

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI D.T.GARASIA, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 2118-2121/Mum/2013,
(निर्धारण वर्ष / Assessment Year : 2002-03 to 2004-05 and 2006-07)

Deputy Commissioner of Income-tax, Central Circle- 11, Room No. 804,8 th Floor, Old CGO Building(Annex.), M K Road,Mumbai-400020	बनाम/ v.	Shri Ketan V.Shah 1-28-41, Sharda, Deo Murti Road, Near Civil Club, Jalna-431203
स्थायी लेखा सं./PAN : ACVPS9924F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 2494-2496/Mum/2013,
(निर्धारण वर्ष / Assessment Year : 2003-04, 2004-05 and 2006-07)

Shri Ketan V.Shah 1-28-41, Sharda, Deo Murti Road, Near Civil Club, Jalna- 431203	बनाम/ v.	Assistant Commissioner of Income-tax, Central Circle-11, Room No. 804,8 th Floor, Old CGO Building(Annex.), M K Road,Mumbai-400020
स्थायी लेखा सं./PAN : ACVPS9924F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 2122-2123/Mum/2013,
(निर्धारण वर्ष / Assessment Year : 2003-04 and 2007-08)

Deputy Commissioner of Income-tax, Central Circle- 11, Room No. 804,8 th Floor, Old CGO Building(Annex.), M K Road,Mumbai-400020	बनाम/ v.	Shri Ketan V.Shah,HUF 1-28-41, Sharda, Deo Murti Road, Near Civil Club, Jalna-431203
स्थायी लेखा सं./PAN : AAEHS8787H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 2497-2498/Mum/2013,
(निर्धारण वर्ष / Assessment Year : 2003-04 and 2004-05)

Shri Ketan V.Shah,HUF 4088/6,Mantha Road, Nath Nagar, Jalna, Maharashtra- 431203	बनाम/ v.	Assistant Commissioner of Income-tax, Central Circle-11, Room No. 804,8 th Floor, Old CGO Building(Annex.), M K Road,Mumbai-400020
स्थायी लेखा सं./PAN : AAEHS8787G		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by:	Shri. Samuel Darse, CIT DR
Assessee by :	None

सुनवाई की तारीख /**Date of Hearing** : 17.10.2017
घोषणा की तारीख /**Date of Pronouncement** : 23.10.2017
आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

These eleven appeals, filed by the Assessee as well Revenue pertains to two assessee's namely Ketan V Shah and Ketan V. Shah,HUF for different assessment years. The genesis of the assessment's is search u/s 132 conducted by Revenue in the Shah Group of Jalna on 21.02.2007.

2. First we shall take up appeal of Revenue in ITA no. 2118/Mum/2013 for assessment year(AY) 2002-03 in the case of Sh. Ketan V. Shah. The assessee is an individual and is Director in Sanket Industries Limited, Sanket Pan Masala Industries Limited , Sanket Food Products Private Limited. As informed by investigation wing to the learned assessing officer(hereinafter called "the AO") , the main allegation against the assessee, which led to the conduct of search , inter-alia was that the assessee's of Shah group were involved in unaccounted production and sale of products, suppressing of profits , generating unaccounted income, ploughing back their unaccounted income into the books by way of manoeuvring bogus/artificial share

transactions (long term capital gains) and also claiming benefit of tax at a lower rate. There were seizure of incriminating documents during the search operations conducted by Revenue u/s 132 on 21-02-2007. The assessee did not file return of income in pursuance to notice u/s 153A issued by the AO. The assessee did not participated in the proceedings for assessment u/s 153A of the Act despite several notices and opportunity granted by the AO which led to framing of best judgment assessment by the AO vide assessment orders dated 24-12-2008 which were common assessment orders for AY 2001-02 to 2007-08 , u/s 153A r.w.s. 144 of Income-tax Act,1961(hereinafter called “the Act”) for AY 2001-02 to 2006-07 and u/s 153B(1)(b) r.w.s. 144 for AY 2007-08. The assessee went in appeal before learned Commissioner of Income Tax(Appeals) (hereinafter called “ the CIT(A)”) in first round of litigation who dismissed the appeal in limine by passing common order dated 21-08-2009 by not condoning the delay of 92 days in filing appeal late by the assessee beyond limitation period as prescribed u/s 249(2). The assessee went in appeal before the Income-Tax Appellate Tribunal(hereinafter called “the tribunal”) in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6089-6094/Mum/2009 for AY 2002-03 to 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.437,438, 439 & 441/ACCC-11/11-12 for AY 2002-03 to 2004-05 and 2006-07 , which is subject matter of appeal before us.

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) in ITA no. 2118/Mum/2013 for AY 2002-03 in the case of Ketan V Shah read as under:-

- (i) *“On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 85,50,000/- on account of investment holding that the payments for the properties in question are made by cheque and these were paid by family members in whose returns of income the said properties are reflected , without considering the remand report of the Assessing Officer mentioning that the bank statement of*

Shri Sanjay Shah, Mayurben Shah and Radhika Shah were not verified due to non submission of bank account by the assessee.”

3. The issue under this appeal is in very narrow compass. During course of search operations u/s 132 on 21-02-2007, there was seizure of documents marked as Annexure A-4 and A-6 which carried details of immovable properties as under:

S.No.	Annexure/Date	FY	AY	Property	Owner/Name of purchaser	Consideration
1.	A-4/11-23 dated 23.05.2001	2001-02	2002-03	Unit No. II, 7 th Floor Solitaire Corporate Park, ANdheri Kurla Road, Andheri(E) Mumbai Area 2500 sq. Ft.	Sanjay Shah and Ketan Shah	Rs.70,50,000/-
2.	A-6/55-75 dated 4.8.2001	2001-02	2002-03	Plot No. 17 & 18 Manthat Rd. Nathnagar Jalna, Area 720 sq. Mt	Smt Mayurben Shah Smt Radhika Ketan Shah	Rs.15,00,000/-
		2001-02	2002-03	Total consideration		85,50,000/-

The assessee did not offer any explanation regarding sources of funds for investments in properties and whether the same was offered for taxation on sale of the above properties. The AO observed that the assessee sold these properties for total consideration of Rs. 85,50,000/- in AY 2002-03. The assessee did not file any return in pursuance of notice u/s 153A nor participated in assessment proceedings u/s 153A despite various notices and opportunities granted to the assessee by the AO as mentioned in the assessment order. It was also not brought on record whether the other joint owners have declared the said property in their return of income filed with the Revenue. The AO added the said amount of Rs. 85,50,000/- in the hands of the assessee, vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s. 153A.

3.2. The assessee challenged the additions by filing first appeal with learned CIT(A) which was delayed by 92 days. The learned CIT(A) dismissed the appeal in limine by not condoning the delay of 92 days in filing the appeal late beyond period of limitation as stipulated u/s 249(2) in first round of litigation vide appellate orders dated 21-08-2009. The assessee went in appeal before the Income-Tax Appellate Tribunal(hereinafter called “the tribunal”) in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6089-6094/Mum/2009 for AY 2002-03 to 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.437,438, 439 & 441/ACCC-11/11-12 for AY 2002-03 to 2004-05 and 2006-07. The assessee in second round of litigation before learned CIT(A) placed certain additional evidences which were admitted by learned CIT(A) in the interest of substantial justice and the said additional evidences were forwarded by learned CIT(A) to the AO for remand report as is mandated under Rule 46A of the Income-tax Rule,1962. The AO based on additional evidences submitted remand report wherein the AO based on the additional evidences submitted that although the property at Solitiare Corporate Park is owned jointly by the assessee with his brother Sanjay Shah in equal share which is also reflected in Balance Sheet by Sanjay Shah but it is not possible to verify the authenticity of cheque payments because cheques were issued by Sanjay Shah who is not assessed with AO and also sources of credits in the bank is not verifiable because the assessee has not provided complete bank statements as the assessee has only shown relevant transactions from his side.

