आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR

आयकर अपील सं./I.T.A. No. 3063/Ahd/2016

(**निर्धारण वर्ष /** Assessment Year : 2012-13)

Shailesh S. Patel Prop. M/s. Toran Auqa Link, 23, Naval Park Society, O/s. Becharpura Railway Fatak, Palanpur – 385001, Dist. Banaskantha	**बनाम/** Vs.	**Income Tax Officer** Ward-5, Palanpur
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AEFPP7860J		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Ms. Aarti Shah, A.R.
प्रत्यर्थी की ओर से / **Respondent by :**	Shri Mudit Nagpal, Sr. D.R.

सुनवाई की तारीख / **Date of Hearing**	13/06/2018
घोषणा की तारीख /**Date of Pronouncement**	31/08/2018

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the order of the CIT(A)-4, Ahmedabad ('CIT(A)' in short), dated 21.09.2016 arising in the assessment order dated 05.11.2015 passed by the Assessing Officer (AO) under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (the Act) concerning AY 2012-13.

2. The grounds of appeal raised by the assessee read as under:

> *"1. The learned Commissioner of Income Tax(Appeals) has erred in law and on facts of the case by holding that the learned Assessing Officer has rightly invoked provisions of sec. 147 r.w.s. 148 of the I.T. Act, 1961 of the IT. Act, 1961 where in fact no such situation existed in the case of the Appellant so as to come to the conclusion that the Appellant has concealed any income, and therefore, on this ground itself, the reopening of the assessment as well as re-assessment made, requires to be considered as illegal and bad at law.*
>
> *2. The learned Commissioner of Income Tax(Appeals) has erred in law and on facts of the case in in confirming the addition of Rs.1,22,24,800/-made by the learned Assessing Officer in the total income of the Appellant on ground that the Appellant has concealed the income by not furnishing the source of investment in the land though in fact the Appellant has not purchased any such land and not made any investment in land."*

3. The assessee also filed additional ground of appeal vide application dated 03.04.2018 which is reproduced as under:

> *"1. The learned Commissioner of Income Tax, (Appeals)-4, has erred in confirming the addition u/s.68 of Rs.1,22,24,800/- in respect of cash paid of Rs.10,00,000/- on 30.09.2010 and Rs.1,40,00,000/- on 03.11.2010 in Asst. Year 2012-13 towards Banakhat money though the said dates fall in Asst. Year 2011-12. Therefore, the addition made in Asst. Year 2012-13 is patently wrong."*

4. The assessee thereafter filed another additional ground of appeal vide application dated 05.06.2018 which reads as under:

> *"1. The Ground No. 1 of Appeal be elaborated by including therein that the Learned Assessing Officer has erred in law and on facts in as much as the assessment has been wrongly re-opened & finalized u/s.148 r.w.s. 147 of the Income Tax Act, 1961 though the provisions of u/s.147 & 148 are not applicable in case of search assessment."*

5. Briefly stated, the assessee, an individual, is engaged in the trading of submersible pumps and their spare parts as a proprietary business. For the AY 2012-13 in consideration, the assessee filed return of income (ROI) on 28.09.2012 declaring total income at Rs.2,51,380/-. The assessment was completed under s. 143(3) of the

Act vide order dated 27.08.2014 whereby the income was assessed at Rs.2,56,380/-. Meanwhile, a search action was carried out in the case of one Shri Rameshbhai Bansilal Agrawal Group on 27.09.2012. In the course of search, a Banakhat (agreement to sale) dated 06.11.2010 *inter alia* found and seized. This Banakhat revealed that the assessee alongwith other four parties agreed to purchase certain parcel of land at Village Sujanpur from one Shri Chandankumar Ramandas Pohani. The details of land including survey numbers and location were found to be mentioned in Banakhat. The consideration for purchase of the said land by the assessee alongwith four co-owners was mentioned in the Banakhat at Rs.6,11,24,000/-. Thus, 1/5th share attributable to the assessee amounting to Rs.1,22,24,800/- was quantified by the AO as share of investment by the assessee in the aforesaid land as co-owner. It was further found from the Banakhat that Rs.10 lakhs was paid in cash by the buyers of the land on 30.09.2010 and another Rs.1,40,00,000/- was paid on the date of execution of Banakhat. Thus, total amount paid in cash towards part consideration stood at Rs.1,50,00,000/- for purchase of land as per the Banakhat. This Banakhat was found to be notarized and signed by the parties of both sides. The AO found that this transaction was not incorporated by the assessee while filing the return of income. Consequently, the case of the assessee was reopened by issue of notice dated 09.07.2015 under s.148 of the Act. The reasons recorded under s.148(2) of the Act were provided to the assessee alongwith the aforesaid notice which reads as under:

> *"Shri Shaileshkumar Shivrambhai Patel, residing at 23, Navalpark, Ramji Nagar Road, Laxmipura, Palanpur, District: Banaskantha had purchased some pieces of land at Sujanpur, Patan with five co-partners. The total consideration agreed between the parties was Rs.6,11,24,000/-. As per Banakhat dated 06.11.2010, the amount of Rs.1.50 crore was paid by the purchasers to the seller. The Sale Deeds of these lands were executed in F.Y.2011-12. On inquiry, the information found to be true. Undisclosed investment is assessable to tax under Chapter VI of I.T. Act (Section 68 to 69D).*

2. I have therefore, reason to believe that income chargeable to tax exceeding Rs.1,22,24,800/- has escaped assessment for A.Y. 2012-13 and intend to reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to the notice subsequently in the course of proceedings under this section."

