आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 656/JP/2016
निर्धारण वर्ष/Assessment Year: 2008-09

Bhopal Singh Shekhawat, 6, Bhartendu Nagar, Khatipura, Jaipur.	बनाम Vs.	Income Tax Officer, Ward-1(4), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AOWPS 1925 G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Mahendra Gargieya (Adv)
राजस्व की ओर से/ Revenue by : Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख/ Date of Hearing : 03/12/2018
उदघोषणा की तारीख/ Date of Pronouncement : 11/01/2019

आदेश/ ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 31/03/2016 of ld. CIT(A)-I, Jaipur for the A.Y. 2008-09. The assessee has filed revised/modified grounds of appeal as under:

"1. The Id. CIT(A) erred in law as well as on the facts of the case in confirming the very action taken u/s 147 r/w 148 by the AO which, is bad in law without jurisdiction and being void ab-initio, the same kindly be quashed. Consequently the impugned assessment framed u/s 148 dated 24.03.2014 also kindly be quashed.

2. Rs.1,18,432/-: The Id. CIT(A) further erred in law as well as on the facts of the case in confirming the addition of Short Term Capital Gain made by the AO of Rs. 1,18,432/- on account of the sale of two

plots in the hands of the appellant individual instead of HUF without any justification. The addition so made and confirmed by the Id. CIT(A), is contrary to the provisions of law and facts hence, kindly be deleted in full.

3. Confirmation of addition of Long Term Capital Gain (LTCG) Rs.7,57,192/-:

3.1 The Id. CIT(A) seriously erred in law as well as on the facts of the case in confirming the addition of LTCG of Rs. 7,57,192/- irt plots No.157-A & 157-B which were sold for & on behalf of Mohd. Irshad and also in holding the appellant to be the beneficiary owner and liable for LTCG. The addition so made and confirmed by the Id. CIT(A) being completely contrary to the provisions of law, the evidences and material brought on record and hence, kindly be deleted in full.

Alternatively & without prejudice to above,

3.2 The Id. CIT(A) further erred in law as well as on the facts of the case in even rejecting the claim of the appellant of the reduction of the (indexed) cost of acquisition as mandated by Sec. 48(2) and in confirming the taxing of notional income as against real income, ignoring the settled law that without considering the cost, the provisions of Sec.45 itself could not have been invoked & applied. The addition so made and confirmed by the Id. CIT(A) being a result of misconception of law & facts and being in utter violation of the binding law, the authorities below be directed to reduce the cost of acquisition u/s 48(2) or alternatively, to delete the entire addition in toto.

4. Enhancement of income & direction without jurisdiction:

The Id. CIT(A) further very seriously erred in law as well as on the facts of the case in exceeding the jurisdiction while directing & setting aside to the AO to refer the matter to the I.G. (Stamps) and to re-compute the LTCG accordingly, merely suspecting possible enhancement, which is in complete violation of the mandatory requirement of Sec.251 (2) and being an illegality, the same kindly be quashed.

5. *Rs.16,56,000/- & Rs. 6,00,000/-: The Id. CIT(A) erred in law as well as on the facts of the case in confirming the additions of Rs. 16,56,000/- made on account of cash deposits and addition of Rs.6,00,000/- made on account of cheque deposited in Bank account. The additions so made and confirmed by the Id. CIT(A), is contrary to the provisions of law and facts hence, kindly be deleted in full.*

6. *The Id. AO further erred in law as well as on the facts of the case in charging interest u/s 234A, & 234B of the Act and as also in withdrawing of interest u/s 244A of the Act. The appellant totally denies its liability of charging and withdrawal of any such interest. The interest so charged/withdrawn, being contrary to the provisions of law and facts, kindly be deleted in full.*

7. *The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."*

2. Ground No. 1 of the appeal is regarding the validity of reopening of the assessment. The assessee is an individual and filed his return of income on 31/3/2009 declaring total income of Rs. 1,34,790/-. The return of income was processed U/s 143(1) of the Income Tax Act, 1961 (in short the Act). Subsequently, the Assessing Officer initiated the proceedings U/s 147 of the Act by issuing a notice U/s 148 of the Act on 28/3/2013. The Assessing Officer thereafter completing the reassessment U/s 143(3) read with Section 147 of the Act on 24/3/2014 at the total income of Rs. 32,66,490/- after making addition on account of short term capital gain, long term capital gain arising from sale of property and on account of unexplained cash credit and deposit made in the bank account.

The assessee challenged the assessment order before the ld. CIT(A) and also raised an objection against the validity of reopening. The ld. CIT(A) confirmed the validity of reopening and rejected the objection raised by the assessee.

3. Before us, the ld AR of the assessee has submitted that it is a precondition for reopening of the assessment and there must be a "reason to believe" and no "reason to suspect" that the income assessable to tax has escaped assessment. The ld AR has submitted that the word "believe" has to be understood in contradiction of suspicion or opinion. The believe of the Assessing Officer should be as to escapement of income and it should not be a product of imagination or speculation. In support of his contention, he has relied upon the decision of the Hon'ble Supreme Court in the case of Gangasharan & Sons Pvt. Ltd. Vs ITO (1981) 130 ITR 1 (SC). Hence, the ld AR has contended that the belief must be of an honest and reasonable person based upon the reasonable grounds. The belief must be based on direct or circumstantial evidence but must not be based on mere suspicion, gossip or rumor. The ld AR has thus pointed out that in the case of assessee, the Assessing Officer has not followed the settled guidelines while reopening the assessment as he was not having any material direct to circumstantial to have believe that

the income assessable to tax has escaped assessment. The second objection of the ld AR is that the reopening is without application of mind and based on borrowed satisfaction. The Assessing Officer has acted merely on some information received from the Director of Income Tax (CIB) that the assessee has sold some immovable properties without even verifying the fact that there was no capital gain arising from sale of those properties. Therefore, there has been a complete lack of application of mind by the Assessing Officer. Some of the property which was sold by the assessee only as a power of attorney holder was also considered by the Assessing Officer for working out the capital gain without reducing the cost of acquisition. Thus, the ld AR has submitted that the reopening is not valid and liable to be quashed. In support of his contention, he has relied upon the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Shri Rajasthan Syntax Ltd. (2009) 313 ITR 231 (Raj) as well as the decision of the Hon'ble Delhi High Court in the case of CIT Vs. SFIL Broking Ltd. (2010) 325 ITR 285 (Del).