3.3 With respect to the second property at Jalna , it was commented by AO in remand report that the property is in the name of Mayurben Shah and Radhika Shah. The AO in remand report observed that the said property is shown in their respective hands and payments have also been made from their respective bank accounts but it was also observed by the AO that authenticity of cheque payments cannot be verified as the cheques were issued by respective persons who are not assessed to the AO’s charge and

sources of credits were also not verifiable as the assessee did not provided the complete bank statements as only relevant transactions were shown from the assessee's side.

3.4. The learned CIT(A) forwarded the remand report to the assessee wherein the assessee instead of complying with the adverse observations of the AO in remand report justified that the AO has accepted the property belonged to the other parties . It is important to highlight the background that these are assessment pursuant to search and incriminating material was found and seized from the assessee. The assessee did not file return of income in pursuant to the notice u/s 153A nor participated in the assessment proceedings u/s 153A despite several notices issued by the AO and adequate opportunities of being heard granted by the AO to the assessee during assessment proceedings . The AO have adversely commented in remand report that the authenticity of cheques could not be verified as the cheques were issued by family members who are not assessed with AO and also sources of credits in the bank are not verifiable because the assessee has not provided complete bank statements as the assessee has only shown relevant transactions from his side. The learned CIT(A) whose powers are co-terminus with the powers of the AO instead of ensuring that all the adverse comments of the AO in remand report are met either by learned CIT(A) himself by making necessary enquiries /verifications or seeking second remand report from the AO , instead entered into blame game by blaming AO wherein he erred in holding that the AO is satisfied with respect to the investments in property are being made by the family members. This is a perverse finding of learned CIT(A) which cannot be sustained in the eyes of law as the AO had categorically stated in remand report that he is not satisfied as the authenticity of cheques could not be verified as cheques were issued by family members who are not assessed with AO and also sources of credits in the bank is not verifiable because the assessee has not provided complete bank statements as the assessee has only shown relevant transactions from his side. It was all the more incumbent on the learned CIT(A) to have directed the assessee to comply with all the adverse remarks of the AO more-so with the background that it is an assessment pursuant to search u/s 132 and during search incriminating material were found and seized during the course of search from the assessee. It is all the more

pertinent also in the back drop of the assessee being non co-operative through out assessment proceedings as the assessee neither filed return of income in pursuant to notice u/s 153A nor participated in the assessment proceedings u/s 153A. The assessee has also not filed complete evidences to support its contentions before learned CIT(A) and in remand report proceedings before AO thereby crippling AO to do complete enquiry/verification as is required with respect to these immovable properties and its sources leading to adverse comments by the AO in remand report which remained un-complied with as of now as the learned CIT(A) just accepted the contentions of the assessee without satisfying the adverse comments by the AO which were valid observations of the AO in the context of search assessment as also seized material during search operations u/s 132. The assessee is also not appearing before the tribunal in second round of litigation despite several notices. Revenue has filed this appeal as it is aggrieved by learned CIT(A) granting relief to the assessee. The learned CIT-DR has vehemently objected to learned CIT(A) allowing the relief to the assessee without complying with all the adverse finding of the AO in remand report proceedings . Thus with the above background , the appellate order of learned CIT(A) cannot be sustained in the eyes of law and is set aside and matter is once again restored back to the file of learned CIT(A) for fresh adjudication on merits in accordance with law. The assessee be given proper and adequate opportunity of being heard by the learned CIT(A) in denovo proceedings and all relevant evidences and explanations be admitted in the interest of justice. The learned CIT(A) shall also consider ratio of decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation(Nhava Sheva) Limited (2015) 374 ITR 645(Bom.) before adjudicating appeal de-novo in set aside proceedings. We order accordingly.

4. In the result appeal of the Revenue in ITA No.2118/Mum/2013 for assessment year 2002-03 is allowed for statistical purposes.

Revenue Appeal in ITA No. 2119/Mum/2013-AY 2003-04-Ketan V Shah

5. The Revenue has filed this appeal and raised following ground of appeal before the tribunal:

“(i) On the facts and in the circumstances of the case and in law , the Ld. CIT(A) has erred in deleting the additions of Rs.41,58,241/- on account of unconfirmed loans in its entirety without considering the remand report mentioning non confirmation of loans of Rs. 23,17,210/- out of total addition of Rs. 41,58,241/-“

5.2 The background of this addition is similar to the issue dealt within appeal of the Revenue for AY 2002-03 which has been adjudicated by us in preceding para's. The assessee was searched by Revenue on 21-02-2007 u/s 132. The issue in this appeal is with respect to loans of Rs. 41,58,241/- raised by the assessee and compliance of mandate of Section 68. The assessee was asked by the AO to file confirmations of said loans and also to prove identity and creditworthiness of loan creditors as well genuineness of the loans. The assessee did not file any details during assessment proceedings u/s 153A. The assessee did not filed any return in pursuance to notice u/s 153A nor participated in assessment proceedings u/s 153A despite various opportunities granted to the assessee by the AO as mentioned in the assessment order. The AO added the said amount of Rs. 41,58,241/- in the hands of the assessee vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s. 153A.

5.3. The assessee challenged the additions by filing first appeal with learned CIT(A) which was delayed by 92 days. The learned CIT(A) dismissed the appeal in limine by not condoning the delay of 92 days in filing the appeal late beyond period of limitation as stipulated u/s 249(2) in first round of litigation vide appellate orders dated 21-08-2009. The assessee went in appeal before the tribunal in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6089-6094/Mum/2009 for AY 2002-03 to 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.437,438, 439 & 441/ACCC-11/11-12 for AY 2002-03 to 2004-05 and 2006-07. The assessee in second round of litigation before learned CIT(A) placed certain additional evidences by way of loan confirmations which were admitted by learned

CIT(A) in the interest of substantial justice and the said additional evidences were forwarded by learned CIT(A) to the AO for remand report as is mandated under Rule 46A of the Income-tax Rule,1962. The assessee also explained that out of total loans of Rs. 41,58,241/- outstanding in the Balance Sheet as on 31-03-2003 , the loans of Rs. 20,54,884/- were opening loans as on 01-04-2002 while fresh loan raised during financial year 2002-03 (AY 2003-04) were to the tune of Rs. 19,84,103/- and the assessee has also paid interest of Rs. 1,19,254/-. The AO based on additional evidences submitted remand report wherein the AO confirmed that loan confirmations were submitted along with PAN and address of loan creditors but commented that the loan confirmations could not be verified . It was also observed by the AO that based on documents now submitted in remand report proceedings, it has transpired that loan of Rs. 20,54,884/- was opening loans as on 01-04-2002 and w.r.t. other loans of Rs. 23,17,210/- raised during the year the assessee has furnished loan conformations which could not be verified and hence authenticity of loans cannot be confirmed as also cheques payments are also not verifiable. It is important to highlight the background that these are assessment pursuant to search and incriminating material was found and seized from the assessee. The assessee did not file return of income in pursuant to the notice u/s 153A nor participated in the assessment proceedings u/s 153A despite several notices issued by the AO and adequate opportunities of being heard granted by the AO. The learned CIT(A) whose powers are co-terminus with the powers of the AO instead of ensuring that all the adverse comments of the AO in remand report are met either by himself by making necessary enquiries /verifications or seeking second remand report from the AO , instead entered into blame game by blaming AO that for some strange reasons the AO has not commented on the veracity and authenticity of the said loans. This is a perverse finding of learned CIT(A) which cannot be sustained in the eyes of law as the AO categorically stated in remand report that the loan confirmations filed by the assessee are not verified and its authenticity could not be commented upon and authenticity of loan cannot be confirmed and cheques payments are not verifiable . It was all the more incumbent on the learned CIT(A) to have directed the assessee to comply with all the adverse remarks of the AO more-so with the background that it is an assessment pursuant to search u/s 132 and during search incriminating material were found and seized during the