6. The objections raised thereupon by the assessee were found to be without any merit by the AO.

7. The AO was of the view that the assessee has failed to discharge onus to negate cogent evidence found in the form of Banakhat/ agreement to sale (executed by the assessee alongwith other co-owners) as a futile and hollow document. The AO took note of payments made in cash to unmask the claim of the assessee that such Banakhat is only a token and symbolic document. The AO accordingly held that source of payment of total consideration as per Banakhat remains unexplained. The AO accordingly added Rs.1,22,24,800/- being proportionate share of the assessee as a co-owner towards undisclosed source of payment of consideration to the total income of the assessee.

8. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) took note of the detailed written submissions filed before him but however was not impressed with the submissions advanced on behalf of the assessee. The CIT(A) rejected the appeal of the assessee on both counts namely alleged lack of jurisdiction under s.147 of the Act as well as on merits. The relevant operative para of the order of the CIT(A) is reproduced hereunder for ready reference:

DECISION :

*5. The submission made by the appellant and the assessment order have been considered carefully. **First Ground** of appeal is against the re-opening of assessment u/s 147 by issuing notice u/s 148 of the Act. The A.O. mentioned the facts of the case in the assessment order, which are reproduced below:*

"In this case, the return of income was filed by the assessee on 28.09.2012 declaring the total income at Rs. 251380/-. By Order u/s 143(3) dtd 27.08.2014, the assessed income in the case was decided at Rs. 256380/-. Upon sharing of information by central Circle 2(4), it was found that the assessee has purchased some piece of land at Sujanpur, Patan with five co-partners and consideration agreed between parties was Rs. 6,11,24,0007-. As per Banakhat dtd 06.11.2010, amount of Rs. 1.50 crore was paid by the purchaser to the seller. The sale deed of these lands were executed in F.Y. 2011-12. On inquiry the information found to be true. As the income chargeable to tax exceeding Rs. l,22,24,800/-as share of assessee escaped assessment, the case was re-opened u/s 147 obtaining approval from JOT, B.K. range Palanpur and notice u/s 148 on 09.07.2015 duly served on the assessee with copy of reason. Thereafter, showcause notice u/s.!42(l) of the I.T. Act was issued on 27.10.2015 requesting the assessee to submit its reply of show cause."

6. The appellant contended that during the assessment proceedings u/s 143(3), all the details were submitted before the A.O., therefore, re-opening of the assessment is not valid. The appellant cited various case-laws in support of this contention. On going through the facts of the case and the submission of the appellant, it is found that the transaction under consideration was not shown by the appellant in the return filed by him. Even during the assessment proceedings, the appellant did not disclose this transaction to the A.O. As the A.O. was not aware about this transaction, no question was asked about this transaction from the appellant. These fact show that this transaction was not investigated by the A.O. during the assessment proceedings. After passing the assessment order u/s 143(3), the A.O. received information from the DCIT Central Circle-2(4), thus, the A.O. had additional information with him, hence, he is justified in re-opening of assessment u/s 147 issuing notice u/s 148 of the Act. The case laws upon which appellant relied are not relevant to this case, as the facts of the appellants case are not identical to the facts of these cases. Therefore, the case laws relied upon by the appellant are not applicable to the appellant case, keeping in view the above discussion, this ground of appeal deserve to be dismissed, hence, it is ***dismissed.***

*7. **Second and third ground** of appeal is against the additions of Rs.1,22,24,800/- made by the A.O. considering the investment of the appellant in a plot of land as unexplained. The brief facts of the case are that during the course of search & seizure action on 27.09.2012 at the premises of Shri Rameshbhai B Agrawal group of cases, a 'Banakhat' dated 06.11.2010 was found & seized. As per this 'Banakhat', the appellant along other 4 parties agreed to purchase land (agriculture and non agriculture) at village Sujanpur from one Shri Chandankumar Ramandas Pohani. The details of land including survey numbers & location is mentioned clearly in the "Banakhat".*

7.1 The consideration of the said land was fixed @ Rs.148/-/ per square feet and accordingly, total consideration of the land under consideration comes to Rs. 6,11,24,000/- The appellant's share is Rs. 1,22,24,800/- being partner of 1/5 share in the transaction. As per para 2 of the "Banakhat", Rs. 10 lakh was paid in cash by the buyers of the land on

30.09.2010 and Rs. 1,40,00,000/- paid on the date of registration of the "Banakhat" Thus, total amount paid in cash is Rs. 1,50,00,000/- for purchase of this land. This Banakhat is notarized and signed by the parties of both sides. As this transaction has not been shown by the appellant in the return filed, the A.O. made the additions of Rs. 1,22,24,800/- (Share of the appellant) in the hands of the appellant as his unexplained investment in this land.

7.2 The appellant confirmed all the facts mentioned in the "Banakhat" as mentioned in para 7 of the submission dated 27.08.2016. But he contended that the vendor Shri Chandankumar Ramandas Pohani had "Banakhat" rights from one Shri Arvindbhai Modi and the vendor has not acquired the rights of actual purchase of the said land by valid purchase deed. The appellant further contended that the possession of the land is to be given on full & final payment on execution of registered sale deed. The appellant also contended that it is mentioned on page no. 6 of the "Banakhat" that the "Banakhat" is made to purchase the land to earn commission. Thus, the appellant requested that the full facts of the "Banakhat" have not been considered by the A.O. Therefore, addition made by the A.O. should be deleted.

*7.3 The facts of the case as narrated above and the submissions of the appellant has been carefully considered. There is no dispute about the facts mentioned above about the land consideration and other facts as mentioned in "Banakhat". The appellant's contentions is that the vendor Shri Chandankumar Ramandas Pohani has only "Banakhat" rights from on Shri Arvindbhai Modi and seller has not acquired ownership rights. This contention of the appellant is not relevant to this transaction because it is common practice in land transactions that "Banakhats" are made by the middlemen/investors. After "Banakhat" is made, the buyer shown in "Banakhat" search for further buyer of the land. On actual sale, such lands are transferred directly from owner of the land to actual buyer of the land and sale deed is made in the names of only these two parties. The persons who are investors/middlemen, entered into transactions by way of making "Banakhat" documents take away the profit but their name nowhere appears in sale deed. Such "Banakhat" are normally found during the course of surprise action like surveys/searches by the department. The same happened in this case also. The land was directly transferred from land owner to the actual buyer Shri Ramesh B. Agrawal. Thus, this contentions of the appellant that other party of "Banakhat" Shri Chandankumar Ramandas Pohani did not have ownership right over the said land is of no help to the appellant, hence it is **rejected.***

*7.4 The **another contention** is that possession of land was to be given in future on making full payments. The possession of the land is not relevant issue. The issue under consideration is the investment made in the asset, which stands unexplained. These facts of the investment have not been disputed by the appellant. Thus, this contention is also not found acceptable, hence it is **rejected**.*

*7.5 The **next contention** is that it is clearly mentioned in the "Banakhat" that this "Banakhat" is made to earn commission on this transaction. The appellant stated that the land was ultimately purchased*

by Shri Ramesh B. Agrawal and in the sale deed, name of the appellant is not mentioned as conforming party. These facts show that the appellant did not make payment, for which additions have been made. The contention of the appellant is found misleading for the reason that the said "Banakhat" has been found at the residence of Shri Ramesh B. Agrawal. If the appellant has no financial relation with Shri Ramesh B. Agrawal, why the "Banakhat" was kept at his place, who ultimately bought the land. These facts prove that at the first stage, the land was purchased by the appellant with 4 other partners. These five persons made investment in the said land, which is confirmed by the 'Banakhat' and has not been disputed by the appellant. This land was later on sold to Shri Ramesh B. Agrawal and sale deed was directly made in the name of vendor and Shri Ramesh B. Agrawal. In the intervening time, the appellant made investment in the said land. Such modus-operandie is normal in land deals. This method is adopted to avoid payment of stamp duty on multiple purchase sale of the same land. The appellant's contention that the Investment was made to earn commission is also of no help to him because it is not mentioned in "Banakhat" that the cash of Rs. 1.5 Crore paid does not belong to the appellant and it has been financed by someone else. The purpose of investment has no relevance weather it is for earning profit for commission. Only quantum of investment is relevant for income tax purposes. Therefore, these contentions of the appellant are also found not acceptable, hence, ***rejected****.*

8. Keeping in view the discussion above, the additions made by the A.O. are found justified, hence ***confirmed****. This ground of appeal dismissed."*

The CIT(A) accordingly dismissed the appeal of the assessee.

9. Further aggrieved, the assessee preferred appeal before the Tribunal.

10. The learned AR for the assessee at the outset adverted our attention to the additional grounds of appeal filed on two occasions before the Tribunal and submitted that the additional grounds so raised seeks to challenge the very jurisdiction of the AO to initiate proceedings under s.147 of the Act and consequent assessment order framed under s.147 of the Act is under challenge for which relevant facts are available on record. The learned AR accordingly urged for admission as well for granting primacy to additional grounds in the matter of hearing.

10.1 The learned AR firstly adverted our attention to the additional grounds of appeal vide application dated 03.04.2018 and contended that the whole basis of addition of Rs.1,22,24,800/- is Banakhat dated 30.09.2010 and the payment of Rs.1,50,00,000/- made to the purported seller by the assessee alongwith other co-owners. The alleged payment falls in a different assessment year i.e. AY 2011-12. Therefore, the transactions involved, if any, do not have any connection or bearing with assessment year 2012-13 which was wrongly re-opened by the AO. The learned AR thus submitted that on this ground alone, the usurpation of jurisdiction under s.147 of the Act by AO requires to be set aside and consequent re-assessment order requires to be quashed.

10.2 The learned AR thereafter adverted to another additional ground raised before the Tribunal vide subsequent application dated 05.06.2018 to contend that whole basis of initiation of proceedings under s.147 of the Act is a Banakhat found in the course of search proceedings under s.132 of the Act in the case of a third party, namely, Rameshbhai B. Agrawal group. Therefore, the provisions of the Section 153A of the Act was initiated in case of third party. Consequently where a document is found to be belonging to the assessee then the jurisdiction under s.147 of the Act is ousted in view of the *non obstante clause* under s.153C of the Act. It was thus contended with vehemence that proceedings, if any, can lie in the case of the assessee under s.153C alone in exclusion to Section 147 of the Act. The right course in the facts and circumstances, as argued, could probably be invocation of Section 153C of the Act. Accordingly, the learned AR professed that the whole proceedings under s.147 is *void ab initio* and bad in law.

10.3 On merits, the learned AR pointed out that the proposed seller of the land in question as per Banakhat was not the owner but was having merely Banakhat rights. The whole purpose of Banakhat was earning commission by the purchasers and sellers named in the document. The learned AR vociferously denied payment of any consideration as a result of such Banakhat and contended that the seller has not received any amount from the assessee and other co-owners being the proposed purchasers. The learned AR heavily relied upon the contents of the Banakahat on page 6 thereof to point out that the executing parties to the Banakhat namely party agreeing to sale (Pohani Chandankumar Ramandas) and intended purchasers (assessee & other co-owners) were very well aware that the Banakhat was never meant to be finally adjudicated as the purported sellers had no legal right, title or interest for execution of sale deed. The learned AR emphasized that seller mentioned in the Banakhat not being the owner of the land was not capable of selling the land and thus the Banakhat was intended only to earn possibly more commission or dalali. The learned AR further contended that while as per Banakhat, Shri Chandankumar Ramandas Pohani was the intending seller who acquired only Banakhat rights from one Shri Arvindbhai Modi, the actual sale carried out subsequently do not make any reference to the aforesaid seller or the assessee as purchaser. The final sale deed is between the real owners and Rameshbhai B. Agrawal group. This also suggests that the Banakhat has not been acted upon in any manner. The learned AR next pointed out that the cash transactions aggregating to Rs.1.5 Crore as mentioned in Banakhat did not really occur at all and without prejudice relates to FY 2010-11 and thus to AY 2011-12. The addition made in the hands of assessee in AY 2012-13 is thus not within the authority of law.

10.4 The learned AR in conclusion submitted that the addition requires to be deleted both on account of incurable defect in assuming jurisdiction as well as on merits and accordingly urged for suitable relief as prayed.

11. The learned DR, on the other hand, strongly relied upon the order of the CIT(A). Elaborating further, the learned DR submitted that a tangible document of incriminating nature was found at the premises of the searched person (Shri Rameshbhai B. Agrawal) whereby the clandestine transactions of staggering amount was discovered which were not found recorded in the books of the assessee at all. The facts towards execution of Banakhat and consideration exchanged as per Banakhat was not disclosed in the return of income as well as in the assessment proceedings completed under s.143(3) of the Act earlier. Thus, facts in the knowledge of assessee were neither disclosed fully or truly for the purposes of assessment. When the facts unearthing undisclosed transactions came to the notice of the department and informed to the AO, the AO was within its right to assess the escaped income under s.147 of the Act.

11.1 The learned DR next submitted that the plea paddled on behalf of the assessee that the transactions belongs to previous assessment year (2011-12) and thus, cannot be assessed in AY 2012-13 is also without any substance. The total consideration involved is in the vicinity of Rs.6.11 Crore. The sale deeds for these lands were executed in FY 2011-12 notwithstanding execution of Banakhat in FY 2010-11. Therefore, the onus lies on the assessee to squarely prove that the whole of land deal transactions belong to some other assessment years. The learned DR pointed out that in view of the sale deeds executed in AY 2012-13, the presumption would naturally arise

against the assessee for taxable event falling in assessment year 2012-13.

11.2 The learned DR also invited a reference to the enabling provisions of Section 150(1) r.w.s. 153(6) of the Act for taxability of the undisclosed income eventually in one year or another year.

11.3 The learned DR pointed out that the AO is required to only arrive at *prima facie* belief towards escapement of income at the time of initiation of proceedings under s.147 of the Act. The tangible material in the form of Banakhat and final sale deed permits the AO to form such *prima facie* belief of escapement based on total sale consideration involved. The learned DR pointed out that once the action under s.147 of the Act and the re-assessment has been rightly commenced based on *prima facie* satisfaction, it was always open to the assessee to dislodge such formation of belief on merits in the course of the re-assessment proceedings. It was submitted that the factum of escapement of income is not required to be conclusively proved at the time of issuance of notice under s.148 of the Act. It was submitted that there is no provision for making any inquiry on the facts available before the AO prior to initiation of action under s.148 of the Act. The learned DR thus submitted that the additional ground filed by the assessee vide application dated 03.04.2018 is bereft of any merit and thus urged for its dismissal.

11.4 Adverting to another additional ground of appeal seeking to challenge initiation of action under s.147 r.w.s. 148 in the case of search assessment, the learned DR emphasized on the fact that the Banakhat and sale deeds discovered at the time of search clearly indicated involvement of the assessee in unreported cash transactions but however such documents merely ‘pertained to’ the assessee in

distinction to the expression 'belonging to' the assessee in the light of the decision of the Hon'ble Delhi High Court in the case of Pepsico India Holdings Private Limited vs. ACIT [2015] 370 ITR 295 (Delhi) and the decision of the co-ordinate bench in the case of Smt. S. Sivagamasundari vs. ITO in ITA No.519/Mds/2015 order dated 12.02.2016. Therefore, neither the AO of the searched person formed satisfaction as contemplated under s.153C of the Act nor he could have. Thus, on facts where proceedings under s.153C has not been initiated at the first place, the sacrosanct rights of the AO of the assessee under s.147 of the Act were fully intact and could neither be curbed nor superseded by the *non obstante clause* of Section 153C of the Act. The learned DR next contended that the onus is quite heavy upon the assessee to disprove the contents of the documents executed by the assessee voluntarily. In view of the agreement to sale and sale deed, the presumption of undisclosed transaction is ostensibly against the assessee.

11.5 The learned DR referred to the orders of the AO and CIT(A) to buttress its plea that the assessee has failed miserably in dislodging the truthfulness of the transactions referred to in the Banakhat and sale deed. The learned DR pointed out that the real question is involvement of unaccounted cash on behalf of the assessee and not as to whether the assessee has finally ended up acquiring the parcels of land as mentioned in the agreement or otherwise.

11.6 The learned DR thus submitted in conclusion that the Revenue was perfectly justified in assessing the undisclosed source of income in the hands of the assessee as borne out from the documentary evidences and no interference with the orders of the AO and CIT(A) is called for.

12. We have carefully considered the rival submissions and perused the orders of the authorities below and material referred to and relied upon on behalf of the assessee as per Rule 18(6) of the ITAT Rules, 1963 and the case laws cited at bar.

12.1 The precise question that arises for our consideration is whether in the given set of facts, impugned addition of Rs.1,22,24,800/- in the hands of the assessee alleged to be paid out of undisclosed source to the proposed seller of the land in terms of agreement to sale, in the capacity of a joint purchaser will come within a sweep of Section 147 of the Act or not, for the purposes of assessment of alleged income escaping assessment.

12.2 Two legal questions emerge in the facts of the case as per the additional grounds raised on behalf of the assessee. Therefore, it is considered expedient to first deal with these legal issues.

13. First and foremost, the assessee seeks to challenge the issuance of notice under s.148 of the Act concerning AY 2012-13 in question on the ground that the cash payments purportedly made up to the date of execution of Banakhat pertains to preceding assessment year i.e. 2011-12. It is thus the case of the assessee that action under s.147 of the Act concerning assessment year in question is *prima facie* wrongful and vitiated by non application of mind and consequently deserves to be struck down.

13.1 To begin with, on a reading of reasons recorded under s.148(2) of the Act, we notice that the AO found the total consideration of land as mentioned in Banakhat to be Rs.6,11,24,000/-. The AO formed belief towards escapement of chargeable income to the extent of 1/5th of the aforesaid amount which worked out to Rs.1,22,24,800/-. Thus,

the plea towards escapement of chargeable income was made by the AO with reference to the total sale consideration and was not restricted to only advance allegedly paid of Rs.1,50,00,000/- up to the date of execution of agreement to sale (Banakhat). Therefore, simply because a part of the transaction has been executed in the preceding assessment year will not in our considered view, restrain the AO to invoke the provisions of Section 147 of the Act in the year of execution of final sale deed more particularly when the agreement to sale itself speaks about the payment of rest of the amount at the time of registration of final sale deed in respect of the said land which falls in AY 2012-13.

13.2 Secondly, seeing it from a different perspective, the assessee is only one of the many joint purchasers as recited in Banakhat and hence it is quite plausible that the share of payment on part of the assessee falls at the time of execution of sale deed. In the absence of any clear stand on the date of payment made by assessee and rather denial of payment at all, the AO is well within its right to invoke provisions of Section 147/148 of the Act with reference to the year in which final sale deed has been executed albeit in some other persons' name. The tangible information available to AO for formation of belief is not required to be subjected to 'sufficiency test' as observed by the Hon'ble Supreme Court in the case of Raymond Woolen Mills vs. ITO [1999] 236 ITR 34 (SC) and ACIT vs. Rajesh Javeri Stock Brokers Pvt. Ltd. [2007] 291 ITR 500 (SC). The agreement to sale (Banakhat) and consequent final sale deed, in our considered opinion, provides sound basis for formation of belief towards escapement of income to a person instructed in law. The AO thus has acted within the bounds of law while exercising its power under s.147 of the Act. Merely because a part of the total sale consideration fall in other assessment year, the action of the AO cannot be curtailed to deny the

exchequer of its rightful dues. Notwithstanding, the technical defect of such nature can be cured under s.150(1) & 153(6) of the Act as rightly observed on behalf of the Revenue.

13.3 Thus, the first additional ground raised on behalf of the assessee is a damp squib. The additional ground on this score is thus dismissed.

14. We shall now address ourselves to the second legal objection. On behalf of the assessee, it is contended that in view of over-riding provisions of Section 153C of the Act in the case of search assessment, the assessment proceedings in the hands of the assessee are not amenable to jurisdiction under s.147/148 of the Act and therefore, entire assessment proceedings itself is a nullity in the eyes of law.

14.1 Before we proceed for determination of issue, it would be pertinent to refer to the provisions of S. 153C and also S. 147 of the Act, as appearing in the statue at the relevant time, to the extent as may be relevant in the context.

> ***"Assessment of income of any other person.***
>
> *- 153C. [(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.] "

[underline is ours]

****

*" [**Income escaping assessment**.*

147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

***Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*

[Provided further ------"

14.2 On a bare reading of S. 153C noted above, it is self evident that this provision governs assessment of income of a person other than a person in whose case search was initiated.

14.2.1 Also, this provision along with other provisions of S. 153A to 153D exerts an overriding effect over the provisions of sections 139, 147, 148, 149, 151 and 153 of the Act since these provisions contain non obstante clause. Secondly, the assessment proceedings under S. 153C are far more onerous qua S. 147 in the sense that proceedings are initiated for six assessment years immediately preceding the year in which search u/s. 132 is initiated or requisition is made u/s.132A. Thirdly, the provisions of section 153C are analogous to section 158BD of the Act. Therefore, decision of the Apex Court in the case of Manish Maheshwari 289 ITR 341 SC would

also apply where assessment is to be made u/s. 153C. As per the aforesaid decision, the precondition for invoking jurisdiction for issue of notice u/s. 153C is that the AO must "record satisfaction" as to the seized material ‘belongs to’ the third person i.e. assessee.

14.2.2 Under S. 153C as applicable to the relevant assessment year in appeal, where the Assessing Officer of the searched person is satisfied that any books of account, or documents seized or requisitioned 'belong to' or belongs to any person, other than the person referred to in section 153 A, 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 for such jurisdictional Assessing Officer to complete the assessment. This position has been confirmed by the Hon’ble Supreme Court in the case of CIT vs. Calcutta Knitwears 338 ITR 239 (SC).

14.2.3 Therefore, question posed whether, in view of the phraseology employed in the section, if the books of account belong to the person searched but entry in such books reflect the undisclosed income of the third party then, whether the AO can assume jurisdiction under s.153C to assess such undisclosed income or not. The expression ‘belongs to’ was a subject matter of debate. The point in issue was examined by Hon’ble Delhi High Court in Pepsico Holdings Pvt. Ltd. vs. ACIT 370 ITR 295 (Del.). It observed in essence that expression belonging to assessee implies something more than idea of casual association. It was observed by the Hon'ble Delhi High Court that S. 153C cannot be invoked unless the AO is satisfied for cogent reasons that the seized documents do not belong to the searched person. It was observed that finding of photocopies with the searched person does not necessarily mean and imply that they "belong" to the person holding the originals. The distinction between

"belongs to" and "relates to" or "refers to" must be borne in mind by the AO. The Assessing Officers should not confuse the expression "belongs to" with the expressions "relates to" or "refers to". The Hon'ble Court went on the explain the purport of the expression by giving illustration that a registered sale deed, for example, "belongs to" the purchaser of the property although it obviously "relates to" or "refers to" the vendor. In this example if the purchaser's premises are searched and the registered sale deed is seized, it cannot be said that it "belongs to" the vendor just because his name is mentioned in the document. In the converse case if the vendor's premises are searched and a copy of the sale deed is seized, it cannot be said that the said copy "belongs to" the purchaser just because it refers to him and he (the purchaser) holds the original sale deed. In this light, it is obvious that none of the three sets of documents - copies of preference shares, unsigned leaves of cheque books and the copy of the supply and loan agreement - can be said to "belong to" the petitioner.

14.2.4 We also notice that the legislature apparently took note of the restricted scope of expression 'belong to' employed in S. 153C which, to some extent, curtailed the power of the deptt. to invoke S. 153C of the Act. Thus, suitable legislative changes were brought with effect from 1-6-2015 to relax the impediment for implementation of the Section 153C. As noted earlier, as per existing provisions, section 153C could be invoked against such other person only when books of account, etc., belonged to him and not otherwise. However, to address the point, section 153C has been amended to widen the powers of the Assessing Officer of the searched person to hand over the books of account or documents to the jurisdictional Assessing Officer even if these merely ‘pertains or pertain to’, or any information contained therein merely relates to the other person. Thus, after the legislative amendment, now the deppt. is well equipped to exercise jurisdiction

under S. 153C even if the document seized merely pertains or pertain to or any information contained therein relates to the other person without the necessity of these documents etc. to be belonging to such other persons. Thus, in the light of the judicial precedent of the Hon'ble Delhi High Court and further in view of the subsequent legislative amendment, the difference between the expression 'belong to' and 'pertain to' / 'relate to' are visibly clear. Similar legal position has been enunciated by the Hon'ble Gujarat High Court in the case of Kamleshbhai Dharamshibhai Patel vs. CIT 263 ITR 362 (Guj). Hence, in the light of above discussion, we are of the view that the loose paper and other documents and diaries etc. found from the possession of the searched person cannot be said to be belonging to the assessee or other third parties merely because transaction noted therein relate to or pertain to assessee and/or such other persons. This view is also fortified by express provision of S. 132(4A) of the Act whereby the presumption of documents etc. found in course of search weighs towards searched person.

14.3 As noted, post the legislative amendment, any books of accounts or documents seized or requisitioned requires to be merely pertain to or relate to the assessee in contrast to the earlier position where such books/documents seized etc. must necessarily belong to the third person i.e. assessee herein. Thus, for the assessment year 2012-13 in question, which is governed by pre-amended law of Section 153C of the Act, the provisions of Section 153C of the Act could not be invoked unless document seized etc. 'belongs to' a person (assessee herein) other than the person searched. Thus, while the case of the assessee can be reopened where the document seized in the case of searched person gives rise to reasonable interference of escapement of income in the hands of third person i.e. assessee, same is not true for invoking Section 153C of the Act in the hands of the assessee unless

the document seized or requisitioned actually belong to the assessee. Thus, the independent power available to AO of the third person under s.147 of the Act cannot be artificially curtailed in such a situation.

14.4 Provisions of Section 153C and Section 147 carry many distinguishing features notwithstanding the ultimate effect of redetermination of true income under both provisions. A conjoint reading of S. 153C & S. 147 would show that the nature of power of reopening assessment under section 147 is materially different from that of the power conferred under S.153C. Section 153 A / S.153C are special provisions dealing exclusively search cases while S. 147 is applicable to all types of escapement including income unearthed in search proceedings. The power available under S. 153C does not render provision of S. 147 repugnant *per se*. The remedy available under S. 153C and S. 147 are also not inconsistent. Relevant here to note the observation of the Hon'ble Bombay High Court in the case of Shirish Madhukar Dalvi 287 ITR 242 (Bom.); Section 148 is a substantive provision whereas section 158BC is a procedural section. Both sections definitely stand on different footings. Section 158BC and S. 153C are analogous. The key variances are firstly, non obstante clause in S. 153C grants nearly sweeping powers to revenue with a liberty to summarily reopen the assessment of 6 years without observing stringent and valuable safeguard of 'reason to believe' set out in S. 147 of the Act. Provisions of S. 153C thus somewhat tones down the rigors of S. 147 in favour of the Revenue. Secondly, for usurping jurisdiction under S. 147, the documents / papers found in the course of search need not ‘belong to’ the person other than person searched. Mere-demonstrable connection or live link to such third person revealing escapement of income is adequate to invoke remedy under S. 147. Thirdly and significantly, operation of Section 153C is dependent on the 'satisfaction' arrived by the AO of the searched

person at the first instance and not that of AO of the person whose income is found to have escaped assessment. In the absence of such 'satisfaction' arrived by the AO of the searched person, the AO of the third party/Assessee herein would be rendered powerless to assess true income under S. 153C. In contrast, Section 147 can be invoked by the AO of the Assessee independently on arriving at satisfaction of escapement of income for a given assessment year regardless of 'satisfaction' of AO of searched person. Thus, it is self-evident that two sections operate quite differently. The effect of non obstante clause under S. 153C is that pending assessment or reassessment proceedings shall abate. Hence, S. 147 will be rendered inoperative and will give way to Section 153C once power under S. 153C are exercised validly. This however is not the same thing to say that there is any statutory compulsion to resort only to mode prescribed under S. 153A / S.153C in the event of search. The scheme of Act does not suggest that mere search action revealing incrementing material against the person other than searched person would automatically oust the power of the AO over the assessee concerned under S. 147 of the Act. The overriding provisions of S. 153C merely enables the AO to set aside the pending reassessment proceedings and grants primacy to Section 153C of the Act. As noted earlier, exercise of power under S. 153C is governed without any stringent fetters of holding 'reason to believe' contemplated under S. 147. Therefore, while exercise of overriding power under S. 153C will render S. 147 otiose, the converse case of clipping the powers available under S. 147 in search cases per se is not found to be reconcilable to the scheme of the Act. In the light of scheme of the Act narrated above, we are of the view that the AO of the assessee (person other than searched person) cannot be compelled to pursue remedy necessarily under s.153C of the Act in exclusion to remedy available to the AO under s.147 of the Act.

Thus, on this count also, the action of the AO under s.147 of the Act is within the four corners of law and not be faulted.

14.5 The decisions cited on behalf of the assessee are clearly distinguishable and do not raise any conflict with position of law narrated above. The decision rendered by the Gujarat High Court in the case of Cargo Clearing Agency vs. JCIT [2008] 307 ITR 1 (Guj) has been rendered under a different scheme for assessment of search cases i.e. with reference to block period regime. The Hon'ble Gujarat High Court also echoes that in case of conflict between the operation of erstwhile Section 158BC of the Act (pertaining to erstwhile assessment procedure in the case of third person under old scheme) and Section 147/148 of the Act under normal provisions, provisions of erstwhile Section 158BC will prevail. The Hon'ble Gujarat High Court has also opined that proceedings under s.147/148 of the Act will not lie where it is repugnant to the procedure laid down under erstwhile Chapter XIV-B relating to search cases. In the instant case, where the onerous proceedings under s. 153C of the Act has not been invoked and could not possibly be invoked, there was no impediment for initiating proceedings under s.147 of the Act by the AO as discussed in elaboration above. Therefore, in Cargo Clearing Agency and other decisions of the co-ordinate bench cited on behalf of the assessee rendered on similar lines do not give rise to any conflict and are of no assistance to the assessee.

14.6 Consequently, the second additional ground is also dismissed.

15. We shall now address the issue on merits. We observe from the appellate order of the CIT(A) that the assessee did not disclose the transactions found to be recorded in Banakhat to the AO at all. While

the assessee has not advanced its arguments on merits in any detail except for the submission that (i) Banakhat was executed for earning hefty commission (ii) the proposed seller in the Banakhat did not have the ownership right to enable him to sell the parcel of the land to the proposed purchasers including the assessee (iii) the sale ultimately took place between the land owners and Shri Rameshbhai B. Agrawal group without any reference to the proposed seller (Chandankumar Ramandas Pohani) and proposed purchasers (assessee and others) in the final deed; we notice that the CIT(A) has found that Banakhat was notarized and duly signed by the assessee and the other parties. The CIT(A) also observed that such Banakhats are typically prepared in the land transactions by the middlemen/investors and the lands are first acquired against consideration and thereafter arranged to be transferred directly from the owner to the actual buyer in the final deed to gain benefit of differential proceeds. The aforesaid narrative appears quite credible in the light of execution of Banakhat. It is for the assessee to demonstrate the circumstances for execution of Banakhat when the proposed seller was not the owner. The assessee is in audacious denial even on the face of tangible documentary evidence towards payment of Rs.1,50,00,000/- in cash as mentioned in Banakhat. The assessee has also not declared any commission income flowing from such Banakhat, if any, as propounded. The Banakhat executed was not shown to have been eventually cancelled. Therefore, the entire story led on behalf of the assessee is a smoke screen with an intent to mislead the Revenue and deny it of its lawful taxes. Ostensibly, the assessee does not seek to come out with clean hands and wishes to play hide and seek. Hence, we find apparent plausibility in the reasoning given by the CIT(A). The inference drawn by the CIT(A) is not without legal foundation. The balance of probabilities are skewed against the assessee. The plea raised on behalf of the assessee appears marginal and peripheral when seen in

totality. Hence, we do not see any justifiable reason to dislodge the order of the CIT(A).

16. In the result, the appeal of the assessee is dismissed.

This Order pronounced in Open Court on 31/08/2018

Sd/-	Sd/-
(MAHAVIR PRASAD)	(PRADIP KUMAR KEDIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Ahmedabad: Dated 31/08/2018

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।