4. On the other hand, the ld DR has submitted that the assessee has not disclosed any capital gain in his return of income and subsequently the Assessing Officer received information that the assessee has sold as many as four properties during the year under consideration, therefore,

the Assessing Officer was having a tangible material to form a belief that the income assessable to tax has escaped assessment when the assessee has not declared any capital gain in the return of income and even the details of the sale of the properties were also not given in the return of income. The ld DR has further contended that the reopening is within the period of four years from the end of the assessment year and further there was no original assessment. Hence, the information received by the Assessing Officer would constitute a reasonable material evidence on the basis of which a reasonable belief can be formed that the income assessable to tax has escaped assessment. He has relied upon the orders of the authorities below.

5. In rebuttal, the ld AR of the assessee has submitted that in the return of income, the assessee has stated that there is no capital gain as purchased price and sale price was same.

6. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the return of income filed by the assessee was processed U/s 143(1) of the Act and therefore, there is no assessment on the return of income. Further the reopening of the assessment by issuing notice U/s 148 of the Act on 28/3/2013 is within the period of four years from the end of the assessment year under

consideration and therefore, the case of the assessee is not hit by the proviso to Section 147 of the Act. The Assessing Officer has reopened the assessment by recording the reasons as under:

"Reasons for belief that the income has escaped assessment.

The assessee (PAN No. AOWPS1925G) filed on 31/3/2009 his return for A.Y. 2008-09 of declaring total income of Rs. 1,34,790/-, which was processed u/s 143(1) at returned income. As per information received from Director of Income Tax (CIB), Jaipur it was noticed that the assessee has sold immovable properties situated as under:

S. No.	*Property Name*	*Date of Registry*	*Face value*	*Evaluated value*	*Difference*
1.	*10, Jai Karni Nagar, Niwaroo Road, Jaipur*	*07/01/2008*	*Rs. 450000*	*Rs.533720*	*Rs. 83720*
2.	*11, Jai Karni Nagar, Niwaroo Road, Jaipur*	*07/01/2008*	*Rs. 450000*	*Rs. 547242*	*Rs.97242*
3.	*Plot No. 157-A, Vishal Nagar, Akeda Doongar, Jaipur*	*12/06/2007*	*Rs. 111000*	*Rs.132192*	*Rs.21192*
4.	*Plot No. 157-B, Vishal Nagar, Road No. 17, VKI Area, Jaipur*	*12/06/2007*	*Rs. 625000*	*Rs. 321921*	*Rs. 303079*
			Rs.1636000	*Rs.1535075*	*Rs.505233*

On going through the copy of return filed by assessee for A.Y. 2008-09, it was found that he had not disclosed income from Long Term Capital Gains. Since, the Long Term Capital Gain of the assessee is Rs. 5,05,233/-. Therefore, I have reasons to believe that income chargeable to tax Rs. 5,05,233/- has escaped assessment within the meaning of Section 147 of the IT Act. Accordingly, proceedings u/s 147 is initiated by issue of notice u/s 148 of the IT act, 1961 for the A.Y. 2008-09."

It is clear from the reasons recorded by the Assessing Officer that the Assessing Officer received information from the Director of Income Tax (CIB), Jaipur regarding the sale of four properties by the assessee during the year under consideration. The details of the face value and evaluated value being stamp duty valuation shows that there is a difference of Rs.

5,05,233/- in the face value shown in the document and the valuation of the stamp duty authority. Though, some of the valuation shown in the documents is more than the stamp duty valuation, therefore, the net outcome of all the four transactions would be less than what was considered by the Assessing Officer in the reasons recorded. However, at the time of reopening of the assessment, the Assessing Officer is not required to establish the correctness of material to form belief that the income chargeable to tax has escaped assessment but if on the basis of the information or material available with the A.O., a reasonable belief can be formed that the income assessable to tax has escaped assessment then the reopening of the assessment satisfies the conditions as provided U/s 147 of the Act. Though the assessee has given one line note in the return of income, however in absence of the description of the properties which were sold by the assessee during the year under consideration the said note regarding the capital gain would not constitute disclosure of the transaction. If the assessee was of the firmed view that there was no capital gain arising from the sale of the properties in question then the details of the properties with cost of acquisition and sale consideration would have been given in proper manner in the return of income showing the net result as NIL or loss as the case may be. However, the assessee has not given all these details in the return of

income and therefore, in absence of minimum required disclosure in the return of income and subsequent information received by the Assessing Officer regarding the sale of the properties in question at a consideration less than the deemed full value consideration U/s 50C of the Act it amounts to escapement of the income in the form of capital gain. The ld. CIT(A) has considered this issue as under:

"Determination:

(i) The facts of the case are that the appellant filed its return of income on 31.03.2009 for the AY under consideration declaring total income at Rs. 1,34,790/- which was processed u/s 143(1) of the Act and subsequently, after recording the reasons, the AO issued notice u/s 148 on 28.03.2013. The copy of the reasons for initiating proceedings 147 of the Act was also provided to the appellant on 28.11.2013 by the AO and it appears that no objections were raised thereof.

(ii) It is noted from the reasons recorded by the AO that information was received from Director of Income Tax (CIB), Jaipur wherein it was informed that during the year under consideration, the appellant has sold four immovable properties. As the appellant had not shown long term capital gains in its return of income, consequently, the AO had reason to believe that the income amounting to Rs. 5,05,233/- has escaped assessment.