course of search from the assessee. It is all the more pertinent also in the back drop of the assessee being non co-operative through out assessment proceedings as the assessee neither filed return of income in pursuant to notice u/s 153A nor participated in the assessment proceedings u/s 153A. The assessee has also not filed complete evidences to support its contentions before learned CIT(A) and in remand report proceedings before AO crippling AO to do complete enquiry/verification as is required with respect to these loans raised by the assessee and proving the mandate of Section 68 leading to adverse comments by the AO in remand report which remained un-complied with as of now as the learned CIT(A) just accepted the contentions of the assessee without satisfying the adverse comments by the AO which were valid observations of the AO in the context of search assessment as also seized material during search operations u/s 132. The assessee is also not appearing before the tribunal in second round of litigation despite several notices. Revenue has filed this appeal as it is aggrieved by learned CIT(A) granting relief to the assessee. The learned CIT-DR has vehemently objected to learned CIT(A) allowing the relief to the assessee without complying with all the adverse finding of the AO in remand report proceedings . Thus with the above background , the appellate order of learned CIT(A) cannot be sustained in the eyes of law and is set aside and matter is once again restored back to the file of learned CIT(A) for fresh adjudication on merits in accordance with law. The assessee be given proper and adequate opportunity of being heard by the learned CIT(A) in denovo proceedings and all relevant evidences and explanations be admitted in the interest of justice. The learned CIT(A) shall also consider ratio of decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation(Nhava Sheva) Limited (2015) 374 ITR 645(Bom.) before adjudicating appeal de-novo in set aside proceedings. We order accordingly.

6. In the result appeal of the Revenue in ITA No.2119/Mum/2013 for assessment year 2003-04 is allowed for statistical purposes.

**Revenue Appeal in ITA No.2120/Mum/2013-AY 2004-05-
Ketan V Shah**

7. Similar issues with respect to sale of immovable property as well not explaining sources for making investment made in immovable property as also second ground is with respect to raising of loans and non satisfaction of mandate u/s 68 has arisen in AY 2004-05 which are dealt with by us in AY 2002-03 and 2003-04 vide our orders in preceding para's . Our decision with respect to said assessment years shall apply mutatis mutandis to issues during the impugned assessment year. We order accordingly.

8. In the result appeal of the Revenue in ITA No.2120/Mum/2013 for assessment year 2004-05 is allowed for statistical purposes.

**Revenue Appeal in ITA no. 2121/Mum/2013-AY 2006-07-
Ketan V Shah**

9. The Revenue has filed this appeal and raised following ground of appeal before the tribunal:

“ (i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 23,81,553/- on account of unexplained bank deposit by filing bank statement etc., whereas the source of credit was not verifiable and it was also not confirmed whether assessee had shown same bank account in original return of income and these transactions were reflected in regular books of accounts.

(ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting addition of Rs.3,00,000/- on account of household expenses relying on the additional evidences produced by the assessee, whereas the Assessing Officer in his remand report has submitted that the assessee failed to provide any evidence in respect of Household Expenses.”

10. At the outset learned CIT-DR submitted that ground no. 2 is wrongly filed by Revenue and prayed that the Revenue want to withdraw ground no. (ii) as the learned CIT(A) has confirmed the additions and there is no grievance to Revenue w.r.t. this issue. None appeared for assessee before the tribunal when the appeal was called for hearing. After hearing learned CIT-DR and perusing material on record, we dismiss ground no (ii) raised by

Revenue in its appeal filed with the tribunal as withdrawn . We order accordingly.

11. The first ground is concerning unexplained bank deposit to the tune of Rs. 23,81,553/- in HDFC Bank account of the assessee bearing no. 00861000057584 with Andheri(East) Branch, Mumbai. The assessee did not explained sources of credit in the bank accounts during assessment proceedings u/s 153A. The assessee did not filed any return in pursuance of notice u/s 153A nor participated in assessment proceedings u/s 153A despite various opportunities granted to the assessee by the AO as mentioned in the assessment order. The AO added the said amount of Rs. 23,81,553/- in the hands of the assessee as income being unexplained credit u/s 68 ,vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s. 153A.

11.2 The assessee challenged the additions by filing first appeal with learned CIT(A) which was delayed by 92 days. The learned CIT(A) dismissed the appeal in limine by not condoning the delay of 92 days in filing the appeal late beyond period of limitation as stipulated u/s 249(2) in first round of litigation vide appellate orders dated 21-08-2009. The assessee went in appeal before the tribunal in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6089-6094/Mum/2009 for AY 2002-03 to 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.437,438, 439 & 441/ACCC-11/11-12 for AY 2002-03 to 2004-05 and 2006-07. The assessee in second round of litigation before learned CIT(A) placed certain additional evidences by way of bank book, bank statements , explanation w.r.t. deposits, ledger account of investments which were admitted by learned CIT(A) in the interest of substantial justice and the said additional evidences were forwarded by learned CIT(A) to the AO for remand report as is mandated under Rule 46A of the Income-tax Rule,1962. The AO based on additional evidences submitted remand report wherein the AO commented that the sources of credit in bank account are not verifiable and also it is not

verifiable that whether the assessee has shown same bank account in the original return of income filed by the assessee and also it could not be verified that whether transactions are reflected in regular books of accounts . It is pertinent to highlight the background that these are assessment pursuant to search and incriminating material was found and seized from the assessee. The assessee did not file return of income in pursuant to the notice u/s 153A nor participated in the assessment proceedings u/s 153A despite several notices issued by the AO and adequate opportunities of being heard granted by the AO. The learned CIT(A) whose powers are co-terminus with the powers of the AO instead of ensuring that all the adverse comments of the AO in remand report are met either by himself by making necessary enquiries /verifications or seeking second remand report from the AO , instead entered into blame game by blaming AO that the AO has not given any finding as to sources of credit in banks. Then in that situation it was all the more incumbent on the learned CIT(A) to have satisfied itself as to the sources of credits in bank account and whether income has escaped assessment which need to be brought to tax. The learned CIT(A) merely accepted the contentions of the assessee without explaining as to why he is accepting the contentions of the assessee in the midst of adverse comments by the AO . This is a perverse finding of learned CIT(A) which cannot be sustained in the eyes of law as the AO categorically stated in remand report that the sources of bank deposits could not be verified and also that whether the assessee has shown same bank account in the original return of income and its regular books of accounts . It was all the more incumbent on the learned CIT(A) to have directed the assessee to comply with all the adverse remarks of the AO more-so with the background that it is an assessment pursuant to search u/s 132 and during search incriminating material were found and seized during the course of search from the assessee. It is all the more pertinent also in the back drop of the assessee being non co-operative through out assessment proceedings as the assessee neither filed return of income in pursuant to notice u/s 153A nor participated in the assessment proceedings u/s 153A. The assessee has also not filed complete evidences to support its contentions before learned CIT(A) and in remand report proceedings before AO thereby crippling AO to do complete enquiry/verification as is required with respect to these deposits by the assessee in HDFC Bank account and proving the mandate of Section 68

leading to adverse comments by the AO in remand report which remained un-complied with as of now as the learned CIT(A) just accepted the contentions of the assessee without satisfying the adverse comments by the AO which were valid observations of the AO in the context of search assessment as also seized material during search operations u/s 132. The assessee is also not appearing before the tribunal in second round of litigation despite several notices. Revenue has filed this appeal as it is aggrieved by learned CIT(A) granting relief to the assessee. The learned CIT-DR has vehemently objected to learned CIT(A) allowing the relief to the assessee without complying with all the adverse finding of the AO in remand report proceedings . Thus with the above background , the appellate order of learned CIT(A) cannot be sustained in the eyes of law and is set aside and matter is once again restored back to the file of learned CIT(A) for fresh adjudication on merits in accordance with law. The assessee be given proper and adequate opportunity of being heard by the learned CIT(A) in denovo proceedings and all relevant evidences and explanations be admitted in the interest of justice. The learned CIT(A) shall also consider ratio of decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation(Nhava Sheva) Limited (2015) 374 ITR 645(Bom.) before adjudicating appeal de-novo in set aside proceedings. We order accordingly.

12. In the result appeal of the Revenue in ITA No.2121/Mum/2013 for assessment year 2006-07 is partly allowed for statistical purposes.

Assessee's Appeal in ITA no. 2494/Mum/2013 for AY 2003-04
-Ketan V.Shah

13. The assessee has raised following grounds of appeal in memo of appeal filed with the tribunal:-

"1. The ld. Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 13,55,355/- as alleged undisclosed income which was declared by the appellant as long term gain on sale of shares.

2. The ld. Commissioner of Income Tax(Appeals) further erred in confirming the addition of Rs. 67,767/- as alleged unexplained expenditure incurred on purchase and sale of shares, the income from which was declared under the head long term capital gain."

14. The brief facts and background of the case are already discussed by us in preceding para's which are not repeated here for sake of brevity. Now, coming straight to the issue . It was observed by the AO that the assessee has declared capital gains to the tune of Rs. 13,35,015/- from sale of penny stock being shares of Database Finance Limited which were purchased in financial year 2001-02 for Rs 20,340/- and sold for Rs. 13,55,355/- during the financial year 2002-03 i.e. AY 2003-04.

14.2. The AO asked the assessee to produce the parties through whom the shares were purchased and sold and also to prove genuineness of the transactions. The assessee did not avail the opportunity despite sufficient opportunity granted by the AO. The AO observed that there is a rampant misuse of the provisions of Section 10(36) and 10(38) to avail tax benefits wherein fabricated transactions in sale and purchase were used to obtain artificial long term capital gains by utilising unaccounted money through share market hawala operations. The detailed modus operandi adopted by unscrupulous tax-payers in collusion with hawala operators was explained by the AO in his assessment order. The AO also verified various parties who were connected with sale and purchase of shares wherein Shailee Securities stated on oath in the statement recorded of its proprietor namely Janak Raja that merely accommodation bills were issued for sale and purchase of shares of Database Finance Limited while Mr Narendra Shah , Director of G R Pandya Share Broking Limited in its statement recorded on oath denied transactions with the assessee with respect to sale of said shares shown by the assessee through said concern . With respect to two parties namely Trimiti Investment and Finance Services Private Limited and M/s T H Vakil Shares and Securities Private Limited, both could not be served with notices issued by the AO in order to carry out verifications. The assessee was given sufficient opportunity from time to time by the AO to explain the genuineness of the transactions . There was no evidences for making payments for purchase of shares and it was also observed by the AO that whole purchase transactions were back dated in order to show earning of long term capital gains. There was also no evidence of receipt of physical delivery of shares received by the assessee when shares were purchased and its movement for sending for transfer, demat etc. . Thus, the AO held these transactions for sale and purchase of shares as merely sham transactions in

order to show earning of exempt long term capital gains, which was then treated as unaccounted money of the assessee brought to tax as undisclosed income of the assessee to the tune of Rs. 13,55,355/- , vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s 153A.

14.3 The assessee challenged the additions by filing first appeal with learned CIT(A) which was delayed by 92 days. The learned CIT(A) dismissed the appeal in limine by not condoning the delay of 92 days in filing the appeal late beyond period of limitation as stipulated u/s 249(2) in first round of litigation vide appellate orders dated 21-08-2009. The assessee went in appeal before the tribunal in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6089-6094/Mum/2009 for AY 2002-03 to 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.437,438, 439 & 441/ACCC-11/11-12 for AY 2002-03 to 2004-05 and 2006-07. The learned CIT(A) dismissed the appeal of the assessee in the second round of litigation as both the brokers in their statement recorded on oath had denied that transactions for purchase and sale of shares of Database Limited took place. Janak Raja Proprietor of M/s Shailee Securities stated on oath in statement recorded by Revenue that these were merely accommodation entries where in paper documents were issued without any genuine purchase/ sale of shares. Similarly , Mr Narendra Shah , Director of G R Pandya Share Broking Limited denied that any transaction for sale of shares of Database Limited have taken place through them. The evidence for making payment for purchase of shares is not produced by the assessee. The 1800 shares of Database Finance Limited were stated to have been purchased on 11.04.2001 for Rs. 11.30 per share while 18000 shares of Database Limited were sold for Rs. 75.30 per share on 3-6-2002(debit on demat account on 15-06-2002)(stock split 10:1) , leading to alleged capital gains of Rs. 13,35,015/-. The said shares came into demat account of the assessee only on 7-6-2002. There is no evidence of receipt of shares by the assessee either on physical or in electronic form in demat account on 11-04-2001 when shares were stated to be purchased till 07-06-2002 when it actually got

credited in demat account of the assessee. The brokers who were stated to have been involved for purchase and sale of shares have denied the transactions as detailed above. The learned CIT(A) observed that the assessee has not made any attempt to cross examine the issuers of the bogus bills/contract notes at any stage before the AO or before learned CIT(A). Thus, the learned CIT(A) dismissed the appeal of the assessee as the assessee failed to discharge its burden which lay on him and also relying on various case laws which are duly detailed in his appellate order dated 12-12-2012 passed in second round of litigation.

14.4. Aggrieved by the appellate order dated 12-12-2012 passed by learned CIT(A), the assessee has filed an appeal before the tribunal in ITA No. 2494/Mum/2013 for AY 2003-04. None appeared for the assessee when the appeal was called for hearing before the Bench. The assessee has also not appeared earlier on several occasions when the appeal was fixed before the Bench from time to time. We now proceed to adjudicate this appeal after hearing learned CIT-DR. The learned CIT-DR vehemently supported the orders of the authorities below. It was submitted that the assessee dealt within penny stock namely Database Finance Limited wherein it was sold for Rs. 13.55 lacs which was a bogus sale. The statements were recorded of brokers who confirmed that these were accommodation entries and one broker denied the transaction of sale of share. It was submitted that the assessee never asked for cross examination. It was submitted that no proof of payment of shares was shown and also no proof of movement of 1800 shares so purchased in the month of April 2001 was shown. This shares was increased to 18000 shares as stock split took place in the ratio of 10:1 wherein the shares were converted into face value of Rs. 1 instead of Rs 10 each. The said 18000 shares of Database Finance Limited were sold @ Rs. 75.30 of face value of Rs 1 on 3-6-2002 as against the purchase price of Rs. 11.30 per share of face value of Rs. 10 each on 11-04-2001. There was no quantitative movement of stock shown by the assessee from the date the said share were allegedly purchased on 11-04-2001 till it came to its demat

account on 7-6-2002. The shares were sold infact on 3-6-2002 i.e. even prior to coming into demat account of the assessee on 7-6-2002. Thus, it was contended that the whole transaction for purchase and sale of shares of Database Finance Limited was a sham transaction and the assessee has introduced its undisclosed income to the tune of Rs. 13.55 lacs when it purchased 18000 shares of Database Limited on 3-6-2002 wherein market price was around Rs. 75/- per share at that time, which was then sold and long term capital gains were shown to have been earned to the tune of Rs. 13.35 lacs which is claimed as an exempt income.

14.5 We have heard learned CIT-DR and carefully perused the material on record. We have observed that the assessee has allegedly shown to have purchased 1800 shares of Database Finance Limited on 11-04-2001 for Rs. 11.30 per share (FV Rs 10). The assessee has not shown how the payment for said shares were made by the assessee towards purchase of said shares. The assessee has also not demonstrated receipt of these 1800 shares of Database Finance Limited which were allegedly purchased on 11-04-2001. The assessee has not shown whether these shares were physically received on purchase of shares or electronically received by it at the time of alleged purchase on 11-04-2001. If physically received, then what happened to the said shares of Database Finance Limited in the intervening period from 11-04-2001 till 07-06-2002 when the shares came into assessee's demat account, is also not demonstrated by the assessee. The assessee has shown that 18000 shares (post split into FV Rs. 1 per share) were sold for Rs. 75.30 per share on 03-06-2002. The assessee's broker namely Janak Raja Proprietor of Shailee Securities who was allegedly involved in purchase of shares have deposed on oath that it has merely issued accommodation bills without any shares being dealt through of Database Finance Limited while selling broker has denied the transaction in statement recorded on oath that no such shares of Database Finance Limited were sold by it. Under these

circumstances, the onus was on the assessee to have proved the genuineness of the transactions which the assessee failed to do so. Both the buying as well selling broker of the assessee has deposed against the assessee in statement recorded on oath wherein purchasing broker stated that these purchase invoices are accommodation entries while selling broker denied the transaction of sale of shares. The assessee has not even sought cross examination of the brokers who have deposed against the assessee. The assessee has also not proved mode and evidence of having made payment for purchasing shares of Database Finance Limited on 11-04-2001. The quantitative movement of shares from 11-04-2001 till it was received by the assessee in its demat account on 07-06-2002 is also not proved. These are facts which are especially in the knowledge of the assessee and the onus is on the assessee to have proved the bonafide and genuineness of the transaction of purchase and sale of share. Section 106 of the Indian Evidence Act ,1872 is relevant. We donot find any infirmity in the orders of authorities below which we are not inclined to interfere with. The assessee fails on the first ground in this appeal. We order accordingly.

14.6 The AO has also made additions to the tune of Rs. 67,767/- on account of commission paid to the brokers for arranging these accommodation entries for sale and purchase of shares. Since,we have upheld the orders of the authorities below by holding that these purchase and sale of shares were sham transactions to show exempt long term capital gains and merely accommodation entries were organised by the assessee . The necessary corollary to our above finding shall be to upheld the estimate of commission so made by the authorities below in arranging accommodation entries by the brokers which is an estimate made by the authorities below which necessarily involve some guess work in estimating commissions being paid to these brokers for arranging accommodation entries . We donot find that the said guess work made by the authorities below in estimating commission paid by the assessee to brokers was

perverse or is unconsciously high which shook conscience and hence we uphold the same. The assessee also fails on second ground. We order accordingly.

15. In the result appeal of the assessee in ITA No.2494/Mum/2013 for assessment year 2003-04 is dismissed.

Assessee's appeal in ITA no. 2495/Mum/2013 for AY 2004-05
- Ketan V Shah

16. Similar issues are raised in this appeal as were raised by the assessee in ITA no. 2494/Mum/2013 for AY 2003-04 as identical grounds of appeal are raised (only difference is amounts) . The grounds of appeal raised by the assessee in ITA no. 2495/Mum/2013 for AY 2004-05 in memo of appeal filed with the tribunal are as under:

"1. The ld. Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.9,89,100/- as alleged undisclosed income which was declared by the appellant as long term gain on sale of shares.

2. The ld. Commissioner of Income Tax(Appeals) further erred in confirming the addition of Rs. 49,455/- as alleged unexplained expenditure incurred on purchase and sale of shares, the income from which was declared under the head long term capital gain."

17. Since identical issues are involved in this year as were there in AY 2003-04, our decision in ITA no. 2494/Mum/2013 for AY 2003-04 shall apply mutatis mutandis to the issues in appeal for AY 2004-05 filed by the assessee with the tribunal in ITA no. 2495/Mum/2013. The assessee fails in this appeal on both the grounds. We order accordingly.

18. In the result appeal of the assessee in ITA No.2495/Mum/2013 for assessment year 2004-05 is dismissed.

Assessee's appeal in ITA no. 2496/Mum/2013 for AY 2006-07
-Ketan V Shah

19. The solitary ground raised by the assessee in this appeal in ITA no. 2496/Mum/2013 for AY 2006-07 is with respect to

additions made by the AO of Rs. 3 lacs towards estimated household expenses for AY 2006-07. The AO observed that the assessee has not furnished any details of household expenses nor any sources of meeting the same were disclosed. There was also no cash withdrawal from the bank account which led to the addition of Rs. 3 lacs towards estimated household expenses vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s. 153A . The assessee carried the matter in appeal before learned CIT(A) and we have discussed in details the sequence of proceedings in the first round of litigation wherein tribunal remanded the matter back to the learned CIT(A) to be adjudicated on merits. The same details are not repeated for sake of brevity as they are elucidated in details in preceding para's of this order. The learned CIT(A) in second round of litigation dismissed this ground. The assessee explained before learned CIT(A) that the assessee is living in joint family and cost of living in Jalna is very less. It was explained that the assessee has interest in various business and out of their earning the household expenses were met. It was also explained that similar additions of Rs. 3 lacs is made in the hands of the assessee's HUF namely Ketan V Shah (HUF) .It was also explained that the assessee was in USA since 2004 and hence no additions on account of estimated household expenses to the tune of Rs. 3 lacs is warranted.The learned CIT(A) did not find any infirmity in the order of the AO and also the said amount of Rs. 3 lacs was also not considered excessive or unreasonable and hence the learned CIT(A) dismissed this ground.

19.2 Before us learned CIT-DR has supported the order of learned CIT(A) while none appeared for assessee.

19.3 We have considered the submissions of the learned CIT-DR and also perused the material on record. We are of the considered view that the assessee deserves one more opportunity to explain its case before the learned CIT(A) wherein learned CIT(A) is directed to consider all the contentions so raised by the assessee to support its stand that the estimation of household

expenses is higher , which contentions shall be disposed of by learned CIT(A) on merits instead of dismissing the said contentions in limine without disposing of all the contentions as has happened presently by the learned CIT(A) while adjudicating this issue vide orders dated 12-12-2012. Let the assessee be given proper opportunity of being heard in set aside proceedings before the learned CIT(A) in accordance with principles of natural justice in accordance with law. The explanations and evidences in support of his contentions be admitted by learned CIT(A) and adjudicated on merits in accordance with law. The issue is set aside and restored to the file of learned CIT(A) for de-novo adjudication on merits in accordance with law wherein learned CIT(A) shall consider all contentions of the assessee and dispose of the same on merits. We order accordingly.

20. In the result appeal of the assessee in ITA No.2496/Mum/2013 for assessment year 2006-07 is allowed for statistical purposes.

Revenue's appeal in the case of Ketan V Shah(HUF) for AY 2003-04 in ITA no. 2122/Mum/2013

21. The assessee is an HUF and is partner in M/s Sanjay Agencies a partnership firm assessed at Jalna,Maharashtra. As informed by investigation wing to the learned assessing officer(hereinafter called "the AO") , the main allegation against the assessee, which led to the conduct of search u/s 132, inter-alia was that the assessee's of Shah group were involved in unaccounted production and sale of products, suppressing of profits , generating unaccounted income, ploughing back their unaccounted income into the books by way of manoeuvring bogus/artificial share transactions (long term capital gains) and also claiming benefit of tax at a lower rate. The search operations were conducted against Shah Group of Jalna u/s 132 on 21-02-2007. There were seizure of incriminating documents during the search operations conducted by Revenue u/s 132 on 21-02-2007. The assessee did not file return of income in pursuance to notice u/s 153A issued by the AO. The assessee did not participated in the proceedings for assessment u/s 153A of the Act despite several notices and opportunity granted by the AO which led to framing of best judgment

assessment by the AO vide assessment orders dated 24-12-2008 which were common assessment orders for AY 2001-02 to 2007-08 , u/s 153A r.w.s. 144 of Income-tax Act,1961(hereinafter called “the Act”) for AY 2001-02 to 2006-07 and u/s 153B(1)(b) r.w.s. 144 for AY 2007-08. The assessee went in appeal before learned Commissioner of Income Tax(Appeals) (hereinafter called “ the CIT(A)”) who dismissed the appeal in limine by passing common order dated 21-08-2009 by not condoning the delay of 92 days in filing appeal late by the assessee beyond limitation period as prescribed u/s 249(2). The assessee went in appeal before the tribunal in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6095-6098/Mum/2009 for AY 2003-04 , 2004-05 , 2006-07 and 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.433,434, 435 & 436/ACCC-11/11-12 for AY 2003-04, 2004-05 , 2006-07 and 2007-08 , which is subject matter of appeal before us.

22. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) in ITA no. 2122/Mum/2013 for AY 2003-04 in the case of Ketan V Shah(HUF) read as under:-

“(i) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 20,07,590/- on account of unconfirmed loan in its entirety without considering the remand report mentioning non confirmation of loans of Rs. 16,53,000/- out of total additions of Rs. 20,07,590/- .

(ii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 17,45,000/- on account of unaccounted income from sale of properties by holding that the purchase consideration of both the parties is reflected in the balance sheet and payments are through banking channels without considering the remand report of the Assessing Officer that purchase agreement was only photocopy and original was not filed , without any proof as to the sources of credits in bank accounts from which payments were reported to be effected.”

23. The assessee was searched by Revenue on 21-02-2007 u/s 132. The first issue in this appeal is with respect to loans of Rs. 20,07,590/- raised by the assessee and compliance of mandate of Section 68. The assessee was asked by the AO to file confirmations of said loans and also to prove identity and creditworthiness of loan creditors as well genuineness of the loans. The assessee did not file any details during assessment proceedings u/s 153A. The assessee did not file any return in pursuance to notice u/s 153A nor participated in assessment proceedings u/s 153A despite various opportunities granted to the assessee by the AO as mentioned in the assessment order. The AO added the said amount of Rs. 20,07,590/- in the hands of the assessee vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s. 153A.

23.2. The assessee challenged the additions by filing first appeal with learned CIT(A) which was delayed by 92 days. The learned CIT(A) dismissed the appeal in limine by not condoning the delay of 92 days in filing the appeal late beyond period of limitation as stipulated u/s 249(2) in first round of litigation vide appellate orders dated 21-08-2009. The assessee went in appeal before the tribunal in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6095-6098/Mum/2009 for AY 2003-04, 2004-05, 2006-07 and 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.433,434, 435 & 436/ACCC-11/11-12 for AY 2003-04 , 2004-05 , 2006-07 and 2007-08. The assessee in second round of litigation before learned CIT(A) placed certain additional evidences by way of loan confirmations which were admitted by learned CIT(A) in the interest of substantial justice and the said additional evidences were forwarded by learned CIT(A) to the AO for remand report as is mandated under Rule 46A of the Income-tax Rule, 1962. The assessee also explained that out of total loans of Rs. 20,07,290/- outstanding in the Balance Sheet as on 31-03-2003, the loans of Rs. 3,54,590/- were opening loans as on 01-04-2002 while fresh loan raised during financial year 2002-03 (AY 2003-04) were to

the tune of Rs. 16,35,000/- . The AO based on additional evidences submitted remand report wherein the AO confirmed that loan confirmations were submitted along with PAN and address of loan creditors but commented that the loan confirmations could not be verified and authenticity of loan could not be verified as also cheques payments are also not verifiable. The AO observed that as per additional evidences , the loans of Rs. 16,35,000/- is raised from the Karta of the assessee which is reflected in the bank account of the assessee and Karta has also reflected the said loan in its books of accounts . The AO commented that the cheque payments in this regard is also not verifiable , because the source of credits in bank is not verified. It is pertinent to mention the background that these are assessment pursuant to search and incriminating material was found and seized from the assessee. The assessee did not file return of income in pursuant to the notice u/s 153A nor participated in the assessment proceedings u/s 153A despite several notices issued by the AO and adequate opportunity of being heard granted by the AO. The learned CIT(A) whose powers are co-terminus with the powers of the AO instead of ensuring that all the adverse comments of the AO in remand report are met either by himself by making necessary enquiries /verifications or seeking second remand report from the AO , instead entered into blame game by holding that the AO has himself admitted that loan of Rs. 16,35,000/- was only raised during the year and it is reflected in the Balance Sheet of both the assessee. This is a perverse finding of learned CIT(A) which cannot be sustained in the eyes of law as the AO categorically stated in remand report that the loan confirmations filed by the assessee are not verified and its authenticity could not be commented upon and authenticity of loan cannot be confirmed and cheques payments are not verifiable . It was all the more incumbent on the learned CIT(A) to have directed the assessee to comply with all the adverse remarks of the AO more-so with the background that it is an assessment pursuant to search u/s 132 and during search incriminating material were found and seized during the course of search from the assessee. It is all the more pertinent also in the back drop of the assessee being non co-operative through out assessment proceedings as the assessee neither filed return of income in pursuant to notice u/s 153A nor participated in the assessment proceedings u/s 153A. The assessee has also not filed complete evidences to support its contentions before learned CIT(A)

and in remand report proceedings before AO thereby crippling AO to do complete enquiry/verification as is required with respect to these loans raised by the assessee and proving the mandate of Section 68 , which lead to adverse comments by the AO in remand report which remained un-complied with as of now as the learned CIT(A) just accepted the contentions of the assessee without satisfying the adverse comments by the AO which were valid observations of the AO in the context of search assessment as also seized material during search operations u/s 132. The assessee is also not appearing before the tribunal in second round of litigation despite several notices. Revenue has filed this appeal as it is aggrieved by learned CIT(A) granting relief to the assessee. The learned CIT-DR has vehemently objected to learned CIT(A) allowing the relief to the assessee without complying with all the adverse finding of the AO in remand report proceedings . Thus with the above background , the appellate order of learned CIT(A) cannot be sustained in the eyes of law and is set aside and matter is once again restored back to the file of learned CIT(A) for fresh adjudication on merits in accordance with law. The assessee be given proper and adequate opportunity of being heard by the learned CIT(A) in denovo proceedings and all relevant evidences and explanations be admitted in the interest of justice. The learned CIT(A) shall also consider ratio of decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation(Nhava Sheva) Limited (2015) 374 ITR 645(Bom.) before adjudicating appeal de-novo in set aside proceedings.We order accordingly.

23.3 Next ground of appeal raised by the Revenue is concerning relief granted by learned CIT(A) w.r.t. addition of Rs. 17,45,000/- on account of unaccounted income from sale of properties in disregard to adverse comments by the AO in remand report. During the course of search operations u/s 132 on 21-02-2007, several incriminating material were found and seized by Revenue. For the impugned assessment year, the following documents revealed undisclosed income of Rs. 17,45,000/- which documents were found and seized by Revenue marked as annexure A-2, A-3 and A-5 concerning immovable properties:-

S.No.	Annexure/Date	FY	AY	Property	Owner/Name	Consideration
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					of purchaser	
2.	A-2/36 & A-3/46-53 sale deed dated 01-07-2002	2002-03	2003-04	Nagar Parishad Plate No. 1-5-42, Survey No. 2597 & 98 Anand Nagar College Rd. Jalna	Ketan Shah(HUF)	Rs. 5,31,000/- Market Value as per Reg. Doc. Rs. 7,85,000/-
3.	A-5/31-35 sale deed dated 17.3.2002	2002-03	2003-04	Gut No. 264 Deo murti 2 H 52 R	Ketan Shah (HUF)	Rs.9,60,000/-
		2001-02	2002-03	Total consideration		17,45,000/-

The assessee did not offer any explanation regarding sources of funds for investment in properties and whether the same was offered for taxation on sale of the said properties , before the AO. The AO observed that property at s.no. 2 situated at Jalna was sold for Rs. 5.31 lacs but its market value as per registration authorities was Rs. 7.85 lacs and the AO invoked Section 50C of the Act and made additions to the income of the assessee on account of undisclosed income to the tune of Rs. 17,45,000/- for the impugned assessment year 2003-04 , vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s. 153A.

23.4. The assessee challenged the additions by filing first appeal with learned CIT(A) which was delayed by 92 days. The learned CIT(A) dismissed the appeal in limine by not condoning the delay of 92 days in filing the appeal late beyond period of limitation as stipulated u/s 249(2) in first round of litigation vide appellate orders dated 21-08-2009. The assessee went in appeal before the tribunal in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6095-6098/Mum/2009 for AY 2003-04 , 2004-05, 2006-07 and 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.433,434, 435 & 436/ACCC-11/11-12 for AY 2003-04, 2004-05 , 2006-07 and 2007-08. The assessee in second round of litigation before learned CIT(A) placed certain additional evidences which were admitted by

learned CIT(A) in the interest of substantial justice and the said additional evidences were forwarded by learned CIT(A) to the AO for remand report as is mandated under Rule 46A of the Income-tax Rule,1962. The AO based on additional evidences submitted remand report wherein the AO based on the additional evidences submitted that the assessee has submitted copy and proof of payments of these two properties. It was observed by the AO in remand report that properties were in-fact purchased by the assessee during AY 2003-04 The properties in question were reflected in the personal balance sheet of the assessee and purchase consideration is reflected in Balance Sheet and payments are through banking channel supported with purchase documents. It is observed by the AO that purchases as well payments made for the purchase of these properties are not verifiable and also sources of credits in the bank account are not verifiable . It was also observed by the AO that the assessee did not produce original purchase documents and merely photocopies are furnished.

23.5. The learned CIT(A) deleted the additions by holding that remand report of the AO categorically states that the said properties are reflected in the Balance Sheet and payments were made through banking channel . It is in the background that these are assessment pursuant to search and incriminating material was found and seized from the assessee. The assessee did not file return of income in pursuant to the notice u/s 153A nor participated in the assessment proceedings u/s 153A despite several notices issued by the AO and adequate opportunities of being heard granted by the AO. The AO have adversely commented in remand report that the purchases as well payments made for the purchase of these properties are not verifiable and also sources of credits in the bank account are not verifiable . It was also observed by the AO that the assessee did not produce original purchase documents and merely photocopies are furnished. The learned CIT(A) whose powers are co-terminus with the powers of the AO instead of ensuring that all the adverse comments of the AO in remand report are met either by himself by making necessary enquiries /verifications or seeking second remand report from the AO , instead held that the AO is satisfied with respect to the disclosure of properties in Balance Sheet and payments made through banking channel. This is a perverse finding of learned CIT(A) which cannot be sustained in the eyes of law as the AO categorically stated in

remand report that he is not satisfied as to the purchases as well payments made for the purchase of these properties are not verifiable and also sources of credits in the bank account are not verifiable . It was also observed by the AO that the assessee did not produce original purchase documents and merely photocopies are furnished. It was all the more incumbent on the learned CIT(A) to have directed the assessee to comply with all the adverse remarks of the AO more-so with the background that it is an assessment pursuant to search u/s 132 and during search incriminating material were found and seized during the course of search from the assessee. It is all the more pertinent also in the back drop of the assessee being non co-operative through out assessment proceedings as the assessee neither filed return of income in pursuant to notice u/s 153A nor participated in the assessment proceedings u/s 153A. The assessee has also not filed complete evidences to support its contentions before learned CIT(A) and in remand report proceedings before AO crippling AO to do complete enquiry/verification as is required with respect to these immovable properties and its sources leading to adverse comments by the AO in remand report which remained un-complied with as of now as the learned CIT(A) just accepted the contentions of the assessee without satisfying the adverse comments by the AO which were valid observations of the AO in the context of search assessment as also seized material during search operations u/s 132. The assessee is also not appearing before the tribunal in second round of litigation despite several notices. Revenue has filed this appeal as it is aggrieved by learned CIT(A) granting relief to the assessee. The learned CIT-DR has vehemently objected to learned CIT(A) allowing the relief to the assessee without complying with all the adverse finding of the AO in remand report proceedings . Thus with the above background , the appellate order of learned CIT(A) cannot be sustained in the eyes of law and is set aside and matter is once again restored back to the file of learned CIT(A) for fresh adjudication on merits in accordance with law. The assessee be given proper and adequate opportunity of being heard by the learned CIT(A) in denovo proceedings and all relevant evidences and explanations be admitted in the interest of justice. The learned CIT(A) shall also consider ratio of decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation(Nhava Sheva) Limited (2015) 374 ITR 645(Bom.) before adjudicating appeal de-novo in set aside proceedings.We order accordingly.

24. In the result appeal of the Revenue in ITA No.2122/Mum/2013 for assessment year 2003-04 is allowed for statistical purposes.

Assessee's Appeal in ITA no. 2497/Mum/2013 for AY 2003-04-Ketan V Shah(HUF)

25. The issues involved in this appeal filed by the assessee namely Ketan V Shah(HUF) are similar to the issue involved in ITA no 2494/Mum/2013 for AY 2003-04 in the case of Ketan V Shah , wherein identical grounds were raised (only difference in the amount) . The assessee has raised following grounds of appeal in the memo of appeal filed with the tribunal:

"1. The ld. Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 18,23,962/- as alleged undisclosed income which was declared by the appellant as long term gain on sale of shares.

2. The ld. Commissioner of Income Tax(Appeals) further erred in confirming the addition of Rs. 91,198/- as alleged unexplained expenditure incurred on purchase and sale of shares, the income from which was declared under the head long term capital gain."

25.2 Since identical issues are involved, our decision in ITA no. 2494/Mum/2013 for assessment year 2003-04 in the case of Ketan V Shah shall apply mutatis mutandis to the appeal of the assessee namely Ketan V Shah(HUF) for AY 2003-04 in ITA no. 2497/Mum/2013 for AY 2003-04. The assessee fails on both the grounds. We order accordingly.

26. In the result appeal of the assessee in ITA No.2497/Mum/2013 for assessment year 2003-04 is dismissed.

Assessee's appeal in ITA no. 2498/Mum/2013 for AY 2004-05 -Ketan V Shah(HUF)

27. The issues involved in this appeal filed by the assessee namely Ketan V Shah(HUF) are similar to the issue involved in ITA no 2494/Mum/2013 for AY 2003-04 in the case of Ketan V Shah as well ITA no. 2497/Mum/2013 in the case of assessee itself for AY 2003-04 , wherein identical grounds were raised (only difference in the amount) . The assessee has raised

following grounds of appeal in the memo of appeal filed with the tribunal:

“1. The ld. Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 10,11,427/- as alleged undisclosed income which was declared by the appellant as long term gain on sale of shares.

2. The ld. Commissioner of Income Tax(Appeals) further erred in confirming the addition of Rs. 50,571/- as alleged unexplained expenditure incurred on purchase and sale of shares, the income from which was declared under the head long term capital gain.”

28.2 Since identical issues are involved, our decision in ITA no. 2494/Mum/2013 for assessment year 2003-04 in the case of Ketan V Shah as well our decision in the case of assessee itself for AY 2003-04 in ITA no. 2497/Mum/2013 shall apply mutatis mutandis to the appeal of the assessee namely Ketan V Shah(HUF) for AY 2004-05 in ITA no. 2498/Mum/2013 for AY 2004-05. The assessee fails on both the grounds. We order accordingly.

29. In the result appeal of the assessee in ITA No.2498/Mum/2013 for assessment year 2004-05 is dismissed.

Revenue’s Appeal in ITA no. 2123/Mum/2013 for AY 2007-08- Ketan V Shah(HUF)

30. The solitary ground raised by revenue is with respect to relief granted by learned CIT(A) by deleting the addition of Rs. 3,73,360/- with respect to the unexplained credits in HDFC Bank account maintained by the assessee on the grounds that said cash credits are reflected in the Balance Sheet of the assessee as well loan giver, without considering the AO observations in remand report that sources, genuineness and creditworthiness are not proved. The assessee did not explained sources of credit in the bank accounts during assessment proceedings pursuant to search u/s 132 conducted on the assessee by Revenue on 21-02-2007. The AO observed that there are credits to the tune of Rs. 3,73,360/- in HDFC Bank account no 00861000059329 maintained by the assessee with Andheri(East) Branch , Mumbai. The assessee failed to explain the sources of such credits. The assessee did not filed any return in pursuance to notices u/s 153A nor

participated in assessment proceedings pursuant to search despite various opportunities granted to the assessee by the AO as mentioned in the assessment order. The AO added the said amount of Rs. 3,73,360/- in the hands of the assessee as income being unexplained credit u/s 68, vide assessment order dated 24-12-2008 passed by the AO u/s 144 r.w.s. 153B(1)(b).

30.2 The assessee challenged the additions by filing first appeal with learned CIT(A) which was delayed by 92 days. The learned CIT(A) dismissed the appeal in limine by not condoning the delay of 92 days in filing the appeal late beyond period of limitation as stipulated u/s 249(2) in first round of litigation vide appellate orders dated 21-08-2009. The assessee went in appeal before the tribunal in the first round of litigation and the tribunal was pleased to condone the delay of 92 days in filing appeal late by the assessee before learned CIT(A) and the matter was remitted back to learned CIT(A) to be decided on merits, vide common orders dated 15-09-2010 in ITA No. 6094-6098/Mum/2009 for AY 2003-04, 2004-05, 2006-07 and 2007-08 passed by the tribunal. The learned CIT(A) in second round of litigation was pleased to pass common order dated 12-12-2012 in Appeal no. CIT(A)-37/I.T.433,434, 435 & 436/ACCC-11/11-12 for AY 2003-04,2004-05,2006-07 and 2007-08. The assessee in second round of litigation before learned CIT(A) placed certain additional evidences by way of bank book, bank statements, explanation w.r.t. deposits, ledger account of investments which were admitted by learned CIT(A) in the interest of substantial justice and the said additional evidences were forwarded by learned CIT(A) to the AO for remand report as is mandated under Rule 46A of the Income-tax Rule,1962. The AO based on additional evidences submitted remand report wherein the AO did not give any finding as to sources of credits in the bank deposits. It is in the background that these are assessment pursuant to search and incriminating material was found and seized from the assessee. The assessee did not file return of income in pursuant to the notice u/s 153A nor participated in the assessment proceedings despite several notices issued by the AO and adequate opportunity of being heard granted by the AO. The learned CIT(A) whose powers are co-terminus with the powers of the AO instead of ensuring that all the adverse comments of the AO in remand report are met either by himself by making necessary enquiries /verifications

or seeking second remand report from the AO , instead accepted the contentions of the assessee . Then in that situation it was all the more incumbent on the learned CIT(A) to have satisfied itself as to the sources of credits in bank account and whether income has escaped assessment which need to be brought to tax. The learned CIT(A) merely accepted the contentions of the assessee without explaining as to why he is accepting the contentions of the assessee in the midst of sources of credit not been explained by the assessee . This is a perverse finding of learned CIT(A) which cannot be sustained in the eyes of law as the AO categorically stated in remand report that the sources of bank deposits could not be verified. It was all the more incumbent on the learned CIT(A) to have directed the assessee to comply with all the adverse remarks of the AO more-so with the background that it is an assessment pursuant to search u/s 132 and during search incriminating material were found and seized during the course of search from the assessee. It is all the more pertinent also in the back drop of the assessee being non co-operative through out assessment proceedings as the assessee neither filed return of income in pursuant to notice u/s 153A nor participated in the assessment proceedings. The assessee has also not filed complete evidences to support its contentions before learned CIT(A) and in remand report proceedings before AO thereby crippling AO to do complete enquiry/verification as is required with respect to these deposits by the assessee in HDFC Bank account and proving the mandate of Section 68 leading to adverse comments by the AO in remand report which remained un-complied with as of now as the learned CIT(A) just accepted the contentions of the assessee without satisfying the adverse comments by the AO which were valid observations of the AO in the context of search assessment as also seized material during search operations u/s 132. The assessee is also not appearing before the tribunal in second round of litigation despite several notices. Revenue has filed this appeal as it is aggrieved by learned CIT(A) granting relief to the assessee. The learned CIT-DR has vehemently objected to learned CIT(A) allowing the relief to the assessee without complying with all the adverse finding of the AO in remand report proceedings . Thus with the above background , the appellate order of learned CIT(A) cannot be sustained in the eyes of law and is set aside and matter is once again restored back to the file of learned CIT(A) for fresh adjudication on merits in accordance with law. The assessee be given proper

and adequate opportunity of being heard by the learned CIT(A) in denovo proceedings and all relevant evidences and explanations be admitted in the interest of justice. The learned CIT(A) shall also consider ratio of decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation(Nhava Sheva) Limited (2015) 374 ITR 645(Bom.) before adjudicating appeal de-novo in set aside proceedings. We order accordingly.

31. In the result appeal of the Revenue in ITA No.2123/Mum/2013 for assessment year 2007-08 is allowed for statistical purposes.

32. Thus, all the eleven appeals are disposed of as indicated above.

Order pronounced in the open court on 23.10.2017

आदेश की घोषणा खुले न्यायालय में दिनांक: 23.10.2017 को की गई।

Sd/-
(D.T.GARASIA)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 23.10.2017

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, E
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI