12**	**Total**
Cash credits	708.00	700.00	1,408.00
GP earned on sale of raw material, bags & waste	-	8.00	8.00
Other income (from plastic business) (balancing figure)	-	234.00	234.00
Total	**708.00**	**942.00**	**1,650.00**
Other irregularities (Adhoc)			**500.00**
Total			**2150.00**

9 The above disclosure was retracted by the assessee on 29.10.2013 after 1 year 9 months by filing an affidavit. The reason for such delay in retraction was explained by the Ld. AR to be the fact that the assessee repeatedly requested the Assessing Officer to provide him the seized documents vide letters dated 10.05.2013, 22.08.2013

and 24.09.2013 but the Assessing Officer provided the seized documents only on 04.10.2013 and soon after the receipt and perusal of the seized documents, the assessee filed an retraction affidavit on 29.10.2013.

10 On 29/30.10.2013, the assessee and two companies namely, Jakhotia Plastics Pvt. Ltd. and M/s Jakhotia Polymers Pvt. Ltd. filed settlement applications u/s 245C(1) of the Act before the Hon'ble Income Tax Settlement Commission ("ITSC"). The assessee made a disclosure of additional income of Rs. 1,93,04,200/- for the A.Ys. 2006-07 to 2013-14. The said disclosure was increased to Rs. 7,48,04,200/- during the course of settlement proceedings.

On 26.11.2014, the Hon'ble ITSC passed the settlement order under section 245D(4) of the Act in which, undisclosed income of the assessee was settled at Rs. 7,56,53,170/-.

11 The Department filed a writ petition against the order of the Hon'ble Settlement Commission before the Hon'ble Delhi High Court. Hon'ble High Court quashed the order of the Hon'ble Settlement Commission vide its order dated 15.04.2019 stating that the disclosure was not full and true and remitted the matter to the Assessing Officer directing him to complete the assessments in accordance with law.

12 The Assessing Officer finalized the assessments for the A.Ys 2009-10 to 2011-12 u/s 153A/143(3) of the Act and for the A.Y 2012-13, u/s 143(3) of the Act on 12.09.2019.

13 The Ld. CIT(Appeals), New Delhi allowed partial relief to the assessee vide his orders passed for the A.Ys 2009-10 to 2012-13 on 09.06.2021 and being aggrieved by his order, the assessee is in appeal before us.

14 For the sake of ready reference and convenience, the ld. AR submitted a chart showing year wise amounts of additions disputed in the captioned appeals of the assessee. The chart is reproduced as under:

Addition Chart of Sh. Om Prakash Jakhotia after CIT(A) Order

S.No	Particulars/AY	2009-10	2010-11	2011-12	2012-13	Total
1	**Cash Receipts from undisclosed sources u/s 69A (Substantive Addition)**	800000	11000000	119675000	58060969	**189535969**
2	**Cash Payments from undisclosed sources(Substantive Addition)**			0	0	**0**
3	**Substantive Addition of Unexplained Expenses on account of Kick backs paid to Dalmia Cement in Cash**		2520000	2520000		**5040000**
4	**Substantive Addition of cash paid in lieu of accommodation entry of Share Capital and Share Premium as unexplained cash**			49200000		**49200000**
5	**Unaccounted cash seized during search**				3549500	**3549500**
6	**Unexplained Investment in immovable property (on the basis of AIR details)**				5643300	**5643300**
7	**Unaccounted cash deposits in saving bank account (On the basis of AIR details)**				1317000	**1317000**
8	**Allegation that No ROI was filed**	No ROI was filed		No ROI was filed	No ROI was filed	
	Total Amount of additions	**800000**	**13520000**	**171395000**	**68570769**	**254285769**

Break up of Cash Receipts upheld by CIT(A)	**58060969**
Capital Receipts:	
Fresh Loans	15110465
Chit Funds	4991828
Debtors and Other Advances	20956215
	41058508
Revenue Receipts:	
Profit @ 15% of total cash receipts of Rs. 11,21,83,571/- excluding receipts related to cash loans	17002461
	58060969

15 The ld. AR stated that the amounts mentioned in the above chart are the additions sustained by the Ld. CIT (Appeals), New Delhi and no appeal has been filed by the department against the additions deleted by the CIT (Appeals).

Regarding request to transfer appeals to the ITAT, Hyderabad.

16 Before we take up the grounds of appeals raised by the assessee, we would like to deal with the request made by the ld. CIT-DR vide letter dated 17.11.2021 to transfer the appeals of the assessee to the Income-tax Appellate Tribunal, Hyderabad. The ld. CIT-DR stated that vide order dated 08.12.2020 passed under section 127(2) of the Act, the jurisdiction of the assessee has been transferred to the office of AO, Ward-4(1) Hyderabad from the office of AO, Central Circle-26, New Delhi and, therefore, the appeals should also be heard by the jurisdictional Tribunal i.e. ITAT, Hyderabad. The ld. AR of the assessee strongly objected to the request of transfer of the appeals. He stated that the assessments in respect of all the captioned assessment years have been made by the ACIT, Central Circle-26, New Delhi and the appeals against the assessments were also decided by the CIT (Appeals)-29, New Delhi. He further submitted that in assessments and in appeals before the CIT(A) various decisions of the jurisdictional Hon'ble High Court of Delhi were referred to and relied upon and in fact relief was also given by the CIT(Appeals) following some of the decisions. The assessee further stated that considering that his matter has been adjudicated upon based on various legal issues decided by the jurisdictional Tribunal at Delhi and jurisdictional High Court at Delhi, prejudice will be caused to him if at this stage his matter is

transferred. It was further stated that the assessee's counsel is based in Delhi who has assisted him both in the assessments and in appeal proceedings before the authorities below and, therefore, any dislocation of the matter will also be prejudicial to his interest. The ld. AR also stated that in this matter there has been adjudication by the Income Tax Settlement Commission which was set-aside by the jurisdictional Hon'ble High Court of Delhi and, therefore, in all fairness the matters must be heard by the Tribunal based at Delhi.

The assessee also brought to our knowledge the decision of the **Hon'ble Bombay High Court in the case of MSPL Ltd. v. PCIT [2021] 436 ITR 199 [21-05-2021]** wherein the Hon'ble Court has, inter-alia, held that the Hon'ble President of the Tribunal does not have the power to transfer an appeal from bench in one State/Zone to bench in another State/Zone as no such power is discernible in section 255 of the Act and only if there are multiple benches in one State, the transfer of appeals can take place *inter se* the benches. The ld. AR further stated that the Hon'ble High Court has held that the bench hearing the matter also does not have the power to transfer since the Tribunal has the power to adjudicate on matters in respect of the case before it under rule 4 of the ITAT Rules, 1963 and since the issue of transfer of jurisdiction does not arise in an appeal before it, no such power of transfer can be exercised. He also stated that section 127 of the Act deals with transfer of assessment jurisdiction from one Assessing Officer to another Assessing Officer and the provisions of this section cannot be read to allow transfer of appeals from one Bench of Tribunal to another Bench and that too in a different State/Zone, for the simple reason that it is not a case before any Assessing Officer.

17 We have perused the request letter for transfer filed by the ld. CIT-DR and also the submissions made by the assessee vide his letter dated 25.11.2021 before us.

18 In our considered view, whence the assessments in respect of all the captioned assessment years have been made by the ACIT, Central Circle-26, New Delhi and the appeals against the assessments were also decided by the CIT (Appeals)-29, New Delhi and appeal has been filed before Delhi Benches, then we do not find any justifiable reasons for transfer, even if for the future years assessment years have been transferred to Hyderabad. We do not find any prejudice is caused when all the material record for adjudicating the issues involved are available and it is also not the case of Ld. CIT DR that assessment records are required which may have been transferred to Jurisdictional Assessing Officer at Hyderabad. Apart from that, as of now, we find that **Hon'ble Bombay High Court in the case MSPL Ltd (supra)** has questioned as far as the power of the Hon'ble President of the Tribunal to transfer an appeal from one bench to another bench in different State outside its headquarter is concerned, the Hon'ble High Court at paras 36, 37 and 38 of their order has held as under:

> ***"36. Sub section (1) of section 255 says that the powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President of the Appellate Tribunal from among the members thereof. As per sub section (5), subject to the provisions of the Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure***

of Benches in all matters arising out of the powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings. To complete the narrative, we may also refer to sub section (6) of section 255 which clearly says that a proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code. It also says that the Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

37. From a careful analysis of section 255, more particularly sub section (5) thereof, it is not discernible as to how power of the President to transfer a pending appeal from one Bench to another Bench outside the headquarters in a different State can be said to be traceable to this provision.What sub section (5) says is that the Tribunal shall have power to regular its own procedure and that of its various Benches while exercising its powers or in the discharge of its functions. This includes notifying the places at which the Benches shall hold their sittings e.g., a particular Bench at Mumbai may hold its sittings at, say, Thane for a particular period for administrative reasons. This provision cannot be interpreted in such a broad manner to clothe the President of the Tribunal the jurisdiction to transfer a pending appeal from one

Bench to another Bench outside the headquarters in another State.

38. We have also noticed from sub section (6) that a proceeding before the Tribunal shall be deemed to a judicial proceeding within the meaning of sections 193, 196 and 228 of the Indian Penal Code and it shall also be deemed to be a civil court for the purpose of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898. Therefore, there is no manner of doubt that a proceeding before the Tribunal is a judicial proceeding and for certain limited purpose it is deemed to be a civil court. Question for consideration is when an appeal or a bunch of appeals are being heard by a Bench of the Tribunal in one State, can an order on the administrative side be passed by the President transferring a live appeal from one Bench to another Bench that too in a different State outside the headquarters ? In our opinion, no such power is discernible in section 255 of the Act. Reading or conferring such a power would amount to interference in a judicial proceeding of the Tribunal."

19 Further, as far as the power of the bench to transfer the appeal is concerned, the Hon'ble High Court at paras 40 and 41 has held as follows:

"The Tribunal Rules have been framed in exercise of the powers conferred by sub section (5) of section 255 of the Act to regulate the procedure of the Appellate Tribunal and the procedure of the Benches of the Tribunal. Since the order

dated 20-8-2020 has been passed under rule 4 of the Tribunal Rules, the same is extracted hereunder :-

"Power of Bench.

4. (1) A Bench shall hear and determine such appeals and applications made under the Act as the President may by general or special order direct.

(2) Where there are two or more Benches of the Tribunal working at any headquarters, the President or, in his absence, the Senior Vice-President/Vice-President of the concerned zone or, in his absence, the senior most member of the station present at the headquarters may transfer an appeal or an application from any one of such Benches to any other."

41. From an analysis of rule 4 as extracted above, we find that as per sub rule (1), a Bench shall hear and determine such appeals and applications made under the Act as the President may by general or special order direct. Sub rule (2) says that where there are two or more Benches of the Tribunal working at any headquarters, the President or, in his absence, the senior Vice President or Vice President of the concerned zone or in his absence the senior most member of the station present at the headquarters may transfer an appeal or an application from any one of such Benches to any other. While sub rule (1) empowers the President to direct hearing of appeals by a Bench by a general or special order, sub rule (2) is more specific. It deals with a situation where there are more than two

Benches of the Tribunal at any headquarter; when there are multiple Benches in a headquarter, the President or, in his absence the senior Vice President etc. may transfer an appeal or an application from one of such Benches to any other. Meaning thereby that it is a transfer of an appeal or an application from one Bench to another Bench within the same headquarters. For example, in Mumbai the number of Benches is twelve and in Bangalore, the number of Benches is three. Thus, this provision can be invoked to transfer an appeal from one Bench in Mumbai to another Bench in Mumbai or from one Bench in Bangalore to another Bench in Bangalore. But this provision cannot be invoked to transfer a pending appeal from one Bench under one headquarter to another Bench in a different headquarter."

20 However, independent of the ratio of the above decision, we have already held that on the facts of the present case such a request for transfer cannot be accepted as the Assessing Officer who and CIT(A) of Delhi had jurisdiction over the assessee when orders were passed and all the records for deciding the issues are already on record and no prejudice is caused to any of the parties. Accordingly, we reject the request made by the Ld. CIT DR and proceed to decide the appeals of the assessee.

Request for consolidation by the Ld. CIT-DR.

21 The ld. CIT –DR, during course of the hearing on 07.12.2021 brought to our notice that there are appeals bearing no. 963, 964, 965/Del/2021 and 967 & 979/Del/2021 appearing on the Income-tax portal in respect of M/s Jakhotia Plastics Pvt. Ltd. and M/s Jakhotia Polymers Pvt. Ltd. and since the Assessing Officer has held that the

income belongs to the assessee and not to these companies, the matter is interconnected and, therefore, all the appeals including those of the companies should be consolidated and heard together.

22 After hearing the ld. CIT-DR, we directed the ld. counsel of the assessee to give details of the appeals filed by these companies and ordered vide order-sheet dated 07.12.2021 as under:

> ***"After the arguments made by the Ld. Counsel of the assessee, today during the course of hearing, Ld. CIT DR submitted that the cases of the concerned companies, where assessee is director, are pending before this Tribunal in 'C' Bench, which are not yet fixed . However, Ld. counsel has made his submissions mainly on legal issues and on merits. His case is that additions cannot be made in the hands of the assessee as document did not pertain to him, but to the companies which are mentioned in the seized documents itself. Accordingly, we feel that the cases of the companies needs to be verified if there are any common issues involved. Hearing is thus, adjourned to 10/01/2022, as part-heard. Both parties informed."***

23 The ld. counsel of the assessee filed a letter dated 06.01.2022 stating that no appeal has been filed by the department in respect of M/s Jakhotia Plastics Pvt. Ltd. and M/s Jakhotia Polymers Pvt. Ltd. This, he stated, is evident from the portal of the ITAT, Delhi as well as the ITAT, Hyderabad. The appeals that have been filed by the companies are in respect of the AYs 2010-11 to 2012-13 by M/s Jakhotia Plastics Pvt. Ltd. vide ITA nos. 963, 964 and 965/Del/2021 and in respect of the A.Y 2011-12 and A.Y 2012-13 by M/s Jakhotia Polymers Pvt. Ltd. vide ITA nos. 967 and 979/Del/2021. According to the ld. Counsel, vide these appeals only a single ground has been

taken up wherein additions of Rs. 10,90,000/- for the A.Y 2011-12 and Rs. 20,50,000/- for the A.Y 2012-13 in the case of M/s Jakhotia Polymers Pvt. Ltd. and additions of Rs. 55,000/- for the A.Y 2010-11, Rs.18,00,000/- for the A.Y 2011-12 and Rs. 18,45,000/- for the A.Y 2012-13 in the case of M/s Jakhotia Plastics Pvt. Ltd., have been challenged on the ground that these ad-hoc amounts of income were offered by these companies before the Income Tax Settlement Commission in order to qualify for settlement and as such no real income of the said amounts was earned. According to the ld. Counsel, there was no evidence found in respect of these incomes during the course of search and the income was offered only to qualify technically before the Income Tax Settlement Commission. Since the order of theSettlement Commission has been quashed by the Hon'ble Delhi High Court vide their order dated 15.04.2019, the assessee chose to challenge the addition before the CIT(Appeals) who did not subscribe to the views of the assessee companies. Hence, against those additions the assessee companies have come in appeal before the ITAT and the said additions are completely unconnected from the issues in appeal in the case of assessee, Sh. Om Prakash Jakhotia.

24 We have perused the grounds of appeal qua M/s Jakhotia Plastics Pvt. Ltd. and M/s Jakhotia Polymers Pvt. Ltd. before the Tribunal and reproduce below one of the common ground taken in the case of M/s Jakhotia Plastics Pvt. Ltd. for the A.Y 2012-13:

> ***"3. That on the facts and in the circumstances of the case, the Ld. CIT (A) was not justified in upholding addition of Rs. 18,50,000/- as made by the Ld. AO on account of it being additional income offered before the Hon'ble Income Tax***

Settlement Commission (hereinafter referred to as "the Hon'ble ITSC") on adhoc basis.

3.1 That the Ld. AO as well as the Ld. CIT (A) did not consider that there was no incriminating material found during the course of search that suggested that the assessee company had earned the said additional income during the impugned assessment year.

3.2 That the Ld. AO as well as the Ld. CIT (A) failed to provide any corroborative evidence to establish the fact that the said income was earned by the assessee company during the impugned year and hence is the additional income of the assessee company.

3.3 That the Ld. AO as well as the Ld. CIT (A) did not appreciate the fact that this amount was offered by the assessee company before the Hon'ble ITSC in order to be eligible for going through the option of tax settlement and to avail the consequent relief thereon.

3.4 That the Ld. CIT (A) has wrongly relied upon the decision of the Hon'ble Guj. HC in the case of Vikas Shipping Corporation v. UOI, 86 taxmann.com 68 (Gujarat), where the facts and circumstances of the case are inconsistent and are at variance with the facts of the case of the assessee company."

25 It is quite clear that the grounds of appeal are completely different and challenge the ad-hoc amount of income offered before the Settlement Commission to qualify for admission and, therefore, quite clearly this is not a connected issue with any of the issues being

challenged by the assessee before us. Therefore, there is no need for consolidation of the appeals particularly since no appeal has been filed by the department in respect of the companies or in respect of the assessee till date.

26 We now proceed to decide the issue on merits in respect of the captioned appeals. The ld. counsel of the assessee after narrating the relevant facts and the background of the case, requested that if the appeal for the Assessment Year 2012-13 is taken into consideration, i.e., ITA No.971/DEL/2021, the same will cover most of the issues in all the appeals. The ld. CIT-DR did not raise any objection to the same. We will first take up the legal issue that the assessment orders passed under section 153A/143(3) and 143(3) are bad in law and illegal.

27 The ld. AR pressed into service a legal and jurisdictional issue raised in his ground no. 2 permeating into the AY 2012-13. He challenged the validity of the assessment order passed u/s 143(3) of the Act for the said assessment year in absence of any return of income having been filed u/s 139(1) or in response to notice u/s 142(1) of the Act. The ld. AR argued that since no return of income was filed, the assessment order ought to have been passed u/s 144 of the Act instead of section 143(3).

28 The ld. AR also raised this legal issue for the A.Y 2009-10 and A.Y 2011-12 vide his application seeking admission of additional grounds dated 15.11.2021. He stated that in these two assessment years also, no return of income u/s 139 as well as u/s 153A was filed by the assessee, therefore, the assessment orders should have been

passed u/s 153A read with section 144 of the Act instead of section 153A read with section 143(3) of the Act. The ld. AR contended that the fact of return of the income having not been filed is manifest from the assessment orders of the A.Ys 2009-10 and A.Y 2011-12 and where no return is filed, no assessment under section 143(3) can conceivably be made. The assessment in such cases has necessarily to be made under section 144 of the Act and, therefore, the assessment orders for A.Y. 2009-10 and A.Y. 2011-12 suffer from the vice of jurisdictional incurable defect. The legal additional ground taken is obvious, patent and apparent from record and therefore, may kindly be allowed in view of the judgment of the **Hon'ble Supreme Court in the case of NTPC vs Commissioner of Income Tax, 229 ITR 383 (SC).**

29 The ld. CIT-DR, on the other hand, strongly objected to the admission of the additional ground by stating that the ld. AR has never raised this legal issue before the Assessing Officer and also before the CIT(Appeals). This issued was raised before the CIT(Appeals) only in the A.Y 2012-13 who adjudicated this ground at para 9.1 of his order.

30 On this legal jurisdictional issue, the ld. AR filed before us a separate synopsis and case law paper book-II on 06.12.2021 and also made his oral arguments which are briefly discussed as under:

30.1 The ld. AR contended that admittedly, no ROI either originally u/s 139(1) or in response to the notice u/s 142(1) was filed for A.Y 2012-13. Similarly, no return of income u/s 139 as well as u/s 153A

was filed for the A.Y 2009-10 and A.Y 2011-12. This fact is evident from the very first and last page of the assessment orders. Return of income was filed by the assessee for the A.Y 2010-11 only.

30.2 Since, no ROI was filed by the assessee, consequently no notice u/s 143(2) was issued by the Assessing Officer for the A.Y 2012-13 which was the year of search and for which assessment was to be completed as per the normal provisions u/s 143(3) or 144 of the Act.

30.3 For making an assessment under section 143(3), the filing of a return and issuance of notice u/s 143(2) are mandatory as is manifest in the section 143(3) of the Act.

30.4 The Income Tax Act, 1961 provides a separate section 144, which mandates a best judgement assessment or Ex parte assessment. As per section 144 a best judgment assessment has to be made if no return of income has been filed under section 139(1), 139(4) and 139(5) or no return of income is filed in pursuance to notice under section 142(1) or directions issued under section 142(2A) are not complied with or the information asked for under section 143(2) or under section 142(1) is not furnished to the Assessing Officer. If any of the aforesaid conditions are not fulfilled, the assessment has to be made under section 144 as the word used in the said section is 'Shall' for completing the assessment.

30.5 Section 292B of the Act, does not come to the aid of the Assessing Officer since the mistake, defect or omission is not purely

technical but is substantive and affects the validity of the assessment made in the case of the assessee.

30.6 The following portions of the assessment order will show that there was a conscious application of mind by the Assessing Officer in making the assessment under section 143(3) and there was nothing to even remotely suggest that he had pressed into service the provisions of section 144 in order to make a best judgment assessment:

i. Paras 1 and 1.2 at page nos. 1 and 2 of the assessment order capture the fact that no return of income was filed in response to section 139 as well as in response to section 142(1);

ii. Para 10 at page no. 25 of the assessment order shows that the assessee extended full cooperation to the Assessing Officer in furnishing whatever replies he sought during the assessment proceedings;

iii. Para 12 at page nos. 34 to 37 and para 13 at page nos. 37 to 39 of the assessment order reflect the replies given to the show cause notice by the assessee in due compliance to the questionnaire issued by the Assessing Officer;

iv. Page no. 40 is the beginning of the issue wise discussion by the Assessing Officer on the various documents found during the course of search. Nowhere does the Assessing Officer mention making of a best judgment assessment;

v. At page no. 56, specific additions are made and there is again no whisper of a best judgment assessment;

vi. An important fact is that the show cause notice dated 23.08.2019 issued by the ld. Assessing Officer before

making the assessment in respect of the all the assessment years, states that the return of income has been perused and that from the same the various explanations are required. The relevant page no. of the said show cause notice dated 23.08.2019 is enclosed at page no. 425 of the common PB;

vii. Similarly, in question no. 6.1 of the same show cause notice enclosed at page no. 432 of the common PB, the Assessing Officer states that on verification of assessees's return of income it is seen that he has not surrendered cash found during the course of search proceedings.

Hence from the aforesaid, it is clear that the assessment proceedings suffer from an inherent lacuna resulting in a jurisdictional defect which is incurable in as much as the assessment order has been passed under section 143(3) through conscious application of mind.

31 The Ld. AR contended that provisions of section 143(3) and 144 are not pari-materia; both the assessments are distinct in nature and have distinct consequences which are briefly discussed below:

i. Section 144 results in a best judgment assessment which is distinct from an assessment under section 143(3) which is after perusal of return of income and seeking evidences in respect of the incomes and expenditure disclosed in such return of income. A best judgment assessment is made without the benefit of return of income and the Assessing Officer can resort to a rejection of books of account and estimation of income.

ii. In a best judgment assessment, the interest is calculated under section 234A of the Act till the date of completion of

the assessment whereas in assessment under section 143(3), the terminal date of calculating interest is the date of filing of return. Hence the consequence of a best judgment assessment is pecuniary in nature and in a penal as well.

iii. Non-filing of return of income results in penalty u/s 271F and prosecution/s 276CC of the Act.

iv. In the case of a best judgment assessment, as per the provision of section 142(3), there is no requirement of any opportunity of being heard to the assessee in respect of the material gathered by the Assessing Officer.

v. As per section 184 of the Act, if the assessment is made under section 144, the firm shall not be allowed deduction in respect of interest, salary, commission or remuneration paid to the partners.

vi. As per section 124(3)(b) of the Act, no person shall be entitled to call in question the jurisdiction of the Assessing Officer in a case where no return has been filed, after the expiry of time allowed by the notice 142(1) or by the notice issued under the first proviso to section 144, whichever is earlier.

vii. Under section 246A of the Act, separate appeal is provided for the assessment made under section 144 of the Act.

viii. As per section 139(8)(a) of the Act, interest payable is till the date of assessment and not till the date of filing of return.

From the above, it may be seen that it cannot be left to the choice of the Assessing Officer to make an assessment under section 143(3) or

under section 144 of the Act. If the return is not filed, he has no choice but to make an assessment under section 144 of the Act.

31.1 The ld. AR further placed reliance on the judgement of the Hon'ble Supreme Court in the case **CIT v Segu Buchiah Setty [1970] 77 ITR 539 (SC)[23-04-1970]** which places an obligation on the Assessing officer to pass a best judgment assessment order u/s 23(4) of the Income Tax Act, 1922 in case of failure of the assessee to file the return of income. He also relied on the decision of the **Hon'ble Calcutta High Court in the case of Maya Debi Bansal v. CIT [1979] 117 ITR 125** which held that the provisions of sections 143 and 144 cannot be said to be in pari materia and the provisions for filing the return in the proper form are statutory and mandatory in nature. If no return in the proper form having been filed, the assessment could not have been made under section 143(3). Reliance was also placed on the following decisions:

a. **Gulab Badgujar (HUF) v. Income Tax Officer [2019] 179 ITD 807 (Pune - Trib.)[06-09-2019];**
b. **Prabhat Mills Stores Co. Ltd. [1966] 59 ITR 197 (Calcutta HC)[21-01-1964];**
c. **CIT v Laxminarain Badridas [1937] 5 ITR 170 (Privy Council) [19-02-1937];**
d. **S. Kumar Enterprises (Synfabs) Ltd. v. JCIT [2005] 4 SOT 412 (MUM Trib.);**
e. **Des Raj Nagpal [2015] 170 TTJ 37 (Amritsar - Trib.) (UO)[23-03-2015];**
f. **The Hon'ble Agra ITAT in the case of Meenakshi Devi v. Asstt. CIT in ITA Nos. 96/Agra/2004 & 29/Agra/2005; order dated 28.02.2005;**

g. **The Hon'ble Chandigarh ITAT in the case of LAL CHAND & CO. [1986] 24 Taxman 228 (Chandigarh) (Mag.)[31-08-1985];**

h. **The Hon'ble Delhi ITAT in the case of Flovel Energy Pvt. Ltd. v. ACIT Devi v. Asstt. CIT in ITA No 6485/DEL/2019; order dated 29.11.2019.**

31.2 The Ld. AR further stated that in respect of the A.Y 2009-10 and the A.Y 2011-12, the assessment orders have been passed u/s 153A read with section 143(3) even though undisputedly no returns of income originally u/s 139 as well as u/s 153A were filed in these A.Ys. Therefore, the assessments should have been made u/s 153A read with section 144. The ld. AR placed reliance on the decisions quoted above as well the following decisions wherein it has been held that the section 144 is the only provision where the Assessing Officer could make proceeded to have a best judgment assessment upon the failure of the assessee to file a return even in the case of the search assessments u/s 153A.

a. **Commissioner of Income-tax, Chennai v. T. Rangroopchand Chordia [2016] 241 Taxman 221 (Madras HC);**

b. **Dr. K.M. Mehaboob v. DCIT [2012] 26 taxmann.com 54 (Kerala HC);**

c. **Ashokji Chanduji Thakor v. PCIT [2021] 130 taxmann.com 130 (Guj. HC)**

32 The ld. AR further submitted that section 292B of the Act does not come to the rescue if substantively the AO has proceeded to make

assessment u/s 143(3). He stated that by no stretch of logic section 292B can be pressed into service to turn the fundamental illegality into 'a mistake, defect or omission' which section 292B seeks to cover. In support of this proposition, the ld. AR placed reliance on the following decisions to support his contention:

a. **Gulab Badgujar (HUF) v. Income Tax Officer [2019] 179 ITD 807 (Pune - Trib.)[06-09-2019];**
b. **S. Kumar Enterprises (Synfabs) Ltd. v. JCIT [2005] 4 SOT 412 (MUM Trib.)**
c. **CIT v. Norton Motors [2005] 275 ITR 595 (Punjab & Haryana HC)**
d. **Shl (India) Private Limited v. DCIT [2021] 438 ITR 317 (Bombay HC)**

33 It was also contended that the object and reasons published in the **Gazette dated 9-5-1973 for Bill No. 34 of 1973, it is stated at clause 80** that section 292Bseeks to provide against purely 'technical objections', without substance, coming in the way of the validity of assessment proceedings, etc.

34 The ld. CIT-DR on the other hand vehemently objected to the contention raised by the ld. AR. She relied upon the reasoning given by the CIT(Appeals) at para 9.1, page no. 81 of his order whereby he dismissed the legal issue raised by the assessee by holding that since no return of income was filed for the A.Y 2012-13, therefore, there was no requirement to issue notice under section 143(2) and therefore the assessment has been validly made under section 143(3).

35 The ld. CIT-DR also relied upon the decision of the **Hon'ble Delhi Court in the case of Ashok Chaddha [2011] 337 ITR 399 (Delhi HC)** for the legal proposition that issue of notice under section 143(2) is not mandatory for finalization of assessment under section 153A of the Act.

Decision

36 We have heard the arguments of both the parties and also considered their written submissions and material placed on record before us which was referred to at the time of hearing.

37 In so far as admission of additional grounds as raised by the assessee for the A.Y 2009-10 and AY 2011-12, are concerned, we find that same are purely legal in nature and are arising out of facts appearing in the impugned assessment orders for the A.Y 2009-10 and AY 2011-12. The Assessing Officer at the very firstand second page of his order has stated that no return of income has been filed by the assessee till the date of the assessment order and has proceeded to assess him under section 143(3) of the Act. Thus, the legal grounds do not require any investigation and the same are being admitted for the purpose of our adjudication.

38 The relevant facts qua this legal and jurisdictional issue raised have already been discussed in detail in the earlier paras and also the detailed submissions made by the parties and the judgments relied upon during the course of hearing have been considered by us.

39 The main argument of the assessee is that the assessment made by the Assessing Officer under section 153A r.w.s. 143(3) ought to be quashed since no return of income under section 139(1)/ 153A was filed by the assessee and, therefore, the assessment could only be made under section 144 of the Act.

40 The Ld. CIT-DR vehemently argued that this is merely a technical defect and is protected by the provisions of section 292B of the Act. According to her, this could be a typographical error or an inadvertent error and no cognizance of the same should be given. The essence of the order needs to be seen which very clearly mentions that it is consequent to no return having been filed by the assessee. The Assessing Officer at paras 1 and 1.2 at page nos. 1 and 2 of his order very clearly mentioned that no return of income has been field by the assessee and in fact at para 18, page no. 56 of his order, he initiated penalty proceedings for non-filing of returns.

41 It is also a fact that nowhere in the assessment order has the Assessing Officer mentioned the provisions of section 144 of the Act. In fact what very clearly goes against the Assessing Officer is the fact that vide his show cause notice dated 23.08.2019which is enclosed at page no. 425 of the common PB, he explicitly stated that he had perused the returns of income and that he was seeking information based on the same. The Assessing Officer, it appears while proceeding with the matter was of the belief that the returns of income have been filed and proceeded to examine the income based on that presumption. He sought information on many occasions based on the seized documents and did not refer to the provisions of section 144 anywhere in the

order. He even mentioned in his order that the assessee co-operated in the assessment proceedings and furnished the replies to every notice issued by him. It is trite that the provisions of section 144 are distinct from section 143(3) of the Act and have separate consequences as highlighted in the submissions of the Ld. Counsel in foregoing para 31. These are two separate independent forms of assessments. Assessment under section 143(3) is made consequent to notice under section 143(2) issued based on the return filed by the assessee. In this case, no return of income has been field admittedly and, therefore, no notice under section 143(2) was issued for examining the return.

42 A bare perusal of the section 144 of the Act shows that where no return has been filed under section 139(1) or section 139(4), 139(5) and consequent to notice under section 142(1), the assessment shall be made under section 144 and would be termed as best judgment assessment.

43 The reliance on the judgment of the Hon'ble Supreme Court in the case of **CIT v Segu Buchiah Setty [1970] 77 ITR 539 [23-04-1970]** is very pertinent. And the relevant portion is reproduced as under:

> *"The clear import of section 23(4) is that on committing any one of the defaults mentioned therein* ***the Income-tax Officer is bound to make the assessment to the best of his judgment****. In other words, if a person fails to make the return required by a notice under section 22(2) and* ***he has further not made a return or a revised return under sub-section (3) of the same section, the Income-tax Officer must make an assessment under this provision."***

44 The same view has been expressed by the various High Courts and Tribunals relied upon by the ld. Counsel in the following decisions:

a. **Maya Debi Bansal v. CIT [1979] 117 ITR 125 (Calcutta HC);**
b. **Prabhat Mills Stores Co. Ltd. [1966] 59 ITR 197 (Calcutta)[21-01-1964];**
c. **CIT v Laxminarain Badridas [1937] 5 ITR 170 (Privy Council)[19-02-1937]**
d. **Gulab Badgujar (HUF) v. Income Tax Officer [2019] 179 ITD 807 (Pune - Trib.)**
e. **Commissioner of Income-tax, Chennai v. T. Rangroopchand Chordia [2016] 241 Taxman 221 (Madras HC)**
f. **Dr. K.M. Mehaboob v. DCIT [2012] 26 taxmann.com 54 (Kerala HC)**
g. **S. Kumar Enterprises (Synfabs) Ltd. v. JCIT [2005] 4 SOT 412 (MUM)**
h. **Des Raj Nagpal [2015] 170 TTJ 37 (Amritsar - Trib.) (UO)[23-03-2015]**
i. **Meenakshi Devi v. Asstt. CIT in ITA Nos. 96/Agra/2004 & 29/Agra/2005; order dated 28.02.2005 (Agra ITAT)**
j. **Mohan Lal Balai [2001] 73 TTJ 876 (Jodhpur Trib.)[15-10-2001]**
k. **LAL CHAND & CO. [1986] 24 Taxman 228 (Chandigarh) (Mag.)[31-08-1985]**

45 It is also trite that the consequences of assessments under section 143(3) and 144 are distinct and different. Assessment under section 143(3) is made after perusal of return of income and seeking evidences in respect of the incomes and expenditure disclosed in such return of income. A best judgment assessment u/s 144 is made without the benefit of return of income and the Assessing Officer can resort to a rejection of books of account and estimation of income. In a best judgement assessment, the interest is calculated under section 234A of the Act till the date of completion of the assessment whereas in assessment under section 143(3), the terminal date of calculating interest is the date of filing of return. Under section 246A of the Act, separate appeal is provided for the assessment made under section 144 of the Act. In the case of a best judgment assessment, as per the provision of section 142(3), there is no requirement of any opportunity of being heard to the assessee in respect of the material gathered by the Assessing Officer whereas in an assessment under section 143(3) whatever evidence is being gathered has necessarily to be confronted. Thus, very different consequences flow from an assessment under section 144 of the Act.

46 It quite clearly comes out that the mention of nature of the order as section 153A r.w.s. 143(3) was not a technical mistake or an error which can be cured by resorting to the provisions of section 292B of the Act. The Assessing Officer even though recording that no return had been filed and no notice under section 143(2) had been issued, continued to proceed as if he was making an assessment under section 143(3) of the Act. Hence, the order made under section 153A/ 143(3) is not legally tenable and ought to have been made under

section 144 of the Act. There is a clear distinction between the two forms of orders i.e. section 143(3) and section 144 and therefore, in the present case, the orders ought to have been passed under section 144 of the Act. Hence the orders so passed by the Assessing Officer u/s 143(3) for the A.Y 2012-13 and under section 153A read with section 143(3) for the A.Ys 2011-12 and 2009-10 suffer from an incurable jurisdictional defect and cannot be upheld. On this count alone the assessment orders in respect of A.Ys 2012-13, 2011-12 and 2009-10 do not survive and are liable to be quashed.

47 Though we are of the opinion that the assessment orders for the AY's 2009-10, 2011-12 and 2012-13 are invalid and we are not required to go into the merits of the case. However, in respect of the AY 2010-11, the return of income was filed and the assessment was correctly framed under section 153A read with section 143(3) of the Act. Therefore, we are proceeding to adjudicate the other issue raised by the assessee which is common to all the assessment years and will have a bearing on the AY 2010-11.

The seized diaries and the income arising therefrom do not belong to the assessee.

48 Another legal issue argued before us is that the seized material A/OPJ/03 and A/OPJ/01 on the basis of which additions have been made in the hands of the assessee does not belong to him and the entries therein do not pertain to him and therefore, the income if at all, cannot be assessed in his hands. This legal issue is common for all the appeals for the A.Ys 2009-10 to 2012-13 and has been raised by the assessee vide ground no. 4.3 for the AY 2012-13, ground nos. 6.2 &

7.1 for the A.Y 2011-12, ground no. 5.5 for the A.Y 2010-11 and the ground 5.5 for the A.Y 2009-10.

49 Before us the ld. AR had stated that search and seizure operation was carried out on the assessee at his residential premises at 3-6-323, Jakhotia House, Basheer bagh Hyderabad-500029. This premise was also the registered office of M/s Jakhotia Plastics Private Limited (AAACJ5070A) and M/s Jakhotia Polymers Private Limited (AABCJ6660P) which were also covered in the search.

50 He also brought on record that, besides above-mentioned two companies, following are the other companies of the assessee, Shri Om Prakash Jakhotia in which he was a promoter and director or director on board or partner:

i. Raghuram Synthetics Pvt. Ltd - AAECR5536P
ii. Jakhotia Enterprises- Partnership Concern-AAGFJ3074R
iii. Jakhotia Polyfibre Pvt. Ltd -AABCJ7246D
iv. Jakhotia Polysacks Pvt. Ltd -AABCJ9725F
v. Jakhotia Spinning Mills Pvt. Ltd-AACCJ6417B
vi. Revathi Synthetics Pvt. Ltd-AAACR9639P

He submitted that all these companies had their registered offices in the same building of Jakhotia House but at different floors which were not covered in the search. He further stated that all the group companies were engaged in the manufacturing of PPE woven sacks bags except Jakhotia Enterprises which was engaged in manufacturing of ready mix concrete.

51 It is matter of record that from the searched premises, a seized diary/book namely A/OPJ/03 containing pages 1-317 was found and

seized which is enclosed at page 1-347 of the common paper book. The said seized diary contained various ledger accounts depicting numerous debit and credit entries of cash sales & purchases of raw material and bags, waste sales, loans, commission on sale expenses, sales expenses, advertisement expenses, factory wages, office salary and other cash expenses, investment in property and chit funds etc. It has been contended that the ledger accounts pertained to the above group companies and contained transactions for the financial year 2011-12 (A.Y 2012-13) only, relating to their business and since, the said seized diary was found from the business premises of M/s Jakhotia Plastics Private Limited and M/s Jakhotia Polymers Private Limited, therefore it can be said to be belonging to the these group companies and 6 other group companies operating out of the registered offices located in the same building and not to the assessee.

52 Ld. AR took us through various pages of the seized diary A/OPJ/03 which is enclosed at 1-347 pages of the common PB in order to establish that the income appearing in the seized diaries i.e. A/OPJ/03 and A/OPJ/01, if at all belonged to the various group companies discussed above.

i. The assessee in his statement recorded u/s 132(4) dated 20.01.2012 at page 349 of the common PB, clearly stated that he has five companies namely, Jakhotia Polymers Pvt. Ltd., Jakhotia Polysacks Pvt. Ltd., Jakhotia Polyfibres Pvt. Ltd., Raghuram Synthetics Pvt. Ltd. and Jakhotia Plastics Pvt. Ltd. which manufacture Polymers and at page 350 of the common PB, he stated the names of the main clients. It

is submitted that the main clients are the clients of the companies and not of the assessee.

ii. The assessee further in his statement recorded u/s 131 of the Act on 08.05.2012 at page 357 of the common PB claimed that he is a director in the following group companies:

1. Jakhotia Plastics Pvt. Ltd.
2. Jakhotia Polymers Pvt. Ltd.
3. Vardivinayak Properties Pvt. Ltd.
4. Revathi Synthetics Pvt. Ltd.

He, on the same page in response to the question no. 2 stated that Jakhotia Plastics Pvt. Ltd., Jakhotia Polymers Pvt. Ltd. and Revathi Synthetics Pvt. Ltd. are engaged in the manufacturing of PP bags whereas Varad Vinayak Properties Pvt. Ltd. is engaged in the business of Real Estate. The entire seized diary A/OPJ/03 enclosed at page no. 1-347 of the common paper book will show that the transactions are of PP bags and partially of Real Estate and therefore, belonged to the above group companies.

iii. The assessee himself has no registration under VAT, PF, ESI to do any business and it is only the above group companies who are undertaking business transactions.

iv. The assessee was having only salary income, rental income and income from other sources. This fact is also mentioned at page no. 3 of the assessment order.

v. The Raw Material Sales ledger is enclosed at page no. 177 to 181 of the common PB and the ledger clearly shows sales of PPE bags. At Page 179 of the common PB, the names of the

companies i.e. Jakhotia Plastics and Jakhotia Polymers, clearly appear. The codes mentioned in Raw Material sales ledger like 12N, 30SG, AM120N, ADL are all PPE Granules raw materials grades. PPE Granules are major part of the raw material being used by the group companies for manufacturing of PPE bags.

vi. The turnover of the companies i.e. Jakhotia Plastics, Pvt. Ltd and Jakhotia Polymers Pvt. Ltd. as per their audited books of account is Rs. 47,45,80,079/- and Rs. 13,97,74,815/-respectively for the year ending 31st March, 2012. There is no turnover of any such item in the hands of the assessee.

vii. At page 185 of the common PB seized ledger of Bags Sales is enclosed which shows that bags have been sold to the tune of Rs. 12,82,050/-. The names of the companies Jakhotia Plastics and Jakhotia Polymers are clearly mentioned which shows that Bags sales do not relate to the assessee. Similarly, from the prima-facie reading of the ledger of sales made to Ramu reflected at page 147 to 149 of the common PB, the names of Jakhotia Plastics, Jakhotia Polymers, Jakhotia Polysacks and Raghuram Synthetics clearly come out. Similarly, in the seized ledger of Shri Krishna Plastic, the amount mentioned is Rs. 1,17,26,616/- which is enclosed at page 287 of the common PB and it refers to bill numbers 321,323,325,326, 344, 345, 346 etc. These bills were raised by the companies M/s Jakhotia Plastics Private Limited, in respect of which cash was received. These are

purchase bills booked in the company against which cash was received.

viii. Seized Ledger of Servo enclosed at page no. 173 to 174 of the common PB: Rs.1,05,60,000/- is a raw material added with PPE Granules for making PPE bags. This is a master batch part of the raw material and clearly belongs to the company.

ix. Waste sales ledger enclosed at page no. 190 of the common PB shows the names of Jakhotia Plastics and Jakhotia Polymers.

x. On the expenditure side of the amounts i.e. factory wages, office salary, interest on raw material, commission on sales, sales expenses etc. are related to the businesses of the group companies and not the individual assessee. Similarly at page 207 of the common PB, the donation has been paid in cash which clearly shows payment made by Jakhotia Plastics and Jakhotia Polymers.

xi. Similarly on page 221 of the common PB is an advertisement ledger which shows the name of the Raghuram, Polyfibre and Jakhotia Polysacks. Seized Ledger of consultancy charges at page no. 227 of the common PB also shows names of Raghuram, Polyfibre and Polysacks. Ledger of Rates & Taxes at page 245 of the common PB shows the names of RSPL (i.e. Raghuram Synthetics Private Limited) and Jakhotia Plastics and Jakhotia Polymers. Suspense account at page 247 of the common PB also shows the names of Jakhotia Plastics and Jakhotia Polymers.

xii. At page 280-281 of loans ledger shows receipts and payments pertaining to Jakhotia Spinning Mills Private Limited and Jakhotia Enterprises.

xiii. Similarly at page 309 of the common PB in the account of Subham Plast which reflects the name of Jakhotia Plastics, Jakhotia Fibre and Jakhotia Polysacks. At page 324 of the common PB is the ledger of Balkrishna Contractor which shows the name of Jakhotia Plastics and Jakhotia Polymers.

xiv. Page 328 of the common PB refers to land purchase ledger which is pertaining to Jakhotia Spinning Mills Private Limited.

xv. Then the ledgers of the companies; Jakhotia Polysacks Private Limited at page no. 75 to 77, Jakhotia Polyfibre Private Limited at page no. 82-85, Ragughram Synthetics Private Limited at page no. 90-92, Jakhotia Enterprises, a partnership firm at page no. 313 and Jakhotia Spinning Mills Private Limited at page 335 of the common PB, found in the seized diary, A/OPJ/03 which show large amounts relating to the companies/firm itself.

xvi. On perusal of the ledgers contained in the seized diary, A/OPJ/03, it may be seen that before every entry there is a notation of 'o' and 'f' where 'o' refers to office and 'f' refers to factory. Quite clearly, factory and office belonged to the group companies because the assessee, Shri Om Prakash Jakhotia does not have any individual office.

xvii. Ld. AR also submitted that the handwriting of the entries contained in the seized diary, A/OPJ/03, is not of assesse

which also shows that the assessee was not maintaining these accounts.

xviii. He also submitted that the expenditure etc. in the seized diary was fuelled out of the receipts, loans etc. He stated that the loans reflected in the seized diaries had been used for the purpose of business which also clearly shows that these related to the group companies and not to the assessee individually.

53 The ld. AR also drew our attention to an important observation at page 38 of the common PB. In the said ledger, there is an entry of Rs. 15 lakhs which represents cash loan given by Om Prakash Jakhotia. This shows that Mr. Om Prakash Jakhotia had given a loan of Rs. 15 lakhs. Ld. AR argued that if these were the personal books of Shri Om Prakash Jakhotia, how could he give loan to himself and then charge interest. The loan account of Om Prakash Jakhotia is at page 38 of the common paperbook and interest paid to him of Rs. 1,80,000/- is reflected at page 235 of the common paperbook in the Interest Ledger Account . This very clearly shows that these were the books of the companies or other entities and not of Shri Om Prakash Jakhotia.

54 The ld. AR also placed a heavy reliance on the judgement of the **Hon'ble Supreme Court in the case of Income Tax Officer v. Ch. Atchaiah [1996] 218 ITR 239 (SC)** wherein the Hon'ble Court has unequivocally held the following proposition of law:

i. The Assessing Officer can and he must tax the right person and the right person alone. Right person is the person who is liable to be taxed according to law;

ii. Section 4(1) of the Income-tax Act, 1961 speaks of levy of Income-tax on total income of every person which necessarily means a person who is liable to pay Income-tax in accordance with law;

iii. Where parliament wanted to provide an option or a discretion to the Assessing Officer to assess the person of its choice, it has provided so expressly. Section 183 provides that in the case of an unregistered firm, it is open to the Assessing Officer to treat it, and make an assessment on it, as if it were a registered firm;

iv. Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person;

v. The Assessing Officer cannot assess the wrong person merely because the course is more beneficial to the revenue.

55 The ld. AR also placed reliance on the recent decision of **the Hyderabad ITAT in the case of JCIT v Narayana Reddy Vakati [2021] 88 ITR (T) 23 dated 21.04.2021** which is on very similar facts. The ld. AR argued that in this case also the assessee being the Managing Director of the company disclosed income in his statement recorded under section 132(4) in his individual name. The Hon'ble Tribunal held that the income was that of the company and the director was not carrying out any business individually. Therefore, the addition made in the hands of the individual assessee was deleted following the judgment of **the Hon'ble Supreme Court in the case of ITO v. CH. Atchaiah (supra)**.

Following other cases are also relied on by the ld. AR for the proposition that income must be taxed in the hands of the person who has earned it:

i. **The Hon'ble Special Bench of Delhi ITAT in the case of Pradeep Agencies v. ITO [2007] 18 SOT 12 (DELHI)(SB);**
ii. **The Hon'ble Mumbai ITAT in the case of Ashwin C Jariwala Pradeep v. ITO [2017] 164 ITD 255 (Mumbai) dated 02.09.2015;**
iii. **The Hon'ble Madras High Court in the case of Murugesa Naicker Mansion [1999] 104 Taxman 563 (Madras HC);**
iv. **The Hon'ble Mumbai High Court in the case of CIT v SMSL-UANRCL (JV) [2015] 372 ITR 429 (Bombay HC);**
v. **The Hon'ble Madras High Court in the case of CIT v. Abdul Rasheed [1999] 240 ITR 402 (Madras HC);**
vi. **The Hon'ble Kerala High Court in the case of Neela Productions [1997] 223 ITR 504 (Kerala HC);**
vii. **The Hon'ble Delhi ITAT in the case of B.D. Gupta & Sons v. ITO [2015] 70 SOT 16 (DELHI Trib.);**

56 The ld. CIT-DR objected to the contentions raised by the ld. AR by stating that this legal issue i.e. the seized documents do not belong to the assessee, has not been raised by him before the lower authorities nor did he raise it before the Hon'ble Settlement Commission.

57 The ld. CIT-DR also submitted that the assessee in his statement u/s 132(4) of the Act dated 20.01.2012 and also in his post search statement u/s 131 of the Act dated 08.05.2012 made a voluntary disclosure of undisclosed income of Rs. 21.50 crores on the basis of

the seized documents. She also stated that retraction was filed by the assessee after 1 year and 9 months which clearly indicates that it was an afterthought and the same was also rejected by the Hon'ble Delhi High Court in the assessee's own case while disposing off the W.P (C) 11859/2016 dated 15.04.2019.

58 The ld. CIT-DR relied upon the order of the Ld. CIT (Appeals) and stated that the Ld. CIT (Appeals) has passed the order and upheld the additions in the hands of the assessee after verifying the seized documents.

59 We have heard the rival submissions and also perused the relevant findings given in the order of the CIT (Appeals) and the Assessing Officer and the relevant facts placed on record. By way of aforesaid grounds the assessee has stated that the income that has been assessed in the hands of the assessee does not belong to him. The assessee had vide his statement under section 132(4) of the Act dated 20.01.2012 offered to pay tax on undisclosed income of Rs. 21.50 crores. The disclosure was essentially made on the basis of diary number A/OPJ/03 containing 1-317 pages and diary no. A/OPJ/01 containing 1-58 pages found and seized during the course of search. The said disclosure was also confirmed by the assessee in his post search statement recorded u/s 131 of the Act dated 08.05.2012. The assessee approached the Settlement Commission that assessed the income of the assessee at Rs. 7,56,53,170/- vide their order dated 26.11.2014. The department challenged the order of the Settlement Commission in Writ and the Hon'ble High Court of Delhi quashed the

same vide their order dated 15.04.2019 and directed the Assessing Officer to assess the income of the assessee afresh.

60 Before the CIT (Appeals) the assessee, inter-alia, contended that the income assessed by the Assessing Officer in its hand, did not belong to him. This was an issue taken for the first time before the CIT (Appeals). The CIT (Appeals) did not consider the same and proceeded to assess the income albeit at a reduced amount in the hands of the assessee.

61 It is trite that income has necessarily to be assessed in the hands of the correct person i.e. person who has earned it. This is manifest from the section 4(1) of the Income-tax Act which states that the income tax is to be levied on the total income of every person who is liable to pay tax on the same. Reliance was placed on the judgment of the **Hon'ble Supreme Court in the case of Ch. Atchaiah [1996] 218 ITR 239** wherein it has, inter-alia, been held that there is no discretion vested in the Assessing Officer to tax the income in the hands of a wrong person merely because such course is more beneficial to the revenue. In other words, the correct person who is liable to pay income-tax on the income has to be assessed and if for any reason a wrong person has been taxed, it does not preclude the Assessing Officer from taxing the right person. This judgment is the guiding force for the principle that the Assessing Officer has to tax the right person and the right person alone who is liable to pay income tax in accordance with law and has no option to tax in accordance with his belief or notion or discretion. The relevant paras of the decision of the Hon'ble Apex Court are reproduced as under:

"7. In our opinion, the contention urged by Dr. Gauri Shanker merits acceptance. ***We are of the opinion that under the present Act, the ITO has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By 'right person', we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression 'wrong person' is obviously used as the opposite of the expression 'right person'. Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. This is so irrespective of the fact which course is more beneficial to the revenue. In our opinion, the language of the relevant provisions of the present Act is quite clear and unambiguous. Section 183 of the Act shows that where the Parliament intended to provide an option, it provided so expressly. Where a person is taxed wrongfully, he is, no doubt, entitled to be relieved of it in accordance with law* but that is a different matter altogether. The person lawfully liable to be taxed can claim no immunity because the Assessing Officer [Income Tax Officer] has taxed the said income in the hands of another person contrary to law. We may proceed to elaborate.***

8. Section 3 of the Indian Income-tax Act, 1922, as amended by the Indian Income Tax (Amendment) Act, 1939, read as follows :

"Charge of Income-tax.—Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family,

company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually." [Emphasis supplied]

The expression 'person' was defined in clause (9) of section 2 in the following words:

"9. 'Person' includes a Hindu undivided family and a local authority."

9. As against the above provisions, section 4 of the present Act [before it was amended by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1-4-1989] read thus :

"Charge of Income-tax.—(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of, this Act in respect of the total income of the previous year or previous years, as the case may be, of every person:

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act." [Emphasis supplied]

(The Amendments made by the aforesaid Amendment Act of 1987 do not make any difference so far as the present controversy is concerned). The expression 'person' is defined in clause (31) of section 2 in the following words :

"'Person' includes—

(i) an individual,

(ii) a Hindu undivided family,

(iii) (in) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses."

10. A comparison of the provisions of both enactments immediately bring out the difference between them. Section 3 of the 1922 Act provided that in respect of the total income of a firm or an AOP, the income-tax shall be charged either on the firm or the AOP or on the partners of the firm or on the members of the AOP individually. It is evident that this option was to be exercised by him keeping in view of the interest of revenue. Whichever course was more advantageous to revenue, he was entitled to follow it. In such a situation, it was generally held that once the ITO opted for one course, the other course was barred to him. But no such option is provided to him under the present Act. Section 4 extracted hereinabove says that income-tax shall be charged on the total income 'of every person' and the expression 'person' is defined in clause (31)of section 2. The definition merely says that expression 'person' includes, inter alia, a firm and an AOP or a body of individuals whether incorporated or not. There are no words in the present Act which empower the ITO or give him an option to tax either the AOP or its members individually or for that matter to tax the firm or its partners individually. If it is the income of the AOP in law, AOP alone has to be taxed; the members of the AOP cannot be taxed

individually in respect of the income of the AOP. Consideration of the interest of revenue has no place in this scheme. When section 4(1) of the present Act speaks of levy of income-tax on the total income of every person, it necessarily means the person who is liable to pay income-tax in respect of that total income according to law. The tax has to be levied on that person, whether an individual, Hindu Undivided Family, Company, Firm, AOP/BOP, a local authority or an artificial juridical person. From this, it follows that if income of B is taxed in the hands of A, A may be legitimately aggrieved but that does not mean that B is exonerated of his liability on that account. B cannot say, when he is sought to be taxed in respect of the total income which is lawfully taxable in his hands, that since the ITO has taxed very same income in the hands of A, he himself cannot be taxed with respect to the said total income. This is not only logical but is consistent with the provisions of the Act. In this connection, it may be pointed out that where the Parliament wanted to provide an option, a discretion to the ITO, it has provided so expressly."

62 In view of the aforesaid judgment of the Hon'ble Supreme Court, we are of the opinion that the issue, whether the income belongs to the assessee or not, is a jurisdictional/ foundational issue which can be adjudicated upon at any stage of the proceedings based on the facts available on record. The Assessing Officer cannot assess any person simply because it is more convenient to do so or it is in the interest of revenue. Similarly, just because the assessee claims that income may be taxed in his hands which he retracts later, he can't be assessed in

respect of the said income if the overwhelming facts establish that the income does not belong to him.