*(iii) During the appellate proceedings, it was the contention of *he appellant that in respect of two transactions of sale of immovable properties, the AO himself computed short term capital gain thereof instead of LTCG as stated in the reasons for reopening the case. Further, the AO has not taken into account the cost of acquisition while computing the alleged LTCG and thus*

there exist no reason to believe for initiating proceedings, u/s 147 of the Act.

(iv) I have duly considered the reasons recorded by the AO for reopening the case of the appellant and submissions of the appellant. It is noted from the computation of income of the appellant for the year under consideration (PB: 11) that it has given a note as under:

"There is no capital gain as the purchase price and sale price was same''.

(v) In the computation of income, the appellant has not stated how many properties were sold by it during the year under consideration and what were their cost of acquisition and when these properties were acquired. It is, therefore, held that the appellant has not disclosed full facts in its return of income for the year under consideration. It may be mentioned that at the stage of initiation of proceedings u/s 147 of the Act, the AO must have some reasons to believe that income had escaped assessment. In the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. [2007] 291 ITR 500 (SC), it was held by the Apex Court that if the AO, for whatever reason, has reason to believe that income has escaped assessment, it confers jurisdiction to re-open the assessment. It is a fact that no assessment was made earlier u/s 143(3)/l 44 of the Act in the case of the appellant, therefore, the ratio in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (Supra) applies squarely to the facts of the case.

(vi) Further, the Courts cannot look into the sufficiency of the reasons recorded by the AO for reopening the assessment u/s 147 of the Act. Reliance is placed on the decision of Hon'ble Apex Court in the case of Raymond Woollen Mills Ltd. Vs ITO [1999] 236 ITR 34 (SC), wherein it was held by their lordship that:

"In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts come to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed."

(vii) In view of the above discussion, it is held that the AO was justified in initiating proceedings u/s 147 of the Act. Hence, this additional ground of appeal is hereby rejected."

Therefore, the sufficiency and correctness of the material available with the Assessing Officer at the time of recording the reasons is not required to be considered while forming the belief that the income assessable to tax has escaped assessment. In view of the facts and circumstances of the case when the assessee has not disclosed the transactions of sale of the properties during the year under consideration giving a very vague one line note that "no capital gain as purchased and sale price was same", we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue. Further the reopening is not hit by the proviso to Section 147 of the Act, therefore, the objections raised by the assessee have no merits or substance. Accordingly, ground No. 1 of the assessee's appeal is dismissed.

7. Ground No. 2 of the appeal is regarding the addition on account of short term capital gain on sale of two plots of land. The assessee has sold two plots No. 10 and 11 at Jai Karni Nagar, Niwaroo Road, Jhotwara, Jaipur on 07/01/2008 for a consideration as per the sale deed of Rs. 4,50,000/- each. However, the stamp duty authority has valued these plots at Rs. 5,33,720/- and Rs. 5,47,242/- respectively. Accordingly, the Assessing Officer has made an addition on account of short term capital gain of Rs. 1,18,432/- arising from sale of these two plots. The assessee challenged the action of the Assessing Officer before the ld. CIT(A) and contended that these two plots belong to HUF namely M/s Bhopal Singh Shekhawat which claimed to have came into existence on 01/5/2001 as a result of family settlement between the assessee and his brothers. However, the ld. CIT(A) was not impressed with this explanation of the assessee and upheld the addition made by the Assessing Officer.

8. Before us, the ld AR of the assessee has submitted that these two plots No. 10 and 11 were owned by M/s Bhopal Singh Shekhwat HUF which came into existence on 01/5/2001 as a result of family settlement. The ld AR has contended that the genuineness of the settlement was not doubted by the Assessing Officer and by virtue of the said settlement, the assessee and his two brothers namely Mr. Ashok Singh Shekhawat and

Mr. Sarjeet Singh Shekhawat succeeded ancestral properties acquired by the grandfather of the assessee. The settlement between the brothers arrived only after the death of mother of the assessee on 15/4/2001, therefore, a new HUF came into existence comprising of assessee, his wife and children. Once the assessee has proved the fact that these plots were ancestral properties succeeded by the assessee out of the family settlement and consequently belong and possessed by the HUF came into existence on 01st May, 2001 then the Assessing Officer was not justified in sustaining the capital gain in the hand of the assessee. Hence, the ld AR has submitted that the addition made by the Assessing Officer and sustained by the ld. CIT(A) may be deleted.

9. On the other hand, the ld DR has submitted that as per the sale deed, the assessee has sold these plots in his individual capacity and not in the capacity of HUF or Karta of HUF. Further the consideration received by the assessee in his personal name and capacity and was not claimed to have been transferred in the HUF account. The Assessing Officer has specifically given the finding that the HUF was allotted PAN only on 01/11/2013 whereas these plots were purchased in the year 2006 and sold in 2008. Further, neither the plots were purchased by the HUF nor sold by the HUF, therefore, the assessee has not produced any evidence

to establish that these plots were owned by the HUF and also sold by the HUF. He has relied upon the orders of the authorities below.

10. We have considered the rival submissions as well as relevant material on record. The assessee has claimed that these plots of lands belong to the HUF namely Bhopal Singh Shekhawat which stated to have come into existence by virtue of a family settlement of 01/05/2001 whereby the ancestral properties were divided by the assessee and his brothers and assessee got 1/3rd share in the ancestral property which came to the share of the new HUF of the assessee. Apart from the ownership of the properties in question being HUF, the assessee has not objected to the computation of capital gain. We find that the sale deed by which these plots were sold by the assessee do not reveal the fact that the plots were owned by the HUF and were sold on behalf of the HUF. There is a categorical statement in the recital of the sale document that the assessee acquired these plots through registered sale deed dated 10/2/2006 and therefore, the assessee claimed to be the owner and in possession of the plots in question. Further the assessee received the cheques in his own name and which was deposited in the assessee's own account. Even the assessee has not claimed that the sale consideration received by the assessee was

transferred to the HUF account. The facts recorded in the sale deed cannot be disputed by the assessee merely based on the submissions that these plots belong to the HUF. Further the Assessing Officer has pointed out that the HUF was allotted PAN only on 01/11/2013 which shows that only during the reassessment proceedings, the assessee applied for PAN on behalf of the HUF whereas the transaction of sale of plots took place in the year 2008 and these plots were acquired in the year 2006 as the facts narrated in the sale deed. Therefore, when the facts as narrated in the sale deed as well as the allotment of PAN to the HUF on 01/11/2013 are not in dispute then the claim of the assessee that these plots belong to the HUF is without any basis and supporting evidence. It is pertinent to note that mere a family settlement would not ipso facto create an HUF and further once the plots in question were not purchased by the HUF but acquired by the assessee in his personal name and also sold by the assessee in his personal capacity then the claim of the assessee is otherwise inconsistent with the admitted facts. The ld. CIT(A) has considered this issue as under:

"3.1.2 Determination:

(i) I have duly considered the submissions of the appellant, assessment order and the material placed on record. During the year under consideration, the appellant has sold two plots on 07.01.2008 for total sale consideration of Rs. 10,80,962/-. It was noted by the Assessing

Officer that the appellant has not shown any capital gain income on the sale of these plots in its return of income. It was the contention of the appellant that these two plots were acquired out of Bhopal Singh Shekhawat (HUF) and belonged to the said HUF only. However, the AO rejected the contention of the appellant and held that the properties were not sold by the HUF but by the assessee himself in view of the following reasons:

* *That the plots were purchased in 2006 and sold in 2008 and the HUF was allotted the PAN only on 01.11.2013.*

* *That the assessee has no bank account for the HUF.*

* *That the assessee has never filed return of income for the HUF.*

* *That the sale proceeds of the above mentioned two plots were reflected in the individual saving bank account of the assessee.*

* *That the purchase and sale deed nowhere mentions that the above two plots were purchased and sold by the HUF.*

* *That the assessee has failed to produce any evidence to show that the above two plots were in the possession of the HUF.*

(ii) *During the appellate proceedings, it was submitted by the appellant that a family settlement between appellant and his two brothers was reached and executed on 01.05.2001 wherein the appellant got 1/3 share in the ancestral agricultural land and cash of Rs. 3,00,000/- with gold ornaments weighing 40 Tolas. These apart, 1/3 share in the residential house and nohra situated in gram Dhana Tehsil, Haryana also came to the share of the appellant. The said property was yielding rental income right since 2001 and thus, it were the accumulations and the savings, out of which Rs. 9,00,000/- being the cost was invested in the purchases of*

the subjected plots in the year 2006. In support of the above referred family partition, the appellant filed affidavits of two witnesses as additional evidence (PB- 117-120).

(iii) I have gone through the family settlement dated 01.05.2001 (PB- 5) and found it to be a self serving document as no documentary evidence has been submitted which support that the father of the appellant Late Shri Chhatrapal Singh Shekhawat was owning Rs. 9 Lac in cash, 120 Tolas of Gold jewellery and agriculture land. Further, no evidence has been submitted which may indicate that the inherited properties were yielding any rental income as claimed by the appellant. Nothing has been brought on record that the alleged properties were owned by the father of the appellant as HUF property. The appellant has filed the copies of Nakal Jamabandi/ Padat Patwar of the appellant along with his brothers (PB: 39-45). On a perusal of the same, it is observed that these documents do not reveal that the agriculture lands stated therein were inherited as HUF property. It is evident from the purchase deed of the plots dated 26.09.2006 (PB: 66-79) and 09.10.2006 (PB: 80-93) that the plot No. 10 and 11 were purchased by the appellant in its individual capacity only and not as Karta of Bhopal Singh Shekhawat (HUF) as claimed by the appellant. It is also evident from the sale deeds dated 07.01.2008 in respect of Plots NO. 10 (PB: 94-105) and 11 (PB: 106-116) that these were sold by the appellant in its individual capacity only. It may be mentioned that these purchase deeds and sale deeds are registered documents and it is a settled law that what is apparent is real unless controverted. The onus lay upon the person, who alleges that what is apparent is not real. Reliance is placed on the decision of Hon'ble Apex Court in the case of CIT (Central) v/s Daulat Ram Rawatmull (1973) 87 ITR 349 (SC), followed in CIT v/s Bedi & Co. Pvt. Ltd. (1998) 230 ITR 580 (SC). In the instant case under consideration, the appellant has failed

to brought on record any material which may lead to the conclusion that the apparent is not real. The alleged family settlement as stated earlier is only a self serving document and hence cannot be relied upon.

(iv) In view of the above discussion, it is held that the short term capital gain of Rs. 1,18,432/- on account of sale of two plots has rightly been assessed by the AO in the hands of the appellant, hence this ground of appeal is rejected."

In view of the facts and circumstances of the case where these plots were acquired by the assessee through sale deed and also sold by the assessee in his personal capacity and sale consideration was also received by the assessee and deposited in his personal bank account, then the claim of the assessee is devoid of any merit or substance. Hence, we confirm the order of the ld. CIT(A) qua this issue.

11. Ground No. 3 of the appeal is regarding the addition of long term capital gain on sale of plots No. 157A and 157B. The assessee sold two plots of land bearing number 157A and 157B at Vishal Nagar, Road No. 17, VKI Area, Jaipur on 12/6/2007. The assessee claimed that the plots were sold by him as a power of attorney holder of Shri Mohd. Irshad, S/o-Sh. Iqbal Hussain executed on 25/6/2001. The Assessing Officer issued summon to Mohd. Irshad but he did not appear before the Assessing Officer nor the assessee produced him for examination. The Assessing Officer, accordingly, held that the plots belong to the assessee and

assessed the capital gain by treating the cost of acquisition at NIL. The assessee challenged the action of the Assessing Officer before the ld. CIT(A) but could not succeed rather the ld. CIT(A) has directed the Assessing Officer to verify the stamp duty valuation of the plot which was valued at Rs. 1,32,192/- as against the second plot valued at Rs. 6,25,000/- and thereafter recomputed the capital gain U/s 50C of the Act.

