

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

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT AND
SHRI GEORGE GEORGE K., JUDICIAL MEMBER**

ITA Nos.261 to 267/COCH/2016
Assessment Years:2006-07 to 2012-13

Shri Eldhose K. Varghese, Kochukudiyil House, Mekkadambu – P.O. Muvattupuzha. PAN:AAFPE 4655 C	Vs	Dy.C.I.T., Central Circle-1, Ernakulam.
(Appellant)		(Respondent)

Appellant by	Shri T. M. Sreedharan
Respondent by	Shri Sudhanshu Shekhar, CIT, D.R.
Date of hearing	27/09/2017
Date of pronouncement	04/10/2017

ORDER

PER P. K. BANSAL, V.P.

All these appeals have been filed by the assessee against the consolidated order of CIT(A) dated 31/03/2016.

2. In the assessment year 2006-07 to 2010-11 and 2011-12 the assessee has taken the following common grounds of appeal except the change in figures in ground No. 4 & 6:

- "1. *The Order of the Commissioner of Income Tax (Appeals) -IV, Kochi dismissing the appeal against the asst. order for 2006-07 as per common order in ITA No.E-75/CIT(A)-IV/14-15 dated 31.3.2016, is opposed to law, facts and circumstances of the case.*

2. *It is submitted that the assessments made u/s.153C r.w.s. 153A and 143(3) is void and without jurisdiction.*
3. *It is submitted that the conditions required to be fulfilled for making assessment u/s 153C are not satisfied in the appellant's case. As such the assessment is invalid.*
4. *Without prejudice, it is submitted that the addition of Rs.9,20,624/- for alleged cash shortage, which is treated as unexplained investment is highly arbitrary and without basis.*
5. *It is submitted that the sources available to the credit of the appellant, fully explained the investment in land and other outgoings. The Assessing Officer was not justified in treating any part of the investment as not explained.*
6. *It is submitted that the entire assessment and additions made are arbitrary and illegal and liable to be set aside. The addition of Rs.60,000/- representing agricultural income, as undisclosed income, is also arbitrary.*
7. *In this connection, it is respectfully submitted that the CIT (A) has failed to consider the arguments put forward at the time of hearing and the written submissions, fairly and judiciously. The contentions taken in the argument note submitted before the CIT (A), a copy of which is produced herewith, may kindly be treated as part of these grounds.*
8. *The agricultural income declared should have been treated as an available source against the various investments and outgoings considered in the asst. order.*
9. *The levy of interest u/s 234A, 234B & 234C, is also illegal and unsustainable."*

2.1 These figures be read as under in place of Rs.9,20,624/- and Rs.60,000/- in ground No. 4 & 6:

Assessment year	Ground No. 4	Ground No. 6
2007-08	27,372	60,000
2008-09	*	2,00,000
2009-10	**	2,00,000
2010-11	10,66,025	2,00,000
2011-12	10,43,928	3,00,000

* In the assessment year 2008-09 no ground has been taken in respect of seized cash treated as unexplained i.e. the ground relating to ground No. 4 in assessment year 2006-07 and accordingly the ground taken in those assessment years has been renumbered and in ground No. 6, the figure of Rs.60,000/- be read as Rs.2,00,000/-.

**In assessment year 2009-10 there is no ground relating to shortage of cash amounting to Rs.2,70,658/- but ground No. 4 reads as under:

"4. The addition on account of alleged investment in land amounting to Rs.29,30,600/- is not legal or sustainable. The addition is not sustainable on the ground that there is no material or evidence justifying such addition."

Ground Nos. 1, 2 & 3 in assessment year 2006-07 to 2011-12 are common and relate to the validity of the assessment made under section 153C read with section 153A and 143(3) of the Act.

3. The facts in the case of the assessee are that a search under section 132 was conducted on 02/11/2011 at the residence of the assessee in connection with the search warrant issued on Shri John Kuriakose of M/s Dentacare Group. At the time of search, certain documents were seized, which relate to the issue of blank cheques by M/s Lola N. Parithran and blank stamp paper signed by her. The assessee submitted the income tax return earlier prior to the date of search for the assessment year 2006-07 to 2010-11. The original return filed along with income returned are detailed as under:

Undisclosed income (money received from Sri Pelexy K Varghese, Brother)	-	-	-	-	-	-	1315000
Profit on sale of land	-	-	-	-	-	-	36000
Section 153C	(B)&(C)	(B)&(c)	(B)&(c)	(B)&(C)	(B)&(C)	(B)&(C)	
Interest under section 234A, 234B & 234C	(G)		(G)	(G)	(G)	(G)	(H)
Total	1103580	225558	341645	3574477	1454285	1940823	3262273

4. The assessee went in appeal before the CIT(A) who confirmed the assessment for assessment year 2006-07 to 2008-09 but partly confirmed the assessment for statistical purposes for assessment year 2009-10 to 2011-12 while the appeal of the assessee for the assessment year 2012-13 was partly allowed. So far the assessment years 2006-07 to 2010-11 are concerned, learned A.R. vehemently submitted before us that as on the date of search these assessments were completed by accepting the returns filed by the assessee under section 143(1) and no incriminating evidence or material was found at the time of search therefore, the provision of section 153C read with section 153A could not have been invoked. The assessee has filed the return prior to the date of search and the assessments have acquired finality either due to acceptance of the return under section 143(1) or the period of limitation of issuance of notice under section 143(2) had expired. These assessments since were not pending would not have abated under section 153A of the Act. The only pending assessments i.e. the assessments for assessment year 2011-12 and 2012-13 got abated. Since the assessments were not abated and no incriminating documents were found therefore, the assessments made are invalid. In this regard he relied on the decision of Hon'ble Supreme Court in the case of CIT-III, Pune vs. Sinhgad Technical Educational Society – Civil Appeal No.11080 of 2017 dated 29/08/2017. Reliance was also

placed on the following decisions for the proposition of law that if no incriminating material was found relating to the year, the Assessing Officer cannot make the assessment

- (i) Principal Commissioner of Income Tax (Central)-2 vs. Index Securities Private Limited 2017 (9) TMI 585 – Delhi High Court
- (ii) Principal Commissioner of Income Tax (Central) vs. T. S. Pulses Pvt. Ltd. 2017 (8) TMI 571 – Delhi High Court
- (iii) CIT vs. Promy Kuriakose [2016] 386 ITR 597 (Ker)
- (iv) Principal Commissioner of Income Tax, Ahmedabad-3 vs. Dipak Jashvantlal Panchal [2017] 397 ITR 153
- (v) Principal Commissioner of Income Tax (Central)-2 vs. Index Securities Private Ltd., Vidya Shankar Investment Private Limited 2017(9) TMI 585 Delhi High Court
- (vi) Principal Commissioner of Income Tax (Central) vs. T. S. Pulses Pvt. Ltd. 2017 (8) TMI 571 Delhi High Court

5. Learned D. R., on the other hand, contended that the incriminating material was duly found. For this our attention was drawn towards the statement recorded during the course of the search in which the assessee has accepted the cash payment in reply to question No. 4 for the purchase of land.

6. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We have gone through the provisions of section 153C as well as the case laws as relied by learned A.R. Now the question before us whether the assessment made under section 153C in the case of the assessee for the assessment year 2006-07 to 2010-11 are valid or not, whether any addition can be made in absence of any incriminating material being found during the course of search if the assessment has already been completed before the date of search. To decide this issue, we have to look into the provisions of the section 153A under Chapter XIV under the title 'Assessment in case of search or requisition'. The provisions of section 153A, 153B & 153C were inserted by

the Finance Act, 2003 w.e.f 1.6.2003. Originally section 153A of the Act did not have any sub-section. However, sub-section (2) to Section 153A was inserted by the Finance Act, 2008 w.e.f from 1.6.2003. Section 153A provides for an assessment in case of a person in whose case search is initiated u/s.132 of the Act or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003. Section 153B provides for time limit for completion of assessment under section 153A and Section 153C of the Act. Section 153C provides for assessment of income of person or other than person in respect of whom warrant or authorization is issued u/s.132 of the Act. Section 153A and Section 153C are extracted below:

"153A. ASSESSMENT IN CASE OF SEARCH OR REQUISITION

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 ;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years :

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) of section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Principal Commissioner or Commissioner :

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

Explanation For the removal of doubts, it is hereby declared that,

- (i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section ;*
- (ii) (ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."*

"153C ASSESSMENT OF INCOME OF ANY OTHER PERSON

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue

such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A.

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

(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or

(b) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under sub-section (2) of section 143 has expired, or

(c) assessment or reassessment, if any, has been made, before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A."

6.1 In our opinion, the Assessing Officer assumed jurisdiction for framing the assessment U/S.153C of the Act where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person in whose case search is conducted u/s.132 of the Act. Therefore, for initiating action U/S.153C of

the Act and framing assessment U/S.153A of the Act, the pre-requisite is that the satisfaction of the Assessing Officer that the money, documents and papers, etc belongs to a person other than the person in whose case search is conducted u/s.132 of the Act.

6.2 It is apparent from the language of section that the section does not require that the documents belonging to the assessee must be incriminating documents. Section 153C gives the jurisdiction to the Assessing Officer once the documents belonging to the assessee are found in the case of the assessee in whose case the search had taken place. It is not the submission of learned A. R. that during the course of search, documents belonging to the assessee or pertaining to the assessee were not found. The submission of learned A.R. relates to that no incriminating documents have been found during the assessment year 2007-08 to 2010-11. We, therefore, reject the contention of learned A.R. that the assessments framed under section 153C read with section 143(3) are invalid.

6.3 Now coming to the submission of learned A.R. whether any addition can be made in the assessment made under section 153C when no incriminating document is found during the course of search. We noted that on the issue whether any addition can be made in the assessment made under section 153A, when no incriminating documents is found during the course of search, a Special Bench was constituted in the case of All Cargo Global Logistics Ltd vs. DCIT, (2012) 137 ITD 287 (SB) (Mum) on the following question:

"Whether, on the facts and in law, the scope of assessment u/s 153A encompasses additions, not based on any incriminating material found during the course of search?"

6.4 Before the Special Bench, Ld Sr. Counsel relied on the decision of LMG International Ltd. as is apparent from para 16 of that order. We noted that in the said judgment in para 52 of its order, the Tribunal has held that section 153A comes into operation if a search or requisition is initiated after 31.5.2003. On the satisfaction of this condition, the Assessing Officer is under obligation to issue notice to the persons requiring him to furnish the return of income of six years immediately preceding the year of search. This finding implied that the proceedings U/S.153A is not to be restricted to the years for which incriminating material is found during the search. Ultimately, in respect of question referred to the Special Bench, the Special Bench in para 58 of its order held as under:

"58. Thus, question No. 1 before us is answered as under:

a) In assessments that are abated, the Assessing Officer retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately.

b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and; (ii) undisclosed income or property discovered in the course of search".

6.5 In view of the decision of Special Bench in the case of All Cargo Global Logistics Ltd., no doubt the addition in the case of the assessee can be made by the Assessing Officer only on the basis of incriminating material found during the course of search but the Assessing Officer got jurisdiction for initiating proceedings u/s.153c r.w. section 153A against the assessee in view of documents etc. belonging to the assessee are

found in the case of the person in whose case search had taken place. Thus, this decision will help the assessee.

6.6 Similar view has been taken in the cases discussed as under:

We noted that Hon'ble Delhi High Court in the case of Chetandas Laxmandas 254 CTR (Del) 392 has taken similar view. In para 11 of this judgement, the Hon'ble High Court held that "obviously an assessment has to be made under this section only on the basis of the seized material". Even we noted that the Hon'ble Delhi High Court in the case of Anil Kumar Bhatia, 352 ITR 493 (Del), under para 20, it has been observed as under:

"Even if assessment order had already been passed in respect of one or any of the six relevant assessment years either under section 143(1)(a) or 143(3) prior to the initiation of search, still the Assessing Officer is empowered to reopen those proceedings u/s 153A without any fetters and reassess total income taking note of undisclosed income, if any, unearthed during the search.

"20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search."

The above observations of Hon'ble High Court, which are though obiter dicta, make it point clear that where an assessment order has already been passed for a year or years within the relevant six assessment years, then the Assessing Officer is duty bound to reopen those proceedings and reassess the total income but by taking note of the undisclosed income if any, unearthed during the search. The expression "unearthed during the

search” is quite significant to denote that in respect of completed or non-pending assessment, the Assessing Officer albeit duty bound to assess or reassess the total income but if there is scope for additions in such assessment, on the basis of income unearthed during the search, he can make the addition. In other words, the determination of total income in respect of the assessment years for which the assessments have been already completed on the date of search, shall not be influenced by the items of income other than those based on the material unearthed during the course of search. However, the scope of such determination of total income is different in respect of the years for which the assessments are pending vis-a-vis the years for which assessments are non-pending. The total income shall be determined in respect of assessment year for which original assessments have already been completed on the date of search by restricting additions only to those which flow from incriminating material found during the course of search. If no incriminating material is found in respect of such completed assessment, then the total income in the proceedings u/s 153A shall be computed by considering the originally determined income. If some incriminating material is found in respect of such assessment years for which the assessment is not pending, then the total income would be determined by considering the originally determined income plus income emanating from the incriminating material found during the course of search. In respect of assessment pending on the date of search which got abated in terms of second proviso to section 153A(1), the total income shall be computed afresh uninfluenced by the fact whether or not there is any incriminating material. We noted that the decision of Special Bench has been confirmed by Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (NHAVA SHEVA) LTD. [2015] 374 ITR 645 (Bom). We noted that Hon'ble Kerala High Court in the case of CIT vs. Promy Kuriakose [2016] 386 ITR

597 (Ker) while discussing the provisions of section 153C under para 10 observed as under:

"10. A comparative analysis of the provisions contained in sections 153A and 153C reveal that jurisdiction under section 153C can be invoked by the Assessing Officer only when money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned and it is found that the seized or requisitioned articles belongs or belong to a person other than the person referred to in section 153A. In such a case, the Assessing Officer shall hand over the books of account or documents or assets seized or requisitioned to the Assessing Officer having jurisdiction over such other person. Thereupon, it is for the Assessing Officer having jurisdiction to proceed against such other person by issuing notice and complete assessments or reassessments as the case may be, in accordance with section 153A. Therefore, the fundamental jurisdictional requirement for invoking the powers under section 153C is the seizure or requisitioning of books of account or documents or assets which belong to a person other than the person referred to in section 153A. Otherwise, the Assessing Officer has no jurisdiction at all to proceed under section 153C. Therefore, the conclusion of the Tribunal that in the absence of search material, proceedings under section 153C cannot be initiated by the Assessing Officer, which finding is consistent with the precedents referred to by the Tribunal itself, does not spell out any illegality."

6.7 We have also gone through the recent decision of Hon'ble Supreme Court dated 29/08/2017 in the case of CIT vs. Sinhgad Technical Education Society, Civil Appeal No.11080 of 2017 under para 18 held as under:

"18. The ITAT permitted this additional ground by giving a reason that it was a jurisdictional issue taken up on the basis of facts already on the record and, therefore, could be raised. In this behalf, it was noted by the ITAT that as per the provisions of [Section 153C](#) of the Act, incriminating material which was seized had to pertain to the Assessment Years in question and it is an undisputed fact that the documents

which were seized did not establish any co-relation, document-wise, with these four Assessment Years. Since this requirement under [Section 153C](#) of the Act is essential for assessment under that provision, it becomes a jurisdictional fact. We find this reasoning to be logical and valid, having regard to the provisions of [Section 153C](#) of the Act. Para 9 of the order of the ITAT reveals that the ITAT had scanned through the Satisfaction Note and the material which was disclosed therein was culled out and it showed that the same belongs to Assessment Year 2004-05 or thereafter. After taking note of the material in para 9 of the order, the position that emerges therefrom is discussed in para 10. It was specifically recorded that the counsel for the Department could not point out to the contrary. It is for this reason the High Court has also given its imprimatur to the aforesaid approach of the Tribunal. That apart, learned senior counsel appearing for the respondent, argued that notice in respect of Assessment Years 2000-01 and 2001-02 was even time barred."

6.8. We have also gone through other decisions, copy of which has been placed on record before us. The propositions of the law in all these decisions are that if during the course of search, documents pertaining to the assessee are found, the Assessing Officer has the jurisdiction under section 153C of the Act but the addition in respect of the assessment, which has not been abated, can be made only on the basis of the incriminating material found during the course of search not otherwise.

7. Now coming to assessment year 2006-07 to 2010-11. We noted that no incriminating material, during the course of search, was found in respect of the agricultural income treated as unexplained cash credit as well as cash shortage treated as unexplained investment. Therefore, no addition in respect of these can be made. We, therefore, delete the addition in each of the assessment years in respect of agricultural income treated as unexplained cash credit and cash shortage treated as unexplained investment. Thus, the grounds in each of these assessment years relating to these additions stand allowed.

I.T.A.No.264/Coch/2013

8. Now coming to the addition of Rs.29,30,600/- as confirmed by the CIT(A) relating to assessment year 2009-10, the facts of the case, in brief, are that during the course of search, statement of the assessee was recorded. The relevant question No. 4 and answer thereto in this regard is reproduced as under:

"Q.4 Can you explain the assets of your family ?

Ans. Nearlyd five years back I have purchased 19 cents of land near Muvattupuzha Junction for Rs.25,000/- per cent. I have also purchased 55 cents of land at Nellimala in Piravom Road four years back @15,000/- per cent. Besides this, 1 acre 36 cents at Peringaza @Rs.20,000/- nearly four years back. In Mudavoor 5 cents of plot @Rs.18,000/- per cent was also purchased. Another 23 cents of land at Vayanasalapady at Kothamangalam was also purchased 3½ years back @Rs.50,000/- per cent. I have also a Maruthi Ritz Car."

8.1 The Assessing Officer, on the basis of the said statement, worked out the investment made by the assessee outside the books of account for land transaction as detailed below:

Sl. No	Date	Doc. No.	Doc. Price Rs.	Price paid Rs.	Other Exp. Rs.	Total Rs.	Particulars of Land
1	18.06.2008	3724/08	3,00,000	9,81,000	38,000	10,19,000	49.05 Cents in Sy.No.491/2/2Agrl. Land in ArakuzhaPanchayath
2	18.06.2008	3725/08	80,000	3,01,400	10,000	3,11,400	15.070 Cents in Sy. No.492/2/2 in ArakuzhaPanchayath
3	02.07.2008	4096/08	2,20,000	7,00,000	28,000	7,28,000	35 Cents in Sy. No.491/2/2 in the name of wife Mini Eldhose Agrl. Land in ArakuzhaPanchayath

4	02/07/2008	4095/08	2,20,000	7,29,200	28,000	7,57,000	36,460 cents in Sy.No.491/2/2 in the name of father K.O. Varghese agrl. Land in ArakuzhaPanchayath
5	10.07.2008	4267/08	50,000	1,08,000	7,000	1,15,000	6 cents in Sy.No.698/5/3 Palpra Panchayat

When the Assessing Officer asked the source of investment the assessee explained that the payment for all these investments was made out of the loan taken by the assessee as detailed below:

04/09/2008	Reliance Capital	Rs. 7,50,000
04/09/2008	Standard Chartered Bank	Rs.11,00,000
01/11/2008	Barclays Bank	Rs.15,00,000

The Assessing Officer was not satisfied about the source as they were taken in the name of M/s Whitelines Marketing Associates, a partnership firm in which the assessee is the Managing Director and was credited in the books of account of the said firm. The Assessing Officer noted that after deducting the bank charges, the said loan has been credited into the books of the assessee firm. The loans were taken subsequently while all five pieces of land were registered in the name of the assessee on 18/06/2008, 02/07/2008 and 10/07/2008. The Assessing Officer took the view that no seller will register the land in favour of the assessee until and unless he received the on-money. The Assessing Officer therefore made the addition of Rs.29,30,600/-. When the matter went before the CIT(A), the assessee submitted an affidavit before the CIT(A), available at page No. 57 of the paper book, retracting the statement made during the course of search. The affidavit is dated 09/03/2016. No such retraction was made before filing of the return or during the course of assessment proceedings.

9. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. Learned A.R. vehemently contended before us that the CIT(A) was bound to consider the affidavit submitted by the assessee retracting the statement made under section 132(4) of the Act during the course of the search. The CIT(A) since have all the powers what the Assessing Officer has in respect of the issue before him therefore, the affidavit filed by the assessee must be accepted. The CIT(A) was bound to examine the deponents before rejecting the affidavit filed by the assessee in respect of the retraction of the statement given by the assessee during the course of search. In this regard, learned A.R. drawn our attention towards the decision of Hon'ble Supreme Court in the case of Mehta Parikh & Co. vs. CIT [1956] 30 ITR 181 (SC) which we have looked into. We noted that the facts involved in that decision are different from the facts involved in the case of the assessee. In that case the Assessing Officer has duly accepted the cash book and the entries therein, which were not challenged by the Revenue. Even no further documents and the vouchers in relation to those entries were call for. The assessee has submitted three affidavits. Neither the Assessing Officer nor the CIT(A) considered it necessary to call for those parties in order to cross examine them with reference to the statement made by them in their affidavit. Under these circumstances the court held that it was not open to the Revenue to challenge the correctness of the cash entries or the statement made by those deponents in their affidavits. In the case before us, we noted that the assessee, in the statement recorded during the course of search, has himself accepted of money being paid by him but he never retracted the said statement either before ADI or before the Assessing Officer. The statement was retracted only before the CIT(A) by filing an affidavit dated 09/03/2016 while the search had taken place on 02/11/2011.

9.1 It is settled law in view of the decision of ITAT, Mumbai Bench in the case of Hiralal Maganlal & Co. vs. DCIT [2005] 96 ITD 113 that where the assessee had made voluntary declaration on oath under section 132(4) and induced the Departmental Authorities to act upon the same at the time of search and its acceptance by the Departmental Authorities but Departmental Authorities did not proceed further with the investigation in order to locate unaccounted income, the assessee cannot deny later the truth or the correctness of the declaration made at the time of search. Where the retraction was not supported by any independent or reliable evidence to prove incorrect nature of facts confined in the original statement, the Assessing Officer could be justified in making impugned addition on the basis of the statement at the time of search. We noted that in the case of Carpenters Classics (Exim) P. Ltd. vs. DCIT [2008] 299ITR (A.T.) 124 (ITAT[Bang]), the Tribunal has held that where retraction of admission of the undisclosed income is to be made is accepted from the assessee or the person admitting undisclosed income to do so within a reasonable time when the retraction is detailed and there is long interval between the admission and the retraction, benefit of retraction cannot easily be accepted. When credit entries are found in the books during the course of search or where receipts were also there along with cheque receipt and cheque receipts were admitted to be additional jobwork receipt and such addition jobwork receipts in cash were admitted to be undisclosed income then retraction after three months without there being any support and reasons particularly when no evidence was found, the retraction was not to be accepted.

The affidavit does not support any book entries but had only retracted the statement made by the assessee. Therefore, the decision of Mehta Parikh & Co. (supra) will not support the assessee's case. Hon'ble Supreme Court

in the case of CIT vs. Sun Engineering Works P. Ltd. [1992] 198 ITR 297 (SC) for the interpretation and applicability of a case held as under:

"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Supreme Court divorced from the context of the question under consideration and treat it to be the complete law declared by the court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the court. A decision of the Supreme Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, courts must carefully try to ascertain the true principle laid down by the decision."

In view of the facts and contents being different in the case of the assessee, we reject this plea of learned A.R.

9.2 The retraction after expiry of five years cannot be accepted. Not only this, we noted that the assessee himself before the Assessing Officer tried to explain the source of the investments made outside the books of account in the land transaction to the extent of Rs.29,30,600/- by taking the loan from Reliance Capital, Barclays Bank and Standard Chartered Bank amounting to Rs.7,50,000/-, Rs.11,00,000/- and Rs.15,00,000/- respectively. These loans were taken on 04/09/2008, 01/11/2008 and 04/09/2008 while the assessee has purchased the land vide sale deed registered on 18/06/2008, 02/07/2008 and 10/07/2008. We do agree with the contention of learned D.R. and the finding given by the authorities below that no seller would transfer the land until and unless he received the on-money agreed between the two. Explaining the source of on-money does not prove that the assessee has paid the on-money for the purchase of land. In view of this fact, we do not find any illegality or infirmity in the order of CIT(A). This is the settled law that the statement recorded during the course of the search will be valuable evidence being incriminating document found during the course of search. Hon'ble

Jurisdictional High Court in the case of CIT vs. St. Francis Clay Décor Tiles [2016] 385 ITR 624 (Ker) has held as under:

"20. On a plain reading of section 153A, it is clear that once search is initiated under section 132 or a requisition is made under section 132A after the 31st day of May 2003, the Assessing Officer is empowered to issue notice to such person requiring him to furnish return of income in respect of each assessment year following within six assessment years referred to in clause (b). It further treats the returns so filed as if such return were a return required to be furnished under section 139. So that on a reading of section 153A(1) it is categorical and clear that once a notice is issued and the Assessing Officer has required the assessee to furnish return for a period of six assessment years as contemplated under clause (b) then the assessee has to furnish all details with respect to each assessment year since the same is treated as a return filed under section 139. It is true that as per the first proviso, the Assessing Officer is bound to assess or reassess the total income with respect to each assessment year following the six assessment years specified in sub-clauses (a) and (b) of section 153A."

We, therefore, dismiss ground No. 4. Thus, the appeal for assessment year 2009-10 is partly allowed.

10. Now coming to assessment year 2011-12. So far ground Nos. 1 to 3 are concerned, as discussed while disposing ground No. 1 to 3 in preceding paragraph relating to assessment years 2006-07 and 2010-11, we dismiss the said grounds as in this case we noted that the return for the aforesaid assessment year has been filed by the assessee after the search had taken place on 02/11/2011 not prior to that. Since the search had taken place prior to that therefore, the assessment for the impugned assessment year has been abated being pending at the time of search. Thus, ground No. 1 to 3 stand dismissed.

11. Ground No. 4 & 5 relate to the sustenance of addition of Rs.10,43,928/- treating it to be unexplained investment.

12. The facts relating to this addition are that the Assessing Officer, during the course of assessment, asked the assessee to furnish the cash flow statement which the assessee has produced as under:

Source	Amount	Application	Amount
Opening Balance	4,83,751	Income tax	6,010
Catholic Syrian Bank SB A/c No.0319 Interest	238	Catholic Syrian Bank SB A/c No.0319	1,016
Catholic Syrian Bank SB A/c No.0200 Interest	41	Income-tax (Mini Eldhose)	1,740
Other income	5,60,000	Personal expense	1,20,000
		Personal expense (mini Eldhose)	60,000
Agriculture Income	3,00,000	Barclays Bank - Principal	3,98,184
Agricultural Income (Mini Eldhose)	2,00,000	Barclays Bank-interest	85,680
Profit from business (Mini Eldhose)	3,65,000	Reliance capital Loan repayment principal	1,79,828
Ernakulam district co-op Bank Int.SB A/c.5245 (Mini Eldhose)	450	Reliance capital Loan repayment Interest	95,248
Ernakulam district co-op Bank IntSB A/c.61 35 (K O Varghese)	434	Standard Chartered Bank Loan Repayment Principal	3,62,722
Catholic Syrian Bank SB A/c. No.0200 interest	98	Standard Chartered Bank Loan Repayment Interest	1,75,478

Drawing from business, M/s. White line marketing associates	5,00,000	Ernakulam district co-op bank SB A/c no.5245 (Mini)	450
		Ernakulam district co-op bank SB A/c No.6135 (Varghese)	934
		Investment in business- M/s Whiteline marketing associates	4,00,000
		Money given to brother Pelexy K Varghese	5,00,000
		Tuition Fee	20,000
		Closing balance	2,722
	2410012		2410012

12.1 The Assessing Officer has recasted the said cash flow by taking the opening balance to be zero as in the recasted cash flow statement for assessment year 2010-11 the closing balance was taken to be zero. The Assessing Officer therefore, modified the cash flow statement and noted that there was a cash shortage to the extent of Rs.10,43,928/-.

13. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. Since the assessment for the assessment year 2010-11 was not abated and no material was found during the course of search, on the basis of which the cash flow statement for the assessment year 2010-11 has to be modified, therefore, in our view, the assessee has to get the set off of opening balance of the cash in hand amounting to Rs.4,83,751/-. We accordingly reduce the addition by the said amount. We also noted that the assessee has shown the profit from the business belonging to Mini Eldhose and the assessee has also considered the expenses as well as the drawing of Mini Eldhose in her cash flow statement. Therefore, in our opinion, the Assessing Officer was not correct in law excluding the sum of Rs.3,65,000/- profit earned

from the said business as the cash to that extent must have been available with the assessee during the year.

13.1 The other dispute, why there is shortage of the cash, relates to the agriculture income amounting to Rs.2,00,000/- earned by Mini Eldhose. The assessee has taken it to be one of the sources of the available cash while the Assessing Officer, when recasted the cash flow statement, ignored the said agriculture income. Since the facts relating to the agriculture income earned by Mini Eldhose and holding of the land by her are not before us, therefore, we cannot decide how much agriculture income would have been earned by Mini Eldhose. To the extent the agriculture income is earned by here, the same will be available as a source of receipt of the cash in the hands of the assessee. Since neither the Assessing Officer nor the CIT(A) and even the assessee has not brought out on record any document in this regard therefore, in the interest of justice and fair play to both the parties, we set aside the issue for the purpose of determining the shortage of cash in respect of the agricultural income earned by Mini Eldhose to the file of the Assessing Officer with the direction that the Assessing Officer, on the basis of the quantum of the land owned by Mini Eldhose, shall estimate the agriculture income and give the credit to the assessee in respect of the said income against the cash shortage. Therefore, except the estimation of the agriculture income of Mini Eldhose, we reduce the addition of the cash shortage by Rs.4,83,751/- and Rs.3,65,000/-. Thus, this ground is partly allowed.

14. Ground Nos. 6, 7 & 8 relate to treating the agriculture income shown by the assessee at Rs.3,00,000/- to be the income from other sources. So far the availability of source of this amount against the outgoing while estimating the cash shortage, we noted that the Assessing

Officer in the modified cash flow statement has taken the sum of Rs.3,00,000/- as income shown by the assessee as agriculture income treating it as undisclosed income therefore, ground No. 8 taken by the assessee becomes infructuous and stands dismissed as such.

14.1 Now coming to the estimation of the agriculture income. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We noted that during the assessment year 2006-07, the assessee was having 54 cents of the agricultural land and from which the assessee has returned the agriculture income to the extent of Rs.60,000/-. During the assessment year 2007-08 and 2008-09 the assessee has returned the agriculture income at Rs.60,000/- and Rs.2,00,000/-. During the assessment year 2009-10 also, the assessee has returned the agriculture income at Rs.2,00,000/-. At the end of the assessment year 2009-10, the assessee has bought the agricultural land measuring 141.580 cents and subsequent to that also the assessee has brought 23 cents of agricultural land at Vayanasalapady at Kothamangalam. This is as per the statement given by the assessee during the course of search in reply to question No. 4. Thus, during the impugned assessment year the assessee was having agricultural land to the extent of 218.580 cents. During the assessment year 2010-11 also the assessee has returned the agricultural income at Rs.2,00,000/-. The return for the assessment year 2006-07 to 2010-11 has been processed under section 143(1) and prior to the date of search. Thus, the agriculture income to that extent stand accepted by the Revenue. No action either under section 263 or under section 147 has been taken by the Revenue. The assessee during the impugned assessment year in a belated return has shown the agriculture income at Rs.3,00,000/-. The Assessing Officer has treated the said income not to be the agriculture income but the income from undisclosed sources. When the matter went before the

CIT(A), the CIT(A) upheld the action of the Assessing Officer. Since in our opinion no addition can be made in the assessment year 2006-07 to 2010-11 as those assessments were not abated and no incriminating material was found during the course of search which may prove that the assessee has not earned the agriculture income during those years as returned by the assessee therefore, we did not uphold the action of the Assessing Officer. Impliedly the agriculture income returned by the assessee stands duly accepted by the Revenue. The Learned A.R. before us even though vehemently contended that the assessee was having agriculture income to that extent and it is not necessary to maintain the books of account as mentioned by the Assessing Officer. We do agree that in view of the quantum of the agriculture income returned by the assessee, the assessee is not required to maintain the regular books of account for the agriculture income but keeping in view the quantum of the land holding, the agriculture income shown by the assessee is on a higher side but since in the preceding assessment year the income from the same land holding stand accepted by processing the return under section 143(1) to the extent of Rs.2,00,000/- therefore, we treat the sum of Rs.2,00,000/- following principle of consistency, although it is on higher side from the said agriculture land, to be the agriculture income and confirm the action of the authorities below treating the balance sum of Rs.1,00,000/- as income from undisclosed sources. Thus, this ground taken by the assessee is partly allowed.

15. Ground No. 9 of the appeal relates to levy of interest under section 234A, 234B & 234C of the Act. As agreed by both the sides, this issue is consequential in nature. We accordingly direct the Assessing Officer to recompute the interest levied under section 234A, 234B & 234C of the Act after giving effect to this order.

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16. Ground Nos. 1,2,6 and 8 are general in nature and do not require any adjudication therefore, the same are dismissed as such.

17. Ground No. 3 relates to the sustenance of addition of Rs.5,44,000/- in respect of investment made in the land purchase. The Assessing Officer during the course of assessment noted that during the impugned assessment year the assessee has purchased the land on various dates consisting of five pieces of 10 cent, 13 cent, 11.5 cent, 13 cent and 9.5 cent for a sum of Rs.5,44,000/-, Rs.6,85,000/-, Rs.6,15,000/-, Rs.6,96,000/- and Rs.24,90,000/- for which the documents price were Rs.4,50,000/-, Rs.3,30,000/-, Rs.3,77,000/-, Rs.4,29,000/- and Rs.4,06,500/-. He went through the cash flow statement furnished by the assessee and noted that two plots of the land for Rs.5,44,000/- and Rs.6,85,000/- were purchased on 06/05/2011 and 07/05/2011 in his name and in the name of his wife Mini Eldhose. The Assessing Officer noted that on 07/05/2011 there was a withdrawal of Rs.6,80,000/- from the capital account of the assessee but there was no withdrawal from the capital account of the spouse. The cash credit is withdrawn on the same date when the assessee got the cash credit i.e. 19/04/2011 and 18/08/2011. The assessee claimed the withdrawal as for repayment and same was not utilized for land purchase. The Assessing Officer also noted that in the cash flow statement the assessee has shown income earned during the year to be the source of the purchase of land. The Assessing Officer was of the view that within one month after the beginning of the financial year the whole of the income of the year could not have been received by the assessee therefore, the Assessing Officer did not accept the source of land purchase for Rs.5,44,000/- and the made the said addition. When the matter went before the CIT(A), the CIT(A) did not give any finding on the said addition.

18. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We noted that the assessee has taken the ground, being ground No. C, before the CIT(A) in respect of the said addition but the CIT(A) while passing the order has not given any finding on this but impliedly this addition gets deleted as the CIT(A) has accepted the sum of Rs.18,15,000/- being received by the assessee from his brother out of which Rs.5,00,000/- was duly accepted by the Assessing Officer but the Assessing Officer did not accept a sum of Rs.13,15,000/- and made the addition for the same. The said sum of which represents Rs.18,15,000/- which is the cash credit in the bank account of Eldhose K. Varghese on different dates i.e. Rs.8,70,000/- on 18/08/2011, Rs.9,00,000/- on 19/04/2011 and Rs.45,000/- on 20/04/2011. It was noted that the said amount was also quickly withdrawn in cash and credited into the accounts of the assessee's wife Mini Eldhose Rs.9,00,000/- withdrawn on 19/04/2011 and Rs.8,70,000/- on 18/08/2011. Once the CIT(A) has deleted the addition of Rs.13,50,000/- which includes the sum of Rs.9,00,000/- withdrawn by the assessee on 19/04/2011 and given to the assessee's wife. Therefore, the contention of Learned D. R. that there was no withdrawal for paying the consideration of Rs.5,44,000/- from the account of Mini Eldhose on 19/04/2011 amounting to Rs.9,00,000/-, which is sufficient to cover up the sum of Rs.5,44,000/- and the Revenue has not come in appeal against the deletion of Rs.13,50,000/- Therefore, we delete the addition of Rs.5,44,000/-. Thus, ground No. 3 stands allowed.

19. Ground No. 4 relates to the estimate of the income by way of profit on sale of land at Rs.36,000/-.

20. The facts related to this issue, in brief, are that the Assessing Officer noted from the cash flow statement submitted by the assessee that the

assessee has sold the land during the year for a sum of Rs.7,15,000/- and Rs.5,50,000/- but the assessee has not shown any profit on the said transaction therefore, he added the same in the income of the assessee. When the matter went before the CIT(A), the CIT(A) did not give the specific finding, even though the assessee has taken the said ground before the CIT(A).

21. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We have also gone through the cash flow statement submitted by the assessee before the Assessing Officer during the course of assessment proceedings in reply to the notice issued under section 142(1) which is appearing at para 8 of the assessment order. From page 4 of the assessment order, we find that the assessee has shown the source of the sum of Rs.7,15,000/- and Rs.5,50,000/- to be the sale of land. Naturally when the assessee has sold the land the assessee might have earned the profit. The Assessing Officer has found that the assessee has not disclosed the said profit in the return filed by him and accordingly computed the said profit at Rs.36,000/-. The profit earned on the sale of the land is chargeable to tax. It is not the claim of learned A.R. that the assessee has not earned the income or the profit so earned is exempt from tax. We accordingly dismiss ground No. 4 of the assessee.

22. Ground No. 5 & 7 relate to agriculture income returned by the assessee at Rs.4,30,000/-, which was treated by the Assessing Officer as undisclosed income.

23. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We noted that during the impugned assessment year although the assessee has invested in five pieces of the land measuring 10 cent, 13 cent, 11.5 cent, 13 cent and 9.5

cent. Out of these lands, one is residential building measuring 9.5 cent while the rest are the land and all these lands are situated in the municipal limit of the concerned city. Except two pieces lands of 10 cent and 13 cent, which were bought on 06/05/2011 and 07/05/2011, rest of the lands were bought in December, 2011. In the earlier year, the income from agriculture has been accepted at Rs.2,00,000/- but so far these lands are concerned, in our view, the onus lies on the assessee to prove that the assessee has cultivated the land and earned the agriculture income. No government document showing the cultivation of the crop by way of revenue record was placed before us. It is not denied that the land so purchased are in small pieces but following the rule of consistency, we direct the Assessing Officer to treat the sum of Rs.2,00,000/- out of the sum of Rs.4,30,000/- to be the agriculture income earned by the assessee. Thus, ground No. 5 & 7 are partly allowed.

24. Ground No. 8 & 9 are consequential in nature relating to levy of interest under section 234A, 234B and 234C. We accordingly direct the Assessing Officer to recompute the interest levied under section 234A, 234B & 234C of the Act after giving effect to this order.

25. In the result, appeals for assessment year 2006-07 to 2008-09 and 2010-11 are allowed while the appeals of the assessee for assessment year 2009-10, 2011-12 and 2012-13 are partly allowed.

(Order pronounced in the open court on 04/10/2017)

Sd/.
(GEORGE GEORGE K.)
Judicial Member

Sd/.
(P. K. BANSAL)
Vice President

Dated:04/10/2017
***Singh**

Copy of the order forwarded to :

- 1.The Appellant
- 2.The Respondent.
- 3.Concerned CIT
- 4.The CIT(A)
5. D.R., I.T.A.T., Cochin

Asstt. Registrar