63 It is an udisputed fact that the search was conducted at the premises 3-6-323, Jakhotia House, Basheerbagh Hyderabad-500029 on 20.01.2012 where the registered office of M/s Jakhotia Plastics Private Limited and M/s Jakhotia Polymers Private Limited was situated and the assessee also resided at the same premises. There were six other companies/entities namely Raghuram Synthetics Pvt. Ltd , Jakhotia Enterprises, Jakhotia Polyfibre Pvt. Ltd., Jakhotia Polysacks Pvt. Ltd., Jakhotia Spinning Mills Pvt. Ltd. and Revathi Synthetics Pvt. Ltd. who had their registered office in the same building. The assessee is promoter, director or partner in these companies and in his individual capacity has income from salary, rental income and income from other sources only. This fact has been acknowledged by the Assessing Officer at page 3 of his assessment order. According to the assessee the seized diary A/OPJ/03 which contains cash credits, transactions and record of various business transactions does not belong to him in as much as he does not derive any income from business and it is the companies that carry out business. The fact that the companies of the assessee are carrying out business of manufacturing of polymers is also manifest from para 6.1 of the assessment order wherein the AO has mentioned the factum of the companies carrying out business. The turnover of the companies, i.e., Jakhotia Plastics, Pvt. Ltd and Jakhotia Polymers Pvt. Ltd. as per their audited books of account was Rs. 47,45,80,079/- and Rs. 13,97,74,815/- respectively for the year ending 31st March, 2012. Even during the course of examination under section 132(4) of the Act,

the assessee stated that he has five companies namely, Jakhotia Polymers Pvt. Ltd., Jakhotia Polysacks Pvt. Ltd., Jakhotia Polyfibres Pvt. Ltd., Raghuram Synthetics Pvt. Ltd. and Jakhotia Plastics Pvt. Ltd. which manufacture Polymers.

64 It is now settled law that income can be assessed only on the basis of incriminating documents found during the course of search. Those documents must belong to the assessee and must contain evidence of income having escaped assessment.

65 According to the ld. AR, the seized diary no. A/OPJ/03 is the only evidence found during the course of search on the basis of which disclosure was made by the assessee and the income has been assessed by the Assessing Officer. It would be, therefore, apposite to analyze the diary seized to see whether the entries referred to belong to the assessee or to the companies.

66 Since the diary found is in respect of the F.Y 2011-12 up to the date of search on 20.01.2012 i.e. AY 2012-13 which is taken to be a representative year, we will have to examine the entries contained therein and the consequent additions to income confirmed by the Ld. CIT (Appeals) to check whether the transactions pertain to the companies for the said assessment year or not. The CIT (Appeals) has computed the undisclosed income of the assessee based on the seized diary A/OPJ/03 at Rs.5,80,60,969/-. He has computed the total undisclosed cash receipts emanating from the said seized diary at Rs. 15,37,92,608/- based on the cash book summary given by the assessee at page 85 and its reconciliation on the subsequent pages of

his order. He has provided the break- up of the said total undisclosed cash receipts at page 93 of his order. Out of the total undisclosed cash receipts, he computed the undisclosed revenue income at Rs. 1,70,02,461/- by applying the gross profit rate of 15% on the undisclosed trading receipts of Rs. 11,21,83,571/-. For the purpose of computing the trading receipts, he has relied upon the profit-loss account drawn by the assessee from the seized diary A/OPJ/03 which features at page 91 of the Ld. CIT (A) order. The trading receipts clearly show raw-material sales, bags sales, waste sales and sales to certain other parties etc. The expenses in the profit-loss account are on account of sales expenses, commission on sales, purchase for waste sales from J Polymer, factory wages, office wages, interest, telephone charges, water charges transport outward etc. There is a statement of affairs drawn as on 20.01.2012 at page 92 of his order shows unsecured loans and its utilization on the asset side. Quite clearly the unsecured loans that have been taken have been used for building construction, land purchase and to fund the business activities as stated in the seized diary A/OPJ/03. The names of J Polysacks, J Polyfibre, Chinnaswami Godown, G Prakash and chit funds as current assets, loans and advances and investment also feature in the said statement of affairs. The CIT(Appeals) besides computing gross profit of Rs. 1,70,02,461/- on undisclosed trading receipts has also computed undisclosed income of Rs. 4,10,58,508/- on account of cash receipts from debtors and other advances, chit funds and cash loans as per the seized diary in the A.Y 2012-13. Then facts are clearly indicatives of business activities of the companies and not the assessee.

67 We have also perused the seized diary A/OPJ/03 enclosed at page nos. 1-347 of the common paper book Page 82 contains the ledger account of J Polyfibre wherein it comes out that cheques have been issued by J Polyfibre against which cash has been received out of which numerous cash expenses have been incurred. Page 75 contains the ledger account of J Polysacks which shows bill numbers entered in the books of J Polysacks against which cash etc. appears to have been taken. At page 90 is the account of Raghuram which is a company called the Raghuram Synthetic Private Limited where similar transactions including issuance of cheques from the third company against which cash has been received for expenses has been reflected. The bags sales ledger at page 185 of the common paper book contains names of Jakhotia Plastics and Jakhotia Polymers and pages 147 to 149 of the common paper book reflecting sales made to Ramu also contains names of Jakhotia Plastics, Jakhotia Polymers, Jakhotia Polyfibre and Jakhotia Polysacks. The ledger account of Servo at page 172 to 174 reflects raw-material for PPE Granules for making PPE bags. Waste sales ledger enclosed at page no. 190 of the common PB shows the names of Jakhotia Plastics and Jakhotia Polymers. Factory wages, Office salary and Donation at page 207 of the common paper book show that the payment was made by Jakhotia Plastics and Jakhotia Polymers. Similarly on page 221 of the common PB is an advertisement ledger which shows the name of the Raghuram, Polyfibre and Jakhotia Polysacks. Seized Ledger of consultancy charges at page no. 227 of the common PB also shows names of Raghuram, Polyfibre and Polysacks. Ledger of Rates & Taxes at page 245 shows the names of RSPL (i.e. Raghuram Synthetics Private Limited) and Jakhotia Plastics and Jakhotia Polymers. Suspense

account at page 247 also shows the names of Jakhotia Plastics and Jakhotia Polymers. The loan ledger at page 280-281 shows receipts and payments pertaining to Jakhotia Spinning Mills Private Limited and Jakhotia Enterprises. Similarly at page 309 of the common paper book is the account of Subham Plast which reflects the name of Jakhotia Plastics, Jakhotia Fibre and Jakhotia Polysacks. Page 324 is the ledger of Balkrishna Contractor which shows the name of Jakhotia Plastics and Jakhotia Polymers. Page 328 refers to land purchase ledger which is pertaining to Jakhotia Spinning Mills Private Limited. Ledger accounts of Jakhotia Enterprises, a partnership firm at page no. 313 and Jakhotia Spinning Mills Private Limited at page 335 of the common paper book, found in the seized diary, A/OPJ/03 which show large amounts relating to the companies/firm itself.

68 There is another very important observation at page 38 of the common paper book which contains an entry of a cash loan in the diary. There is a sum of Rs. 15 lakhs as cash loan given by Om Prakash Jakhotia. This shows that Om Prakash Jakhotia had given a loan of Rs. 15 lakhs which also is indicative of the fact that all the entries contained in the seized diary A/OPJ/03 do not belong to him. Why would Om Prakash Jakhotia give loan to himself and record the same. This is also a reflection that the books do not pertain to Om Prakash Jakhotia but perhaps belong to the companies. It is reiterated that the books of account that has been found are for the financial year 2011-12 (A.Y 2012-13) up to the date of search i.e. on 20.01.2012 only and it also contains the opening balances of cash credits and debtors/loans and advances as on 01.04.2011. Books for the earlier period were not found during the course of search. However from the

statement of affairs drawn by the assessee on the basis of seized diary A/OPJ/03, it clearly comes out that the money was used for the business of the companies and the land and other investments were made also for the companies. It is also a fact that the assessee in his individual capacity did not have any registration under VAT, PF, ESI which is required to do any business for running a company. He is only a director, promoter, shareholder or partner in these companies and these companies are having robust business of manufacturing of PPE woven sacks.

69 The ld. CIT-DR vehemently contended that the corporate veil ought to be lifted and the assessee be assessed in respect of the incomes of the companies, if any. We would not agree with this proposition considering the overwhelming evidence found during the course of search. As is quite apparent from the aforesaid facts, the seized diary A/OPJ/03 does not belong to the assessee. It has not even been written by him. In fact, he is only one of the person who has given a cash loan out of his sources to the companies. Even otherwise a director acts under a fiduciary capacity on behalf of the company. Merely because he acts on behalf of the company, it cannot be said to income of the company belongs to him. The companies have been filing their return of income at showing very large taxable sums from business year after year. Their accounts are audited and they have other directors and large number of managers and personnel to run their business.

70 The Hon'ble Supreme Court in the case of Union of India and Anr Vs. Azadi Bachao Andolan(2003) 263 ITR 706 have held that

even a single share-holder company is to be held an independent company from its share-holder. The Companies Act, 2013 also recognizes a single share-holder company under section 2(62) of the Act. There is also nothing to show that the income of the companies has been appropriated by the assessee. In fact what comes out is that he has given a loan to the companies for running their business activities. We have already stated the legal principle propounded by **the Hon'ble Supreme Court in the case of CH. Atchaiah (supra)** and also the provision of section 4(1) of the Income-tax Act which says that the person who has earned the income and is liable to income-tax, can only be assessed.

71 We are also bound by the settled law laid down by the **Hon'ble Delhi High Court in the case of Kabul Chawla [2016] 380 ITR 573** that the income can be accessed only in the case of incriminating documents belonging to the person. In this case from the facts as is apparent from the seized diary A/OPJ/03 and also from the orders of the authorities below i.e. Assessing Officer and the Ld. CIT (Appeals), it clearly comes out that the diary does not pertain to the assessee and income does not belong to him in his individual capacity. Since it does not belong to him, it cannot be taxed in his hands. Therefore, the income confirmed by the CIT (Appeals) in the hands of the assessee based on the seized diary A/OPJ/03 in the AY2009-10 to AY 2012-13 cannot be upheld. The amounts of Rs. 1,10,00,000/- on account of

addition of cash receipts from undisclosed sources u/s 69A and addition of Rs. 25,20,000/- on account of kick-backs paid to Dalmia Cement made in the AY 2010-11 also arise from the seized diary A/OPJ/03 and since the entries in the seized diary do not belong to the assessee, the said additions stands deleted. Therefore, the income confirmed by the CIT (Appeals) in the hands of the assessee based on the seized diary A/OPJ/03 in the AY2009-10 to AY 2012-13 cannot be upheld. The assessee thus gets relief of Rs. 5,80,60,969/-, Rs. 11,96,75,00/-, Rs. 1,10,00,000/- and Rs. 8,00,000/- for AYs 2012-13, 2011-12, 2010-11 and 2009-10 respectively.

AY 2012-13:

72 Ground no. 5 relates to the addition of Rs. 35,59,500/- on account of cash found during the course of search.

73 In respect of the cash in hand of Rs.35,49,500/- found during the course of search, the ld.AR contended that the same belongs to the companies and is a part of the cash available as per the cash book prepared on the basis of seized diary A/OPJ/O3. He, therefore, stated that this cash cannot be treated as undisclosed income of the assessee. It was further stated there was cash in hand available in the hands of the companies which were operating from the premises no. 3-6-323, Jakhotia House, Basheerbagh Hyderabad-500029and were

searched during the course of search. The Ld. CIT-DR stated that the assessee had surrendered this amount before the Settlement Commission and had also offered this amount for tax during the course of recording of statement under section 132(4) of the Act on 20.01.2012.

74 We have heard the contentions of both the parties. The order of the Settlement Commission has been quashed by the Hon'ble Delhi High Court. The assessee also retracted the statement. We have already held that the seized diary A/OPJ/03 belong to the companies and not the assessee in his individual capacity. There are numerous cash transactions that appear in the seized diary. There is no evidence that the cash belongs to the assessee in his individual capacity since he only derives passive income. The conclusion therefore, is inescapable, that the cash belongs to the companies and hence, cannot be assessed in the hands of the assessee. Thus, the addition amounting to Rs.35,49,500/- stands deleted.

75 Ground nos. 6 and 7 relate to the additions of unexplained investment of Rs. 56,43,300/- in immovable property and cash deposit in saving bank account of Rs. 13,17,000/- made on the basis of AIR details respectively.

76 The ld. AR submitted that the sole basis of these additions was some AIR Report which was never confronted to the assessee at any stage. This fact is evident from the assessment order and CIT(A)'s order also. The ld. AR further stated that the Assessing Officer in fact, did not even mention the name of saving bank account in which alleged cash deposit of Rs. 13,17,000/- was made. No specific details were provided to the assessee regarding the impugned additions so that the assessee could provide the explanation on the same and this is against the principles of natural justice.

77 The ld. AR also showed us the Form 26AS of the assessee for the impugned A.Y which contained a column titled 'AIR information' which shows that there is no transaction of Rs. 56,43,300/- reflecting on account of unexplained investment in immovable property and Rs. 13,17,000/- on account of cash deposit in saving bank account. Thus, the ld. AR contended that these additions are baseless and are made without application of mind and therefore, deserve to be deleted. He also stated that the Form 26AS was also filed before the CIT(A) who chose to remain silent on the same.

78 The ld. CIT-DR relied upon the findings of the CIT(Appeals) on the impugned additions.

79 We find that these two additions were made by the Assessing Officer on the basis of AIR information which was not confronted to the assessee at the stage of assessment proceedings and also at the first appeal stage. Also, as per the Form 26AS enclosed as Annexure-I to the synopsis, the Form does not contain any such information. Hence, the additions of Rs. 56,43,300/- and Rs. 13,17,000/-deserve to be deleted.

A.Y 2011-12:

80 Ground no. 5 relates to the addition on account of unexplained investment of share capital of Rs. 4.92 crores.

81 The ld. AR argued that the impugned addition of Rs. 4,92,00,000/- being share capital and share premium was invested by M/s Varad Vinayak Properties Pvt. Ltd into M/s Jakhotia Plastics Pvt. Ltd. Thus, this amount should not be added in the hands of assessee who is an individual.

82 He further stated that the seized books of accounts do not belong to the assessee but to his group companies. Therefore, Rs. 4.92 crores cannot be added in the hands of the assessee in view of the fact that money in the form of share capital and share premium was received by Jakhotia Plastics Private Limited from Varad Vinayak Properties

Private Limited which are separate legal entities and are separately assessable to Income Tax.

83 He also submitted that during the first appeal proceedings, the additional evidences under Rule 46A of the Income Tax Rules, 1962 were also filed in the case of Jakhotia Plastics Private Limited where this amount was also substantively added by the Assessing Officer. The additional evidences included confirmation, ITR, Computation of Income, Ledger accounts, Bank statement and Audited financial statements from Varad Vinayak Properties Private Limited in order to discharge onus u/s 68 of the Act in the hands of Jakhotia Plastics Private Limited. However, the CIT(A) deleted the addition in the case of Jakhotia Plastics Private Limited and instead confirmed the addition in the hands of the assessee.

84 The ld. AR also stated that the Assessing Officer did not make any independent enquiry or verification of the impugned transaction by issuing summons u/s 131 of the Act to M/s Varad Vinayak Properties Pvt. Ltd, a separate legal entity and the actual investor, before adding this huge sum in the hands of the assessee.

85 The ld. CIT-DR, on the contrary, stated that the assessee himself admitted in his statement recorded under section 132(4) that the

share capital and share premium paid by Varad Vinayak Properties Ltd. into M/s Jakhotia Plastics Pvt. Ltd. is his unaccounted money generated over a period of time. She also relied upon the findings of the Assessing Officer and the CIT(Appeals) on this issue.

86 We find that the share capital and share premium amounting to Rs. 4,92,00,000/- has been received by M/s Jakhotia Plastics Pvt. Ltd. from M/s Varad Vinayak Properties Pvt. Ltd through account payee cheque. The Assessing Officer has added this amount based on the statement given by the assessee during the course of search u/s 132(4) of the Act on 20.01.2012.

87 The assessee has already retracted from the statement made during the course of search giving cogent reasons for the same vide his affidavit dated 29.10.2013. Besides, there is nothing to show that it is the assessee's money which has come in by way of the share capital in M/s Jakhotia Plastics Private Limited which is a separate legal entity and has robust business activities. The share capital was received by M/s Jakhotia Plastics Pvt. Ltd. from M/s Varad Vinayak Properties Pvt. Ltd through account payee cheques and the seized documents do not contain anything that suggest that any cash was given by the assessee in lieu of the share capital. We fail to understand how

addition of the share capital and share premium can be made in the hands of the assessee especially when there is no evidence of any unexplained investment having been made by the assessee or any credit having been received by the assessee in his books of account. The cash credit has been received by M/s Jakhotia Plastics Pvt. Ltd. from a source which is completely distinct from the assessee i.e. M/s Varad Vinayak Properties Pvt. Ltd. and as there is nothing to show that it is the assessee's money which has found place in the company. Under these circumstances this addition cannot be sustained in the hands of the assessee and is therefore, deleted.

88 Ground no. 7 relates to the addition of Rs 25,20,000/- made on account of kick-backs paid to Dalmia Cement.

89 The ld. AR argued that the seized documents do not belong to the assessee but to his group companies and he was not doing any business in his individual name. He did not have any VAT, Sales Tax, PF and ESI registration in his individual name, thus no addition on account of kickbacks paid to Dalmia Cements can be made in the hands of the assessee. Besides, Dalmia Cements was not the client of the assessee but to his group companies.

90 The ld. CIT-DR relied upon the statement of the assessee along with findings of the authorities on this issue.

91 We have already held that the seized books of accounts or diaries do not belong to the assessee but to the companies in which assessee was a director or partner and the assessee was not doing any business in his individual capacity. The dealings with Dalmia Cement are business dealings and do not pertain to the assessee in his individual capacity. Hence, the addition ought to be deleted in the hands of the assessee.

A.Y 2010-11:

92 Ground no. 6 relates to the addition of Rs 25,20,000/- made on account of kick-backs paid to Dalmia Cement .

93 We have already decided this issue for the A.Y 2011-12, following the principle of uniformity and consistency, the addition of Rs. 25,20,000/- stands deleted for this year also.

94. In view of our aforesaid reasons and findings all the appeals of the assessee are allowed.

Order was pronounced in open court on 21st day of February, 2022.

Sd/-	**sd/-**
(DR. B.R.R. KUMAR)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 21.02.2022
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A-29, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.