12. Before us, the ld. AR of the assessee has submitted that the subject property legally and factually belongs to Mohd. Irshad as evident from the power of attorney dated 25/6/2001 as well as the sale deeds dated 12/6/2007. The ld AR has submitted that the Assessing Officer has not doubted the power of attorney and even the assessee has executed the sale deeds as a power of attorney holder and not as the owner of plots of land, therefore, the capital gain arising from sale of these plots of land cannot be assessed to tax in the hand of the assessee. The assessee acted in a fiduciary capacity on behalf of the third party as a power of attorney holder, therefore, legally the properties were transferred by Mohd. Irshad and not by the assessee who has acted as an agent. In support of his contention, he has relied upon the decision of Hon'ble Supreme Court in the case of Suraj Lamp and Industries (P) Ltd. Vs. State

of Haryana (2012) 340 ITR 1. The ld. AR has also relied upon the following decisions of the Coordinate Benches of this Tribunal:

(i) Gyan Chand Agarwal Vs ACIT in ITA No. 266/JP/2017 order dated 10/07/2017.

(ii) Shri Suraj Narain Khatoria Vs ITO in ITA No. 1043/JP/2011 dated 27/05/2013.

The ld AR has further submitted that as per the record, the properties were purchased by Mohd. Irshad on 14/3/2001 and were transferred in his name by JDA vide letter dated 17/3/2001. Though the assessee received sale consideration but it was for and on behalf of the seller only. The ld. AR also objected to the enhancement of the assessment by the ld. CIT(A) regarding the stamp duty valuation. Alternatively, the ld. AR has submitted that the ld. CIT(A) has ignored the provisions of Section 48 of the Act regarding the cost of acquisition. Once it was held that the assessee is the beneficial owner of the property then the cost of acquisition as on the date of acquisition shall be computed either as fair market value of the property or the cost of acquisition in the hand of Md. Irshad.

13. On the other hand, the ld DR has submitted that the assessee has not only sold the plots in question but also received the sale consideration in his personal capacity which was not transferred to the alleged owner of

the property. The assessee was the real beneficial owner of the plots of land as the assessee was authorized to sell the plots and receive the consideration. Once the consideration was received by the assessee in his own name and not in the name of the alleged owner then the said amount will be treated as income of the assessee arising from sale of the capital asset. He has relied upon the orders of the authorities below.

14. We have considered the rival submissions as well as relevant material on record. Though, the assessee was appointed as general power of attorney by Mr. Md. Irshad vide power of attorney dated 25/6/2001, however, the assessee subsequently divided the plot of land in question bearing No. 157 into two parts and allotted new number being 157A and 157B. This action of the assessee dividing the plot in question into two plots shows that the assessee was having control over the plots as the owner of the plots and not merely a power of attorney of the original owner. Further it is not in dispute that the assessee received sale consideration in his own name. The cheques for sale consideration were received in the name of the assessee and not in the name of Md. Irshad, therefore, the contention of the assessee that the sale deed has been executed by the assessee as an attorney of Md. Irshad is contrary to the fact that the consideration was received through cheque in the name of

the assessee and not in the name of Md. Irshad. The assessee has also not disputed the fact that the sale consideration was retained by the assessee and not transferred to Md. Irshad, therefore, all these facts go to prove that the assessee was having full control and beneficial ownership of the plots in question. Further we note that the Assessing Officer tried to examine Mr. Md. Irshad, however, he did not respond to the summon issued U/s 131 of the Act and the assessee has also not produced him before the Assessing Officer. Even the assessee has not claimed that he would produce Md. Irshad for examination before the Assessing Officer. Therefore, the claim of the assessee is contrary to the facts on the ground that the assessee has acted as the de-facto owner of the plots of land and received the consideration in his personal capacity and not as a representative of Md. Irshad. The ld. CIT(A) has considered this issued as under:

> *"(vi) I have duly considered the alternate contention of the appellant. Though, certainly there must be some cost of acquisition for acquiring the plot no. 157 over which all the rights of an owner were acquired by the appellant through a power of attorney. It may be mentioned that the onus is upon the appellant to provide evidence in support of cost of acquisition of the property, which was not discharged by the appellant. As the appellant has not come forward with clean hands i.e. it had not provided the copy of the agreement to sell with Mohd. Irshad, no deduction on account of cost of acquisition could be given as no evidence was furnished in this regard.*

(vii) Further, it is noted from the sale deeds placed on record that plot no. 157A and 157B admeasuring 116.11 and 130.05 square meters were sold for Rs. 1,11,000/- and Rs. 6,25,000/- and the sub registrar for the purpose of stamp duty valued the same at Rs. 1,32,192 and Rs. 6,25,000/- respectively. It is not understandable, how there can be so much difference in the sale consideration and the value adopted by sub registrar for almost similar size of plot (difference of only 13.94 Sq. meters) *which are nothing but part of plot no. 157 only and both of them were sold on the same date. The AO is directed to refer the matter to the IG (Stamps) or other appropriate authority for taking necessary action in respect of plot No. 157A. The Assessing Officer is further directed to recomputed capital gains U/s 50C after getting the report from concerned authority.*

In view of the above discussion, this ground of appeal is rejected."

Therefore, so far as the ownership of the plots of land in question is concerned, we find that the assessee has sold the plots in question after dividing one plot into two which shows that the assessee was having the domain over the property and also acted as beneficial owner and not merely a power of attorney holder. As per the attorney the assessee was not authorized to divide the plots but only to act on behalf of the principal to represent him in certain matters including the sale of plots in question. The division of the plot by the assessee itself shows that the assessee was having full domain and control as the owner of the property in question. As regards the alternative plea that once the assessee was

treated as an owner then even if the cost of acquisition is not available on the document, the cost of acquisition as on the date of execution of power of attorney dated 25/6/2001 be taken as prevailing DLC rates/fair market value. The Assessing Officer is directed to recompute the capital gain by allowing the cost of acquisition as DLC/fair market value of the plot as on 25/6/2001. Accordingly, this issue is set aside to the record of the Assessing Officer.

15. Ground No. 4 of the appeal is regarding the directions of the ld. CIT(A) for reference of the matter to I.G.(Stamps) for proper valuation of plot No. 157A in violation of the provisions of Section 251(2) of the Act.

16. The ld AR of the assessee has submitted that the ld. CIT(A) has exceeded his jurisdiction U/s 251(2) of the Act while directing the Assessing Officer to refer the matter to the I.G. (Stamps) for proper stamp valuation and then recompute the long term capital gain which amounts to enhancement of assessment. The ld AR has thus contended that in absence of mandatory show cause notice, these directions are in violation of provisions of Section 251(2) of the Act.

17. On the other hand, the ld DR has submitted that it was only a set aside direction to the Assessing Officer and not an enhancement of assessment as the ld. CIT(A) has not determined the full value

consideration of plot of land in question, therefore, the assessee can raise objection before the Assessing Officer. He has relied upon the orders of the authorities below.

18. We have considered the rival submissions as well as relevant material on record. As it is apparent from the finding of the ld. CIT(A) reproduced in the foregoing para of this order that the ld. CIT(A) has directed the Assessing Officer to refer the matter to IG(Stamps) and recomputed the long term capital gain accordingly. The directions of the ld. CIT(A) was likely to enhance the assessment, therefore, such directions which had element of enhancement of assessment cannot be given without mandatory show cause notice and opportunity of hearing given to the assessee. The provisions of Section, 251(2) of the Act are unambiguous on this point which envisage that the ld. CIT(A) shall not enhance the assessment or a penalty unless the appellant has a reasonable opportunity of show cause against such enhancement. Thus, it is a mandatory precondition to issue a show cause notice to the assessee prior to the enhancement of assessment. We find that the directions issued by the ld. CIT(A) are clearly in the nature of enhancement but without giving a show cause notice to the assessee, therefore, it is a clear violation of mandatory compliance of show cause notice as provided U/s

251(2) of the Act. Accordingly, the said part of the findings of the ld. CIT(A) is set aside.

19. Ground No. 5 of the appeal is regarding the addition made on account of cash deposit as well as cheques deposit made in the bank account. The Assessing Officer noted that the assessee has deposited cash of Rs. 16,56,000/- in his bank account during the year under consideration and further two cheques of Rs. 1.00 lac and Rs. 5.00 lacs respectively were also deposited in the bank account. Since the assessee has failed to explain the source of deposits in the bank account, therefore, the Assessing Officer made the addition of said deposits of cash as well as cheque to the income of the assessee. The assessee challenged the action of the Assessing Officer before the ld. CIT(A), but could not succeed.

20. **Cash deposit in bank of Rs. 16,56,000/-**

Before us, the ld. AR of the assessee has submitted that the assessee received a sum of Rs. 16,56,000/- from four persons varying from 3,56,000/- to 4,50,000/-. The assessee produced the confirmation from these persons alongwith identity as well as their land holding to show the agricultural income and other source of income. He has referred to the affidavits of these persons to establish the creditworthiness and

genuineness of the amount received by the assessee. Thus, the assessee discharged its initial onus of proving the identity, creditworthiness and genuineness of the transactions. All the four persons have confirmed having given advances to the assessee and explained the source through their affidavits. The Assessing Officer as well as the ld. CIT(A) has rejected the evidence produced by the assessee without conducting a further enquiry, therefore, once the assessee has discharged its initial onus it is shifted to the revenue to prove the contrary. The ld AR has thus contended that the addition made by the Assessing Officer may be deleted. He has further pointed out that all these four persons have agricultural income as well as agricultural land holding to prove the source of amount given to the assessee. The cash deposited in the account was also refunded during the year under consideration. Therefore, once the amount was repaid within the year then it cannot be treated as unexplained cash credit. The ld AR has relied upon the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Shree Rajasthan Syntex Ltd. (2009) 313 ITR 231.

21. On the other hand, the ld DR has submitted that the assessee failed to produce any supporting evidence before the ld. CIT(A) and subsequently the assessee has produced the affidavits of four persons

before the ld. CIT(A) which was duly considered by the ld. CIT(A) while deciding this issue. The ld. CIT(A) has examined the affidavits filed by the assessee of each of the four persons and found that none of the persons were having the capacity to advance the huge amount to the assessee. Therefore, the assessee has failed to explain the cash deposit in the bank account and specifically the creditworthiness and genuineness of the transaction. Though the assessee has taken a plea which is an afterthought that the amount was received from these persons for making an application for allotment of petrol pump, however, no evidence was produced by the assessee either before the authorities below or before this Tribunal in support of that claim. He has relied upon the orders of the authorities below.

22. We have considered the rival submissions as well as relevant material on record. There is no dispute that the assessee has not produced any evidence before the Assessing Officer to explain the source of cash deposit of Rs. 16,56,000/- in the bank account. However, before the ld. CIT(A), the assessee produced four affidavits of four persons and claimed the amount was received as an advance from these four persons. The details and particulars of the person and amount claimed to have been received are as under:

(i)	Narayan Lal Choudhary	Rs. 4,500,000/-
(ii)	Dilip Singh	Rs. 4,50,000/-
(iii)	Sarwan Singh	Rs. 3,56,000/-
(iv)	Tejpal Singh	Rs. 4,00,000/-
	Total	Rs. 16,56,000/-

The assessee has not shown these cash credits in the books of account but it only deposited in the bank account of the assessee and therefore, the addition was made by the Assessing Officer on account of unexplained cash deposit in the bank account. Before the ld. CIT(A), the assessee has also taken a plea that these advances were received from these four persons for making an application for allotment of a petrol pump. The assessee has also claimed that amount was also refunded in cash during the year under consideration. We find that the assessee has not produced any documentary evidence in support of the claim that the advances were taken by the assessee for the purpose of making the application for allotment of petrol pump. Even the details of allotment of petrol pump were also not given by the assessee. Hence, this explanation of the assessee that he has received the advances from four persons do not inspire any confidence when the assessee has not produced any documentary evidence to show that the assessee has actually applied for any petrol pump. Even the details of the proposed petrol pump were also not given by the assessee. Hence, we find that it is only an afterthought, baseless claim made by the assessee that the source of cash deposit in

the bank account is an amount received from these persons. Once the assessee has failed to prove the purpose of taking the advance, the affidavits filed by the assessee from these persons will not serve any purpose. The ld. CIT(A) has considered this issue as under:

"3.3.2 Determination:

(i) I have carefully perused the submissions of the appellant and the material placed on record. During the appellate proceedings, the appellant filed copies of affidavits dated 07.11.2015 of Shri Narayan Lal Choudhary, Shri Dilip Singh, Shri Shravan Singh and Shri Tejpal Singh, wherein all of them claimed to be friends of the appellant, advanced huge amount to appellant in cash for the application made by the appellant for allotment of a petrol pump and received back the same during the year under consideration in cash only. It was prayed by the appellant that these affidavits may be admitted as additional evidence under Rule 46A of the IT Rules as sufficient opportunity was not provided by the AO at the assessment stage to prove their identity, creditworthiness genuineness of the cash creditors. As these additional evidences goes to the root of the matter and required for deciding the appeal, hence, these are admitted in the interest of natural justice under Rule 46A of the I.T. Rules.

These four affidavits are summarized as under:

S. No	Particulars	Source explained	Other Evidence	Affidavit PB No.
1.	Narayan Lal Choudhary (Rs. 4,50,000/-)	Out of agricultural income and sale of milk. He is having irrigated land of 15 big a yielding Rs. 3-3.5 lacs p. a. and 10 buffaloes.	Form 61 (PB 21)	125-126

2.	Dilip Singh (Rs. 4,50,000/-)	Out of agricultural income. He is having irrigated land of 30 biga yielding Rs. 7-8 lacs p. a.	Form 61 (PB 19)	127-128
3.	Sarwan Singh (Rs. 3,56,000/-)	Out of his accumulated saving from pension and income from bank of Rs. 15,000/- p.m. and also out of the amount of Rs. 61,317/- received at the time of retirement.	Form 61 (PB 22), Pension Slip (PB 122), Bank Statement (PB-I1123)	129-130
4.	Tejpal Singh (Rs. 4,00,000/-)	Out of his accumulated saving from pension and income from bank of Rs. 15,000/- p.m. and also out of the amount of Rs. 1,81,051/- received at the time of retirement.	Form 61 (PB 20), Pension Slip (PB-II 121)	131-132

(ii) It is noted from the evidences placed on record relating to copies of Khasra Girdawari, voter id of cash creditors etc. in support of their agriculture income that:

* ***Shri Shrawan Singh*** *purchased 7 Bigha of agriculture land on 17.05.2000 for a sum of Rs. 80,000/-. It is noted from Pension Payment Order (PPO) of Sh. Shrawan Singh dated 08.05.1989 that pensions benefits of Rs. 61,317/- were paid and the monthly pension was reduced to Rs. 289/-. No bank statement has been filed as claimed by the appellant and no evidence was filed in respect of income from bank of Rs. 15,000/- per month. It is difficult to understand, how the retirement benefits could be a source of granting loan of Rs. 3,56,000/- to the appellant especially looking to the fact*

that Sh. Shrawan Singh purchased land on 17.05.2000 for a sum of Rs. 80,000/-.

* ***Narayan Lal Choudhary:*** *It is claimed that Sh. Choudhary own 15 bhighas of agriculture land and 10 buffaloes. However, no evidence was submitted to show that he was deriving agriculture income of Rs. 3 to Rs. 3.5 Lac per annum by sale of two crops as claimed in the affidavit. The dates of giving loan to the appellant has not been stated. It is difficult to understand that if the annual income is between Rs. 3 to Rs. 3.5 Lac, how Sh. Choudhary could give loan of Rs. 4.5 Lac to the appellant.*

* ***Tejpal Singh:*** *It appears that Sh. Tejpal Sing received a sum of Rs. 1,89,051/- as pensionery benefits on 01.03.2003. the Pension Payment Order (PPO) is not legible. As per PPO, Sh. Tejpal Singh should be having a bank account with the State bank of Patiala, Satnali, Mohindergarh, Haryana. The appellant has filed a copy of the bank account relating to the period 15.09.2014 to 11.02.2015 (PB: 123) which is not relevant for the instant case under consideration. It is pertinent to mention that as per the above bank statement, the monthly pension was to the tune of Rs. 9267/- only and not Rs. 15,000/- as claimed in the affidavit. Thus, the amount of Rs. 189051/- received on 01.03.2003 cannot be the basis of alleged loan of Rs. 4 Lac to the appellant during the year under consideration, especially looking to the fact that Sh. Tejpal Singh was maintaining a bank account as stated above in his PPO.*

* ***Dilip Singh:*** *The appellant has filed Jamabandi of Sh. Dilip Singh for the Samvat year 2068-2071 i.e. pertaining to calendar year 2012-2015 which was issued on 23.12.2014. The same is not relevant as it is not relating to the period under consideration.*

* *A copy of form No. 61 dated 24.02.2014 has been filed in support of the affidavit of all the above four cash creditors. I tail to understand how the said Form No. 61 can prove their creditworthiness.*

(iii) *Thus, the documents filed by the appellant to prove the creditworthiness of these four cash creditors are of no help to the appellant. Further, none of the four creditors is assessed to income tax. All the transaction were made in cash. The loans were claimed to be provided to the appellant for the purported purpose of making an application by the appellant for allotment of a petrol pump but no evidence was filed which may indicate that the appellant had applied for a petrol pump during the year under consideration which was rejected and the appellant received back the money and repaid its alleged loans. Therefore, in view of the above facts, neither the creditworthiness of the creditors nor the genuineness of the transaction could be proved by the appellant. It may be mentioned that in the income tax proceedings strict rule of evidence do not apply and surrounding circumstances and the test of human probability have to be taken into account as held by the Hon'ble Apex Court in the case of Sumati Dayal vs. CIT [1995] 214 ITR 801 (SC).*

(iv) *The surrounding circumstances as discussed above, clearly establish that an effort was made by the appellant to explain the cash deposit in its bank account. However, the appellant failed to prove the creditworthiness and genuineness of the cash transactions as claimed by it. Therefore, in view of the above discussion and looking to the facts and circumstances of the case, it is held that the appellant was not able to prove the source of cash deposit of Rs. 16,56,000/- in its bank account and the addition made by the AO is hereby sustained."*

Thus, the very basis of the assessee's explanation remained unsubstantiated by any evidence. Accordingly, in view of the facts and circumstances of the case, we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue.

23. **Cheque deposit in bank of Rs. 6,00,000/-**

As regards the addition made on account of cheques total amounting to Rs. 6.00 lacs deposited in the bank account, the ld AR of the assessee has submitted that the Assessing Officer has made this addition merely on suspicion when these payments were made through account payee cheques. He has further contended that the assessee could not recall the details and the persons from whom these cheques were received in the bank account. However, the Assessing Officer has made the addition without conducting a proper enquiry from the bank regarding the details of the persons who have given the cheques, thus the ld AR has submitted that instead of making the addition, a proper enquiry ought to have conducted by the Assessing Officer by issuing the summon U/s 131 of the Act to the bank. The assessee tried his best to collect the details from the bank but the bank has not obliged to the assessee for providing the necessary details. Hence, the ld AR has submitted that at once, the amount was received through cheque, the

Assessing Officer could have conducted a proper enquiry from the bank before making addition. He has pointed out that the amount of Rs. 6.00 lacs was repaid by the assessee on 21/11/2007 through cheques of Rs. 3.00 lacs each, therefore, no addition can be made when the assessee has repaid the amount.

24. On the other hand, the ld. DR has submitted that the assessee has failed to give particulars of the persons from whom the cheques were received and again to whom repayment was made. Once the amount was found deposited in the bank account of the assessee, the onus is on the assessee to explain the source of the deposit. Despite the various opportunities given by the Assessing Officer as well as the ld. CIT(A) the assessee has failed to explain the source of deposit and even the particulars of the persons from whom the cheques were received. He has relied upon the orders of the authorities below.

25. We have considered the rival submissions as well as relevant material on record. The Assessing Officer noted that there was deposit of Rs. 6.00 lacs vide two cheques No. 712141 of Rs. 1.00 lac and cheque No. 037315 of Rs. 5.00 lacs in the bank account on 23/8/2007 and 01/09/2007 respectively. Thus, the total deposit was of Rs. 6.00 lacs. The Assessing Officer asked the assessee to furnish the requisite detatils,

however, the assessee failed to explain the particulars of the persons from whom the cheques were received. The Assessing Officer accordingly made the addition of the said amount of Rs. 6.00 lacs for want of any explanation from the assessee. Even before us, the assessee has failed to explain as from whom these cheques were received by the assessee. Though, the assessee claimed to have repaid the said amount through cheque, however, the assessee has not even given the particulars of the persons to whom the amount was repaid. Therefore, there is a complete failure on the part of the assessee to explain the deposit of Rs. 6.00 lacs in the bank account through two cheques. Mere deposit made through cheque is not sufficient to discharge the onus of source of deposit. The ld. CIT(A) decided this issue as under:

"3.4.2 Determination:

(i) I have duly considered the submissions of the appellant and the material placed on record. The brief facts are that cheque no. 712141 of Rs. 1,00,000 & cheque no. 037315 of Rs. 5,00,000 were credited in the appellant's bank account maintained with SBBJ on 23.08.2007 and 01.09.2007 respectively. During the assessment proceedings, the AO required the appellant to explain the source of deposit of above cheques totaling to Rs.6,00,000/-, however, no reply was furnished and consequently the AO made addition of Rs. 6 Lac to the income of the appellant on account of unexplained cheque deposit in its bank account.

(ii) During the appellate proceedings, it was submitted by the appellant that the requisite details were out of the memory of the appellant and it has

been trying with the concerned bank for obtaining the details as to the name of the person who gave these cheques and stated that the AO should have issued summons to the bank for getting the necessary details and the addition u/s 69 is discretionary in nature.

(iii) It may be mentioned here that the primary onus is on the appellant to explain the source of cheque deposit in its bank account. The said onus has not been discharged by the appellant. In fact, the appellant is not aware from whom he received the said payments. Since, the appellant is not aware of the source of the cheques amounting to Rs. 6 Lac deposited in its bank account, there is no question of getting any confirmation from the concerned persons. It is therefore, held that the amount of Rs. 6 Lac deposited in the bank account of the appellant through cheques remained unexplained. Thus, the addition of Rs. 6 Lac made by the AO is hereby sustained."

Thus, the assessee has failed even to give the necessary particulars about the persons from whom cheques were received and deposited in the bank account. It is pertinent to note that the assessee is not engaged in any business and has shown income from salary and therefore, if any cheque was deposited in the bank account of the assessee, it was not difficult for the assessee to explain the same. However, failure on the part of the assessee to produce even the minimum particulars and details regarding the deposit of cheque has led to the conclusion that the said deposit of Rs. 6.00 lacs remained unexplained. Accordingly, we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue.

26. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 11th January, 2019.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल राव)
(VIKRAM SINGH YADAV)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 11th January, 2019

*Ranjan
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Shri Bhopal Singh Shekhawat, Jaipur.
2. प्रत्यर्थी/ The Respondent- The ITO, Ward-1(4), Jaipur.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 656/JP/2016)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar